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Hazardous Secrecy Proposal Re-Emerges **Pentagon Seeks to Hide Information about Hazards in Communities;** **Congress Rejected a Nearly Identical Proposal Last Year** *May 3, 2007*

The Pentagon is asking Congress to write a law nearly identical to one that Congress rejected last year that would hide information about how the government and private sector are preventing and preparing for accidents and other releases of chemical, biological and other hazardous materials.

The administration's proposed Defense authorization bill for fiscal 2008 includes language that would allow the Defense Department to conceal information "concerning" anything that could be turned into a Weapon of Mass Destruction (WMD). The language is in both the House and Senate versions (H.R. 1585 and S. 567). The Pentagon's concern, however, is not only with its own information on the making or securing of such weapons but with any information, anywhere, that discloses vulnerabilities of potential targets of those WMDs.

The broad sweep of this provision cannot be overstated. This provision would impose secrecy on information in the hands of the Pentagon or elsewhere about safety problems at tens of thousands of chemical plants, nuclear facilities, biological labs and other critical infrastructure. In addition to being overbroad, the exception duplicates existing secrecy rules and has the potential to seriously jeopardize the free flow of local and state health and safety information. Just as important, it puts the military squarely in the middle of many local and state policy debates about open government and the safety of communities. The administration has offered no plausible grounds for this harmful legislation.

Background

Section 923 of the Defense Authorization Act for Fiscal Year 2008 (S. 567 and H.R. 1585) would allow the Department of Defense to withhold under the Freedom of Information Act any information about any weapon or device that "is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact" of chemicals, organisms or radiation. It would also allow the Pentagon to seal information on the "vulnerabilities" of any potential target, whether the target is a local chemical plant, a dam, health systems, communication lines, or cyberspace access. The secrecy provision would pre-empt state and local disclosure laws. It would also encompass information held by private companies. While the text states the Defense Department would not "unduly" limit public access to environmental and health assessments, the bill would allow the Defense Department to unilaterally withhold any documents that discuss threats to the lives of a significant number of people. The bill fails to specify criteria for withholding, and guidelines for setting time limits, and puts the responsibility for implementing this proposal entirely within the military.

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Congress rejected a nearly identical proposal last year. The only difference is that this year's proposal specifies that any official designated as an "initial denial authority" throughout the Pentagon could certify that the information should be withheld.

New FOIA Exemption is Unnecessary and Unjustified

The language, included at the request of the Defense Department, represents an unnecessary and unjustified intrusion on open government. Specifically, the language:

- **Sweeps vast amounts of information into overbroad and ill-defined categories.** The Defense Department could keep secret information about real estate and property values of office space, environmental and health assessments, reports generally describing weaknesses at security plants and threats to the public such as toxic chemicals processed in local communities and food-borne bacteria.
- **Allows private owners of critical infrastructure to bypass existing "critical infrastructure information" standards.** The Department of Homeland Security already has in place more than adequate protections for receiving and withholding information from non-U.S. operated facilities regarding vulnerabilities and safety problems. These standards were specifically tailored to allow the federal government to understand the public safety and health threats posed by facilities that would be considered weapons of mass destruction under the Defense Department proposal. Sec. 923's overbroad secrecy regimen could create confusing standards and duplication. The proposal further undermines the government's ability to collect, evaluate and act on public safety threats. It makes it even harder for the public to become informed about the same dangers.
- **Pre-empts state and local laws on public disclosure and reporting on public health and safety topics.** Public health officials and agencies in state and local governments and outside government often have different, sometimes competing, public health priorities. These priorities set their strategies, which for many include public reporting and disclosure of public health and safety risks. This language allows the Pentagon, an agency that by law is not allowed to get involved in domestic matters, to unilaterally pre-empt state and local public health priorities and efforts.
- **Complicates information sharing between federal agencies.** The language would establish a new standard for the Defense Department to decide when to withhold or disclose information that is different from the standards other agencies use in responding to FOIA requests. The 9/11 Commission concluded information sharing between federal agencies was woefully lacking; this language only aggravates this problem.
- **Invites abuse and overuse despite promises of restraint.** The plain language in the proposed text suggests the Defense Department would limit secrecy to short time periods and not "unduly" restrict information. Unfortunately, the proposal fails to establish:
 - (1) Clear criteria for withholding information,
 - (2) An independent process for making such decisions, and
 - (3) Standards for deciding how long documents should be withheld.
- **Encourages the proliferation of "pseudoclassifications."** A Government Accountability Office report and several congressional hearings in recent years have established that agencies create too many new categories of unclassified information that can still be kept secret. At least 107 different designations and 131 different procedures allow federal agencies to withhold *unclassified* information from the public, according to congressional testimony last month by the official in charge of creating a new information sharing standards in the Office of the Director of National Intelligence.

This proposal would exacerbate the problem by creating an entirely new exemption category which the Defense Department may use to withhold information.

- **Undermines a comprehensive solution.** Congress is considering legislation that would create a comprehensive approach to “pseudoclassifications.” The bill requires agencies to document and justify restrictions on unclassified information before regulations are written. Further, the Director of National Intelligence is currently coordinating a multi-agency effort to establish common categories to help federal agencies more readily share information.

The language in the defense authorization bill may undermine or even contradict these comprehensive approaches.

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Text of Hazardous Secrecy Proposal

H.R.1585

National Defense Authorization Act for Fiscal Year 2008 (Introduced in House)

SEC. 923. PROTECTION OF INFORMATION REGARDING WEAPONS OF MASS DESTRUCTION.

(a) Prohibition From Disclosure Under Freedom of Information Act- Information in the possession of the Department of Defense concerning weapons of mass destruction, as defined in subsection (d) of this section, shall not be disclosed under section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act (FOIA)) for the period of time the sensitivity of the information can be reasonably confirmed. Any information controlled under the Atomic Energy Act of 1954, as amended, is exempt from the provisions of this Act. This exemption shall be implemented in a manner so as to not unduly restrict the public's current level of access to environmental impact statements, records concerning healthcare activities, or other information essential to inform official decision-making concerning the health and safety of the public.

(b) Requirement for Safeguarding- The Department of Defense shall safeguard information concerning weapons of mass destruction commensurate with the sensitivity of the information concerned and shall take all reasonable actions to ensure parties outside the Federal government with whom the Department shares such information safeguard it in the same manner.

(c) Application of State or Local Disclosure Laws- Information subject to this section that the Department has provided to state and local authorities shall not be made available pursuant to any state or local law requiring disclosure of information or records.

(d) Definitions- In this section:

(1) The term 'weapon of mass destruction' has the same meaning as given in the Defense Against Weapons of Mass Destruction Act of 1996 (50 U.S.C. 2302).

(2) The term 'information concerning weapons of mass destruction' means information that--

(A) would assist in developing, producing, or using weapons of mass destruction or in evading the detection or the monitoring of the development, production, use, or presence of weapons of mass destruction; or

(B) would disclose a vulnerability to the effects of a weapon of mass destruction; and

(C) has been determined to be currently sensitive by an official designated as an Initial Denial Authority for the Department of Defense component concerned pursuant to Department of Defense Directive 5400.7-R, 'DoD Freedom of Information Act Program', September 1998, or successor directive.

Examples of such information could include information that remains current and sensitive, such as but not limited to, formulas and design descriptions of lethal and incapacitating materials; maps, designs, security/emergency response plans, and vulnerability assessments for facilities containing weapons of mass destruction materials; studies of the effects and possible methods of weaponization of weapons of mass destruction materials; design details, capabilities, and application of detection, surveillance, countermeasures, and measurement equipment or plans; United States Government evaluations of response plans of state and local governments; and evaluation of weapons of mass destruction dispersal systems or methods.

(e) Reporting- Ninety days following the one-year anniversary of the effective date of this section, the Department of Defense will provide to the Department of Justice and the Office of Management and Budget a report detailing the number of FOIA requests received for information covered under this section, a description of the information requested, and specific actions taken as a result of the request.