

Peter Gruber Rule of Law Clinic  
YALE LAW SCHOOL

April 22, 2020

*Via OSD/JS Public Access Link FOIA Request Form*

Stephanie Carr, Chief  
OSD/JS FOIA Requester Service Center  
Freedom of Information Division  
1155 Defense Pentagon  
Washington, DC 20301-1155

Dear Ms. Carr:

This letter constitutes a request (Request) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for records in the possession of the U.S. Department of Defense (DoD). **The requested records concern how DoD calculates and determines the number of U.S. troops serving in Afghanistan, Iraq, and Syria—numbers which DoD had publicly reported through the Defense Manpower Data Center (DMDC) for years until December 2017.** These records will (1) provide critical context for understanding the number of military personnel deployed to the Middle East and South Asia; (2) allow the public to engage in democratic oversight on core questions of government responsibility to the public; and (3) inform the public about the government’s reasons for redacting critical troop-level information that previously had been available for years. **Withholding this information from the American public undermines democratic accountability for the solemn decision to put troops in harm’s way and erodes public trust in government.**

The Peter Gruber Rule of Law Clinic at Yale Law School submits this Request on behalf of our client *Just Security* (Requester), an online publication dedicated to U.S. national security law and policy that aims to promote principled and pragmatic solutions to the national security problems facing the country.

**Requested Records**

Requester seeks the following records about counting and publishing the number of U.S. military personnel in Afghanistan, Iraq, and Syria<sup>1</sup>:

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<sup>1</sup> As used herein, the term “records” includes any and all communications preserved in electronic or written form including, but not limited to, correspondence, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

1. Records sufficient to show the criteria for counting or determining the number of military personnel by country reported in the DMDC quarterly manpower report, “Number of Military and DoD Appropriated Fund (APF) Civilian Personnel Permanently Assigned By Duty Location and Service/Component” (DRS #103763).
2. Records sufficient to explain the decision to stop publishing the number of military personnel assigned to Afghanistan, Iraq, and Syria in DMDC quarterly reports (DRS #103763) starting in late 2017.
3. Records sufficient to show the criteria for counting or determining the number of personnel under the Force Management Level (FML) for Afghanistan, Iraq, and Syria.
4. Records sufficient to show whether FML continues to function as a troop cap in Afghanistan, Iraq, and Syria.

Requester agrees to pay search and duplication fees up to \$100. Requester, a member of the news media, requests a fee waiver pursuant to 5 U.S.C. § 522(a)(4)(A)(iii) and 32 C.F.R § 286.12(l) if the fees amount to more than \$100, as obtaining these records is in the public interest. The Department of Defense considers these three factors set forth in 32 C.F.R § 286.12(l)(2)(i)-(iii) when determining whether the disclosure is in the public interest:

1. Whether “[d]isclosure of the requested information would shed light on the operations or activities of the government;”
2. Whether “[d]isclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities;” and
3. Whether disclosure would be “primarily in the commercial interest of the requester.”

This request satisfies all three factors, as disclosure of the requested records would inform the American public of some of the most fundamental aspects of the decision to send U.S. soldiers into harm’s way—an understanding that is essential to continuing public oversight of its democratically elected government and its national security and foreign policy. Withholding this information has reduced public understanding of the U.S. military presence abroad and denied the public the ability to have an informed debate on this critical topic. Further, disclosure of this information is not in Requester’s commercial interest.

**First, the requested records would “shed light on the operations or activities of the government.”** 32 C.F.R § 286.12(l)(2)(i). The requested records concern the Department of Defense, a cabinet-level agency of the federal government. DoD “operations” or “activities” include the stationing and deployment of U.S. military and civilian personnel abroad, including in areas with ongoing operations such as Afghanistan, Iraq, and Syria. For decades, DoD has released data on the number of active military and civilian personnel stationed overseas.<sup>2</sup> This

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<sup>2</sup> Before DMDC began reporting this data, other DoD entities published troop numbers for a number of years. DoD previously released data on U.S. troop numbers by country as part of the report *Worldwide Manpower Distribution by Geographical Area* and later through the DMDC website. Decades of historical reports are available on the

FOIA requests seeks records pertaining to the criteria DoD uses to determine and calculate the number of military personnel by geographic location recorded in DMDC reports and under FML, which would be informative as to the DoD's manpower accounting practices. The subject of the request therefore has a "direct and clear" connection with "identifiable operations or activities of the Federal Government." 32 C.F.R § 286.12(1)(2)(i).

**Second, disclosure of the requested information would "contribute significantly to public understanding of [government] operations or activities."** 32 C.F.R § 286.12(1)(2)(ii). DoD has long recognized the importance of making troop numbers available to the public. DoD generally has released quarterly DMDC reports on the number of personnel located in countries with ongoing military operations, including Afghanistan, Iraq, and Syria, since the commencement of such operations. At times, DoD also has released troop counts for Afghanistan, Iraq, and Syria under Force Management Level.<sup>3</sup> During Summer 2017, Pentagon officials announced then-Defense Secretary James Mattis's commitment to "transparency in [DoD's] public reporting procedures," which included a more comprehensive FML accounting practice to include both permanent and temporary troops stationed abroad.<sup>4</sup> Yet, starting in the December 2017 DMDC quarterly report, DoD abruptly redacted the numbers of U.S. military and civilian personnel serving in Afghanistan, Iraq, and Syria.<sup>5</sup> Since then, troop numbers for these countries have also not been readily available.<sup>6</sup> The decision to redact DMDC figures has denied the American public information that is essential to democratic accountability of government policy in these areas. The public needs to know the government's reasons for redaction in order to evaluate the adequacy of those reasons and maintain trust in the operations of the government.

Disclosure of the requested records would be "meaningfully informative about government operations or activities." 32 C.F.R. § 286.12(1)(2)(ii)(A). Until November 2017, the DMDC records were an important public source of information about the U.S. military presence in key combat zones. The records provided official and regular information about U.S. personnel counts in Afghanistan, Iraq, and Syria. The data also facilitated democratic accountability for President Trump's pledge to withdraw troops from the Middle East and South Asia. **Records concerning the decision to stop publishing DMDC figures for Afghanistan, Iraq, and Syria would help the public understand why this longstanding and essential disclosure has been**

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DMDC website, with the earliest report from 1950. *See DoD Personnel, Workforce Reports & Publications*, DEF. MANPOWER DATA CTR., [https://www.dmdc.osd.mil/appj/dwp/dwp\\_reports.jsp](https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp) (last accessed Apr. 21, 2020).

<sup>3</sup> *See* HEIDI M. PETERS AND SOFIA PLAGAKIS, CONG. RESEARCH SERV., R44116, DEPARTMENT OF DEFENSE CONTRACTOR AND TROOP LEVELS IN AFGHANISTAN AND IRAQ: 2007-2018 (2019),

<https://fas.org/sgp/crs/natsec/R44116.pdf>; Tara Copp, *26,000 US Troops Total in Iraq, Afghanistan and Syria, DoD Reports*, MIL. TIMES (Nov. 27, 2017), <https://www.militarytimes.com/news/your-military/2017/11/27/26000-us-troops-total-in-iraq-afghanistan-and-syria-dod-reports>.

<sup>4</sup> Nancy Youssef, *U.S. Acknowledges More Troops Are in Afghanistan*, WALL ST. J. (Aug. 30, 2017, 7:17 PM), <https://www.wsj.com/articles/u-s-acknowledges-more-troops-are-in-afghanistan-1504135052>.

<sup>5</sup> David Welna, *Pentagon Questioned Over Blackout on War Zone Troop Numbers*, NPR (July 3, 2018, 5:02 AM), <https://www.npr.org/2018/07/03/625544265/pentagon-questioned-over-war-zone-numbers-blackout>.

<sup>6</sup> *See* PETERS & PLAGAKIS, *supra* note 3; Welna, *supra* note 5.

**halted.** Especially when other sources of information concerning the number of military personnel located abroad are irregular, inadequate, and incomplete,<sup>7</sup> understanding DoD's reasons for removing the public's access to an official, consistent source of information is critical to public oversight.

Learning the criteria for how the Department of Defense determines FML and DMDC figures would also be "meaningfully informative about government operations." 32 C.F.R. § 286.12(1)(2)(ii)(A). In 2017, DoD revised both its FML and DMDC accounting practices. Despite Secretary Mattis's intention to enhance transparency, the changing definitions in combination with the ultimate redaction of the DMDC figures have caused public confusion about the accuracy of any figures that DoD does report.<sup>8</sup> The public needs to know how FML and DMDC troop counts are determined in order to evaluate the figures that DoD discloses. Without this context, troop level figures are less meaningful and informative than they otherwise would be.

Furthermore, there is no information in the public domain that is "either the same or a substantially identical form" as the requested records. 32 C.F.R. § 286.12(1)(2)(ii)(A). To the best of Requester's knowledge, there is no meaningfully informative and publicly available description of how U.S. personnel are currently counted in Afghanistan, Iraq, and Syria under FML or DMDC. There is also no meaningfully informative and publicly available description of DoD's reasons for redacting DMDC figures, which had been publicly available for years. Denial of a fee waiver on the ground that requested materials are already in the public domain is reserved for cases when those records are "easily accessible and available to everyone,"<sup>9</sup> which is not the case here.

Disclosure of the requested information would also "contribute to the understanding of a reasonably broad audience of persons interested in the subject." 32 C.F.R. § 286.12(1)(2)(ii)(B). The requested information is of interest to a broader audience than the individual requester. Transparency of troop levels is critical for public understanding of U.S. officials' policy decisions in areas of core democratic accountability.<sup>10</sup> The American public, and servicemembers and their families, should be able to know the number of American soldiers who are being placed in harm's way. **Without knowing how troop levels are calculated or determined, the public is unable to evaluate or meaningfully comprehend the numbers that the government discloses.** In addition to the longstanding public interest in the number of U.S. troops located in combat zones, media coverage demonstrates that there is significant public

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<sup>7</sup> See Alexa Liautaud, *How Many Troops Are Serving in America's Legacy Wars? We Still Don't Really Know.*, NBC NEWS (Nov. 10, 2019, 3:10 PM), <https://www.nbcnews.com/news/us-news/how-many-troops-are-serving-america-s-legacy-wars-we-n1079531>.

<sup>8</sup> Jared Keller, *The DoD Has Way More Troops In Syria Than It's Telling Us*, TASK & PURPOSE (Nov. 28, 2017, 12:31 PM EST), <https://taskandpurpose.com/analysis/pentagon-syria-troop-levels-reports>.

<sup>9</sup> *Durham v. U.S. Dep't of Justice*, 829 F. Supp. 428, 434-35 (D.D.C. 1993).

<sup>10</sup> John M. Donnelly, *Analysis: Why Won't Trump Discuss Troop Numbers?*, ROLL CALL (Aug. 23, 2017, 11:21 AM), <https://www.rollcall.com/news/politics/analysis-wont-trump-discuss-troop-numbers>.

concern over discrepancies and inconsistencies in the reporting of troop levels.<sup>11</sup> Members of Congress have expressed concern over the withholding of DMDC figures for Afghanistan, Iraq, and Syria, noting an “accurate and transparent accounting of deployed U.S. forces has enabled Congress to make better-informed decisions regarding equipment and personnel necessary to maximize U.S. force protection in combat zones.”<sup>12</sup> Media coverage of the DoD redaction of DMDC figures relating to Afghanistan, Iraq, and Syria is indicative of the public interest in this information.<sup>13</sup>

Requester’s “expertise in the subject area . . . [and] ability and intention to effectively convey information to the public” increases the prospect that the requested information would be likely to contribute to the understanding of a broad audience. 32 C.F.R. § 286.12(l)(2)(ii)(B). *Just Security* is a leading source of legal and policy analysis in the national security field. Requester publishes original analyses, opinion pieces, and news articles on the most important defense and national security questions facing the United States today. *Just Security* regularly covers DoD policy and transparency issues. *Just Security*’s Board of Editors include individuals with significant government, academic, and civil society experience, and its readership is broad, consisting of journalists, news producers, congressional staff, policymakers, and the general public. Hundreds of thousands of Americans read Requester’s content per month. Upon receiving the requested records, Requester intends to publish them in their original form alongside supporting analysis that gives context to the records, enabling a wide audience to understand the importance and meaning of the records.

**Finally, disclosure of this information is not in Requester’s commercial interest.** *See* 32 C.F.R § 286.12(l)(2)(iii). *Just Security* is based at the Reiss Center on Law and Security at New York University School of Law, a 501(c)(3) charitable organization. Requester is a non-profit organization and is supported by institutional and individual donors. Requester does not seek the requested materials to further any commercial, trade, or profit interest, but solely for a public purpose: to provide the public with information about DoD’s criteria for calculating and determining official military and civilian personnel counts in Afghanistan, Iraq, and Syria. Materials disclosed as a result of this FOIA request will be used to develop publicly accessible content.

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<sup>11</sup> *See* W.J. Hennigan, *Trump Administration Stops Disclosing Troop Deployments in Iraq and Syria*, L.A. TIMES (Mar. 30, 2017, 2:30 PM), <https://www.latimes.com/politics/la-na-trump-deployment-20170330-story.html>; Wesley Morgan, *Pentagon’s Concealment of Total Troops in War Zones Under Fire*, POLITICO (Aug. 26, 2017, 7:19 AM), <https://www.politico.com/story/2017/08/26/mattis-trump-troop-numbers-war-zone-242055>; Loren DeJonge Schulman & Alice Friend, *The Pentagon’s Transparency Problem*, FOREIGN AFF. (May 2, 2018), <https://www.foreignaffairs.com/articles/united-states/2018-05-02/pentagons-transparency-problem>; *see also* Liautaud, *supra* note 7; Welna, *supra* note 5.

<sup>12</sup> Letter from Representative Stephen F. Lynch, Ranking Member, U.S. House Comm. on Oversight & Gov’t Reform, et al., to James Mattis, Sec’y, Dep’t of Def. (May 10, 2018), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2018-05-10.%20Lynch,%20Welch,%20DeSaulnier,%20Gomez%20&%20EEC%20to%20Mattis%20re.%20Defense%20Mpower%20Data%20Center.pdf>.

<sup>13</sup> *See supra* notes 3-11.

Pursuant to applicable regulations and statute, Requester expects the determination of this request for documents within twenty (20) days. *See* 5 U.S.C. § 552(a)(6)(A)(i). If this request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. Requester expects the release of all separable portions of otherwise exempt material. Requester reserves the right to appeal a decision to withhold any information or to deny a waiver of fees.

*Just Security*'s request clearly meets the requirements for expedited processing according to 32 C.F.R. § 286.8 (e)(1)(i)(B) ("The information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged government activity"). As described at length above, the public has an urgent right to understand the number of military personnel deployed in these countries, why this information is being withheld from the American public, and there is significant public concern and media attention to these issues. *See id.* § 286.8 (d)(3) (explaining that a requester under section (e)(1)(i)(B) must show "a particular urgency to inform the public", and the "existence of numerous articles published on a given subject can be helpful in establishing the requirement" that there is urgency to inform). Further, as discussed, *Just Security*, a member of the news media, disseminates information on the most important defense and national security questions facing the United States today, and routinely covers DoD policy and transparency issues. *See id.* § 286.8 (d)(3) (requester's "primary professional activity or occupation" must be "information dissemination"). For these reasons, *Just Security* asks the Office of the Secretary of Defense to grant our request for expedited processing. We certify these statements to be true and correct.

In conclusion, if you have any questions regarding how to construe this request or believe that further discussions regarding search and processing would facilitate a more efficient production of records to Requester, please do not hesitate to contact the Peter Gruber Rule of Law Clinic to discuss this request. We welcome an opportunity to discuss this request with you before you undertake your search or incur search or duplication costs.

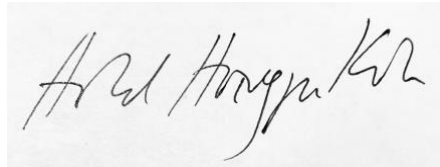
Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to:

Professor Harold Hongju Koh and Phillip Spector  
Peter Gruber Rule of Law Clinic  
Yale Law School  
P.O. Box 209090  
New Haven, CT 06520-9090

If it will accelerate release of responsive records, please also provide responsive material on a rolling basis.

We look forward to working with your agency on this request. If you do not understand any part of this request, please contact Harold Hongju Koh at [teamclear@mailman.yale.edu](mailto:teamclear@mailman.yale.edu). Also, if Requester's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination. Thank you for your assistance and prompt attention to this matter.

Sincerely,

A handwritten signature in black ink on a light-colored background. The signature is cursive and reads "Harold Hongju Koh".

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