

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), Defense Manpower Data Center (DMDC). **The requested records concern the number of U.S. troops serving in Afghanistan, Iraq, and Syria, which DMDC had publicly reported for years until December 2017.** These figures are critical to (1) gauging the accuracy of the government's statements about the progress of military operations in the Middle East and South Asia; (2) exercising democratic oversight over core questions of responsibility to the public; (3) holding elected officials accountable to promised troop withdrawals in the region; and (4) keeping servicemembers—and their families—informed of the risks they might face upon assignment. **Withholding this data 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 troop levels in Afghanistan, Iraq, and Syria¹:

1. Records sufficient to show the number of military and DoD Appropriated Fund (APF) civilian personnel permanently assigned to:
 - a. Afghanistan,
 - b. Iraq, and

¹ 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.

c. Syria

for the period December 2017 to the most recent available quarter, disaggregated by country and broken down quarterly. DMDC currently releases these figures for other countries in quarterly manpower reports titled “Number of Military and DoD Appropriated Fund (APF) Civilian Personnel Permanently Assigned By Duty Location and Service/Component” (DRS #103763).

2. Records sufficient to show the number of U.S. Armed Forces personnel on temporary duty or deployed in support of contingency operations (i.e. personnel in-country for short-duration missions, personnel in a temporary duty status, personnel assigned to combat support agencies or deployed in support of contingency operations, and personnel assigned to the material recovery element of the Resolute Support Sustainment Brigade) in reported totals in the following countries:

- a. Afghanistan,
- b. Iraq, and
- c. Syria

for the period December 2017 to the most recent available quarter, disaggregated by country and broken down quarterly.

3. Records sufficient to show the Force Management Level (FML) for:
 - a. Afghanistan,
 - b. Iraq, and
 - c. Syria

for the period August 2017 to the most recent available quarter, disaggregated by country and broken down quarterly.

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 facts about the decision to send U.S. soldiers into harm’s way—an understanding that is essential to continuing public oversight of democratically elected officials and the national security and foreign policies they adopt**. 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. Through DMDC,² the Department of Defense has released data on the number of active duty military and civilian personnel by geographic location for decades, generally on a quarterly basis.³ At times, DoD also has released troop counts under the Force Management Level for Afghanistan, Iraq, and Syria.⁴ 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(l)(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(l)(2)(ii). The Department of Defense has generally 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. The Pentagon has previously recognized the importance of making troop numbers publicly available. During Summer 2017, Pentagon officials announced then-Secretary of Defense James Mattis’s commitment to “transparency in [DoD’s] public reporting procedures,” which included a revised, more comprehensive accounting system for the number of troops serving abroad.⁵ 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. Since then, FML figures for these countries have also not been readily available.⁶ Withholding this data significantly undermines democratic accountability for decisions to send U.S. troops overseas and erodes public trust in the operations of our government.

Disclosure of the requested DMDC figures would be “meaningfully informative about government operations or activities.” 32 C.F.R. § 286.12(l)(2)(ii)(A). Until November 2017, the data had been an important public source of information about the U.S. military presence in key combat zones, providing the public with information about Operation Enduring Freedom,

² Before DMDC began reporting this data, other DoD entities published these troop numbers for a number of years.

³ The Department of Defense has previously released data on U.S. troop levels 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 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 (last visited Apr. 21, 2020).

⁴ See 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>.

⁵ 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>.

⁶ See HEIDI M. PETERS & 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>.

Operation Iraqi Freedom, and Operation Inherent Resolve. Given the extended duration of these operations, publicly available information about the scope of the U.S. military presence and commitment to these regions is crucial. For both the media and public at large, DMDC data serves as an official, specific, and consistent source of information on U.S. personnel counts in Afghanistan, Iraq, and Syria. Particularly in light of President Trump's pledge to withdraw troops from the Middle East and South Asia, the data is key to public transparency and accountability concerning U.S. military activities. The withholding of these figures 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.

Furthermore, there is no information in the public domain that is "either the same or a substantially identical form" as the requested figures. 32 C.F.R. § 286.12(l)(2)(ii)(A). 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."⁷ As the Congressional Research Service notes, "in late 2017, the Defense Department stopped reporting the number of U.S. military personnel deployed in support of operations in Afghanistan, Iraq, and Syria as part of its quarterly manpower reports and in other official releases."⁸ Other public sources of information concerning the number of military and civilian personnel located abroad, such as media estimates or the occasional statement from DoD spokespeople, are deeply irregular, inadequate, and incomplete.⁹

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(l)(2)(ii)(B). The requested DMDC data is of interest to a broader audience than the individual requester.

Transparency on troop levels is critical for public oversight and understanding of U.S. decision making on questions of national security and foreign policy.¹⁰ 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. In addition to the longstanding public interest in the number of U.S. troops located in active combat zones, media coverage demonstrates that there is significant public concern over discrepancies and inconsistencies in the reporting of troop levels.¹¹ Members of Congress have expressed concern over the withholding of DMDC figures

⁷ *Durham v. U.S. Dep't of Justice*, 829 F. Supp. 428, 434-35 (D.D.C. 1993).

⁸ PETERS AND PLAGAKIS, *supra* note 6.

⁹ 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>.

¹⁰ See 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>.

¹¹ 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*

for Afghanistan, Iraq, and Syria, noting an “accurate and transparent accounting of deployed U.S. troops has enabled Congress to make better-informed decisions regarding the equipment and personnel necessary to maximize U.S. force protection in combat zones.”¹² Media coverage of the DoD redaction of DMDC figures relating to Afghanistan, Iraq, and Syria is indicative of the public interest in this information.¹³

Requester’s “expertise in the subject area . . . [and] ability and intention to effectively convey information to the public” increase 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). Requester 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 includes 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 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.

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

Liautaud, *supra* note 9; 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>.

¹² 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%20Mapower%20Data%20Center.pdf>.

¹³ *See* Welna, *supra* note 11; *see also* Liautaud, *supra* note 9.

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 in detail above, the public has an urgent right to know the number of U.S. troops being placed in harm's way, 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, publishes information on the most important defense and national security questions facing the United States today. *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.

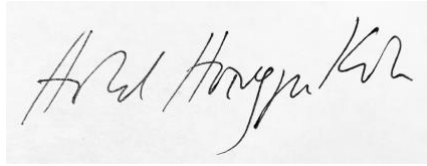
Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to:

Professor Harold Hongju Koh and Phillip Spector
Peter Gruber Rule of Law Clinic
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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. 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, appearing to read "Harold Hongju Koh", is centered within a light gray rectangular box.

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