

June 27, 2017

VIA CERTIFIED MAIL

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**Re: Freedom of Information Act Request Regarding the Waiver Process
Provided for in Executive Order 13,780**

To Whom It May Concern,

Muslim Advocates, the Southern Poverty Law Center, and Americans United for Separation of Church and State (“Requestors”) submit this letter as a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* for documents, communications, and all other materials related to the implementation of the waiver provisions of President Donald Trump’s March 6, 2017 Executive Order 13,780, titled “Protecting The Nation From Foreign Terrorist Entry Into The United States.” We ask that this request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E) and that we be granted a fee waiver. We also ask that you refer the requests contained in this letter to any other

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component agency of the U.S. Department of Homeland Security (“DHS”) or the U.S. Department of State as appropriate.

I. Background

On January 27, 2017, President Trump issued Executive Order 13,769, titled “Protecting the Nation from Foreign Terrorist Entry into the United States” (“First Executive Order”).¹ The First Executive Order temporarily banned entry of individuals from seven predominantly Muslim countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—and temporarily suspended the entire United States Refugee Admissions Program and indefinitely barred entry of Syrian refugees.²

In the wake of nationwide confusion and legal challenges to the First Executive Order, President Trump issued a new executive order with the same title on March 6, 2017 (“Second Executive Order”).³ The Second Executive Order replaces the First Executive Order with some changes. Namely, the Second Executive Order removes Iraq from the list of targeted countries but subjects Iraqis to specific enhanced-vetting requirements.⁴ In addition, section 6 of the Second Executive Order directs the Secretary of Homeland Security to review current procedures to “determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States.”⁵

Significantly, the Second Executive Order empowers the Commissioner of U.S. Customs and Border Protection (“CBP”) or his designee, with oversight from the Secretary of Homeland Security, to grant case-by-case waivers for certain individuals for whom entry into the United States would otherwise be suspended as a result of the Executive Order.⁶ The instant records request relates specifically to this waiver provision.

¹ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

² *Id.* §§ 3(c), 5(a), (c)

³ Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

⁴ *Id.* § 4.

⁵ *Id.* § 6(a).

⁶ *Id.* § 3(c).

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On June 14, 2017, following nationwide injunctions to portions of the Second Executive Order, President Trump issued a memorandum changing the effective date of the enjoined provisions of the Second Executive Order from March 16, 2017, to “the date and time at which the referenced injunctions are lifted or stayed.”⁷ On June 26, 2017, the Supreme Court narrowed the scope of the injunctions, allowing implementation of sections 2(c) and 6 of the Second Executive Order as to persons who do not have any credible claim of a bona fide connection to persons or institutions in the United States. As a result, the waiver process is now the only way for nationals from the six affected countries without ties to the United States to gain entry into this country while the portion of the Second Executive Order not currently enjoined is in effect.

II. Request for Records

For the purposes of this Request, “Record” means a record in the broadest sense possible, and includes, without limitation, everything tangible, electronic, or digital containing a datum, number, photograph, picture, word, or any other information, including, but not limited to, communications between phones or other electronic devices, e-mails, digital or physical images, video, audio recordings, voicemail messages, social-media posts, instructions, directives, guidance documents, formal and informal presentations, training documents, bulletins, notices, alerts, updates, advisories, reports, legal and policy memoranda, contracts, agreements, minutes or notes of meetings and phone calls, and memoranda of understanding.

The Requestors seek release of the following:

1. Records created on or after January 27, 2017, concerning interpretation, enforcement, or implementation of the waiver provision of the Second Executive Order by DHS, CBP, the Department of State, or any component agency of the federal government, including, but not limited to:

⁷ Presidential Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence, Jun. 14, 2017, available at: <https://www.whitehouse.gov/the-press-office/2017/06/14/presidential-memorandum-secretary-state-attorney-general-secretary>

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- a. Policies, practices, and procedures that went into effect on or after January 27, 2017, relating to criteria for evaluating individual waiver requests.
- b. Policies, practices, and procedures that went into effect on or after January 27, 2017, concerning the manner in which officers should determine when an individual's waiver request should be granted.
- c. Internal guidance on how to assess when denying an individual's entry "would cause undue hardship" or when "his or her entry would not pose a threat to national security and would be in the national interest."
- d. The processes for accepting and adjudicating waiver requests.
- e. The person or office to whom waiver requests should be directed.
- f. The number of waiver requests received by the Department of State, CBP, DHS, or any other component agency of DHS.
- g. The number of waiver requests granted by the Department of State, CBP, DHS, or any other component agency of DHS, and the reasoning for the grants.
- h. The number of waiver requests denied by the Department of State, CBP, DHS, or any other component agency of DHS, and the reasoning for the denials.
- i. Any guidance provided to CBP, DHS, or Department of State field personnel regarding the waiver provisions of the Second Executive Order.⁸
- j. Any memoranda providing guidance for the Department of State, CBP, DHS, or any other component agency of the

⁸ See *Q&A: Protecting the Nation from Foreign Terrorist Entry to the United States*, U.S. Dep't of Homeland Security (Mar. 6, 2017), <https://www.dhs.gov/news/2017/03/06/qa-protecting-nation-foreign-terrorist-entry-united-states> ("CPB has and will continue to issue any needed guidance to the field with respect to this Executive Order.").

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DHS on enforcement of the waiver provisions of the Second Executive Order in light of federal-court decisions granting preliminary injunctions against the implementation of the Executive Order.

In sum, we seek information regarding interpretation and enforcement by DHS, CBP, the Department of State, and any other component agency, of the Second Executive Order's waiver provisions only. We do not in the instant request seek more general information on the interpretation or enforcement of other provisions of the Executive Orders. Specifically, we seek records held by employees, directors, and corresponding local offices of DHS, CBP, the Department of State, and any other component agency of DHS. The Department of State, DHS, CBP, and all other relevant components of DHS have an obligation to search all such field offices that are reasonably expected to produce any relevant information. *See, e.g., Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978) (agency not required to search all of its field offices because request did not ask for a search beyond the agency's central files); *see also Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 230 (D.D.C. 2013).

Due to the expedited nature of the relevant events and interpretations, we request that searches of all electronic information include the personal email accounts and work phones of all employees and former employees who may have sent or received emails or text messages regarding the subject matter of this Request.

To the extent that our Request encompasses records responsive or potentially responsive to the Request that have been destroyed, our Request should be interpreted to include, but is not limited to, any and all records relating or referring to the destruction of those records. This includes, but is not limited to, any and all records relating or referring to the events leading to the destruction of those records.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), we request that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, we request that the records be provided electronically in a text-searchable, static-image format (e.g., PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

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III. Application for Waiver of Fees

The Requestors request a waiver of document search, review, and duplication fees on the grounds that disclosure is in the public interest because it is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). If the waiver request is not granted, Requestors request that fees be limited to reasonable standard charges for document duplication because Requestors qualify as representatives of the news media and the records sought are not for commercial use. *Id.* § 552(4)(A)(ii)(II).

A. Disclosure Is in the Public Interest

As an initial matter, the public interest in this case is evident: at this time, the waiver process is the only way for an individual seeking entry into the United States to avoid the absolute prohibition on travel and on refugee-processing contained in the Second Executive Order. To date, no information has been released on (1) the manner in which this waiver process is to proceed, (2) the person or office to whom such waivers should be directed, (3) the documents that should accompany such requests, or (4) the clear and specific criteria by which officials are to evaluate whether a person meets the broad criteria outlined in the Executive Order itself.

Moreover, the First and Second Executive Orders have generally been the subject of widespread and ongoing media attention.⁹ The records sought will significantly contribute to the public understanding of how the waiver process is being used and of how waivers are being adjudicated.

Thus, a fee waiver would fulfill Congress’s legislative intent in granting fee waivers to noncommercial requestors. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requestors.” (internal quotation marks omitted)).

⁹ *See, e.g.*, Evan Perez et al., *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017), <http://cnn.it/2kGdcZy>; Ariane de Vogue, *Supreme Court Allows Parts of Travel ban to Take Effect*, CNN (Jun. 26, 2017), <http://www.cnn.com/2017/06/26/politics/travel-ban-supreme-court/index.html>.

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B. Requestors Are Representatives of the News Media

Even if a waiver is not granted, fees should be “limited to reasonable standard charges for document duplication” because each of Muslim Advocates, the Southern Poverty Law Center, and Americans United for Separation of Church and State is a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(4)(A)(ii)(II). Other organizations similar to Requestors in mission, function, and educational activities have been found by courts to be representatives of the news media. *See Elec. Privacy Info. Ctr. v. Dep’t of Defense*, 241 F. Supp. 2d 5, 10–15 (D.D.C. 2003) (a non-profit educational organization qualified under the news media category); *Nat’l Sec. Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (a non-profit research organization qualified under the news media category).

Finally, Requestors do not seek to use the information requested for commercial use, 22 C.F.R. § 171.16(a)(2), and do not have a commercial interest that would be furthered by the disclosure. Instead, their primary interest in the disclosure of information is to educate the public and advocate for the rights of Americans to be free from racial and religious profiling. § 171.16(a)(2)(i)-(ii).

IV. Application for Expedited Processing

The Requestors request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).¹⁰ There is a “compelling need” for these records as defined in the statute because: (1) the request concerns “[t]he loss of substantial due process rights,” 6 C.F.R. § 5.5(e)(1)(iii); 5 U.S.C. § 552(a)(6)(E)(ii); and (2) the request concerns “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence,” 6 C.F.R. § 5.5(e)(1)(iv); 5 U.S.C. § 552(a)(6)(E)(ii).

The requested records seek to inform the public about an urgent issue implicating thousands of individuals’ due-process rights—namely, the interpretation, implementation, and enforcement of the Second Executive Order’s waiver provision, which at this time is the sole manner by which affected individuals from the six

¹⁰ *See also* 6 C.F.R. § 5.5(e)(1).

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countries are able to gain entry into the United States. Reports of the Second Executive Order's implementation have raised serious due-process concerns,¹¹ giving rise "to questions about the government's integrity" and an "urgency to inform the public." 28 C.F.R. § 16.5(d)(1)(iv). The waiver process instituted by the Second Executive Order has been shrouded in mystery and confusion and has not eliminated the constitutional and statutory questions raised by the First and Second Executive Orders. Thus, attorneys, other service providers, and the public urgently need these important public documents.

Given the foregoing, the Requestors have satisfied the requirements for expedited processing of this Request. Pursuant to applicable statutes and regulations, the Requestors expect a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552 (a)(6)(E)(ii); 6 C.F.R. § 5.5(e)(4).

If the Request is denied in whole or in part, the Requestors ask that you justify all denials by reference to specific FOIA exemptions. The Requestors expect the release of all segregable portions of otherwise exempt material. The Requestors reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Additionally, in order to avoid delays in receiving records, Requestors request that records be produced seriatim as they become available.

Thank you for your prompt attention to this matter. Please furnish the applicable records to:

David J. Weiner

Arnold & Porter Kaye Scholer, LLP
601 Massachusetts Ave, NW
Washington, D.C. 20001

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

¹¹ *See, e.g., Universal Muslim Association of America v. Trump*, No. 1:17-cv-00537 (D.D.C. Mar. 27, 2017); *International Refugee Assistance Project v. Trump*, No. 8:17-cv-00361 (D. Md. Mar. 16, 2017).

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Sincerely,

A handwritten signature in black ink, appearing to read "David Weiner", with a long horizontal flourish extending to the right.

David J. Weiner