



January 23, 2018

VIA CERTIFIED MAIL AND EMAIL

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**Re: Freedom of Information Act Request Regarding the Waiver Process Provided
for in Presidential Proclamation 9645**

To Whom It May Concern:

Muslim Advocates and the Center for Constitutional Rights (“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 September 24, 2017 Proclamation 9645, titled

“Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats.” 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 request that you refer the requests contained in this letter to any other 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.² It also suspended the entire United States Refugee Admissions Program, and indefinitely barred entry of Syrian refugees.³

Following legal challenges to the First Executive Order, President Trump issued a new executive order on March 6, 2017 (“Second Executive Order”).⁴ The Second Executive Order presented a few key differences. First, it removed Iraq from the list of targeted countries but subjected Iraqis to specific enhanced-vetting requirements.⁵ Second, it permitted the grant of case-by-case waivers for individuals whose entry the Executive Order would have otherwise suspended.⁶

After decisions from the Fourth and Ninth Circuits enjoined the Second Executive Order⁷, a “worldwide review” was undertaken to assess what “additional information would be needed from each foreign country to assess adequately whether their nationals seeking to enter the United States pose a security or safety threat.”⁸ This “worldwide review” resulted in Presidential Proclamation 9645 (“the Proclamation”) on September 24, 2017. The Proclamation barred nationals of eight countries from entry into the U.S.: Chad, Iran, Libya, North Korea,

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

² Id. §§ 3(c), 5(a), (c).

³ Id. §§ 3(c), 5(a), (c).

⁴ Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

⁵ Id. § 4.

⁶ Id. § 3(c).

⁷ *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir.), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080 (2017), and *vacated and remanded sub nom. Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017).

⁸ Pres. Proclamation 9645, 82 FR 45161 (Sept. 24, 2017).

Syria, Venezuela⁹, and Yemen.¹⁰ There is near-perfect overlap between the countries whose nationals are banned before and after the “worldwide review.”

Importantly, a waiver provision, like that provided in the Second Executive Order, was also included in the Proclamation, allowing case-by-case waivers in certain circumstances.¹¹ These include whether the denial of entry “would cause undue hardship” or when “entry would not pose a threat to national security” or when his or her entry “would be in the national interest.”¹² The Proclamation states, “The Secretary of State and the Secretary of Homeland Security shall coordinate to adopt guidance addressing the circumstances in which waivers may be appropriate for foreign nationals seeking entry as immigrants or nonimmigrants.”¹³ Although the Proclamation provides some examples of circumstances in which waivers might be granted, the general public still does not have any detailed information about how a person may apply for a waiver, how determinations regarding eligibility for a waiver are made and by whom; and whether there is any recourse for persons denied a waiver. Since a waiver grant is currently the sole means by which a national of the banned countries may enter the United States, the records requested herein would provide information that is critically important to the public.

Clarity on the waiver process is also of significant urgency. Beginning on December 17, 2017, our organizations have received reports that the U.S. Consulate in Djibouti has issued a significant but unknown number of form letters denying visas to Yemenis awaiting processing of family-based visas. These visa denial letters appear to follow a standardized form and inform applicants that a “consular officer found you ineligible for a visa under Section 212(f) of the Immigration and Nationality Act, and pursuant to Presidential Proclamation 9645.” Additionally, several of these documents inform petitioners that “their case will not be considered for a waiver.” Our organizations have also received reports of similar denial letters from other U.S. consulates during the same week—including in Armenia, Dubai, Abu Dhabi, Saudi Arabia and Jordan. An example of such a letter from the U.S. Consulate in Djibouti is attached as Exhibit 1.

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,

⁹ As opposed to the other countries, the Proclamation only bars the entry into the United States of certain Venezuelan government officials “involved in screening and vetting procedures” and their immediate family members on non-immigrant business and/or tourist visas. *Id.* § 2(f)(ii).

¹⁰ Pres. Proclamation 9645 § 1(g).

¹¹ *Id.* § 3(c).

¹² *Id.*

¹³ *Id.*

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 September 24, 2017, that concern guidance, interpretation, implementation, or enforcement of the Proclamation's waiver provision by DHS, Customs & Border Patrol ("CBP"), the Department of State, or any component agency of the federal government, including, but not limited to:
 - a) Practices, policies, guidance, and procedures implemented on or after September 24, 2017, relating to criteria for assessing individual waiver requests;
 - b) Policies, practices, guidance, and procedures implemented on or after September 24, 2017, regarding how officers should determine that an individual's waiver request be granted;
 - c) Internal guidance or correspondence instructing consular or other officers on how to assess whether denial of an individual's entry "would cause undue hardship"; or when "his or her entry would not pose a threat to national security"; or when his or her entry "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 addressed;
 - f) The number of waiver requests the Department of State, CBP, DHS, or any other component agency of DHS has received under the Proclamation;
 - g) The number of waiver requests granted by the Department of State, CBP, DHS, or any other component agency of DHS under the Proclamation 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, under the Proclamation and the reasoning for the

denials;

- i) Any guidance provided to CBP, DHS, or Department of State field personnel regarding the Proclamation's waiver provisions;
 - j) Any memoranda setting guidance for the Department of State, CBP, DHS, or any other component agency of the DHS on enforcement of the Proclamation's waiver provisions in light of the Supreme Court's December 4, 2017 stay of the lower court injunctions; and
 - k) Any memoranda providing guidance for the Department of State, CBP, DHS, or any other component agency of the DHS on enforcement of the Proclamation's waiver provisions in light of federal court decisions granting preliminary injunctions against its implementation.
 - l) Any guidance or communications regarding the prioritization of the issuance of denial letters among applicants from the countries named in the Presidential Proclamation, or in the Second Executive Order.
- 2) Records concerning guidance, interpretation, enforcement, or implementation of the waiver provisions of the Proclamation created any time after December 4, when certain U.S. Consulates began issuing an unknown number of denials of visas. These include, but are not limited to:
- i) The number of letters issued on December 4 through present by the U.S. Consulate in Djibouti denying eligibility for a waiver; and
 - ii) The number of letters issued on December 4 through present by the U.S. Consulate in Djibouti reviewing eligibility for a waiver.
 - iii) The number of letters issued granting waiver
 - iv) Communications between the Department of State, CBP, DHS or any other component agency of DHS with the consulates of Djibouti, (X and Y consulates) regarding the language of the form letters, including the language indicating the availability of a waiver provision; and
 - v) Any written guidance, including but not limited to memoranda, establishing how to assess whether individuals who had received a visa approval notice prior to the Presidential Proclamation and whose visas were only awaiting printing are to be considered separately for eligibility for the waiver program.

The Department of State, DHS, CBP, and all other relevant components of DHS are obliged to search all such field offices that are reasonably expected to produce 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.

Format of Production

With respect to the form of production, see 5 U.S.C. § 552(a)(3)(B). Please search for responsive records regardless of format, medium, or physical characteristics, and including electronic records. Please provide the requested documents in the following format:

- Saved on a CD, CD-ROM or DVD;
- In PDF or TIF format wherever possible;
- Electronically searchable text wherever possible;
- Each paper record in a separately saved file;
- "Parent-child" relationships maintained, meaning that the requester must be able to identify the attachments with emails;
- Any data records in native format (i.e. Excel spreadsheets in Excel);
- Emails should include BCC and any other hidden fields;
- With any other metadata preserved.

III. The Requestors

The Center for Constitutional Rights ("CCR") is a non-profit, public interest legal organization located in New York City. CCR engages in litigation, public advocacy, and the production of publications in the fields of civil and international human rights. CCR's diverse dockets include litigation and advocacy around immigration detention, post-9/11 immigration enforcement policies, policing, and racial and ethnic profiling. CCR is a member of immigrant rights networks nationally and provides legal support to immigrant rights movements. One of

CCR's primary activities is the publication of newsletters, know-your-rights handbooks, legal analysis of current immigration law issues, and other similar materials for public dissemination. CCR operates a website, <http://ccrjustice.org>, which addresses the issues on which the Center works. The CCR regularly files Freedom of Information Act cases, and makes the information produced by government agencies publically available through its website and further shares the information released under FOIA through reports, production guides and other written materials. In addition, CCR regularly issues press releases, has a social media reach of over 85,000 followers, and issues "action alerts" that notify supporters and the general public about developments and operations pertaining to CCR's work. CCR staff members often serve as sources for journalist and media outlets, including on immigrant rights.

Muslim Advocates ("MA") is a non-profit, public interest legal advocacy organization dedicated to promoting freedom and equality for Americans of all faiths. MA has offices in Oakland, California and Washington, DC. MA engages in litigation, legal advocacy, and educational outreach, and regularly produces reports, white papers, and other materials to educate the public on civil rights matters. MA has a wide-ranging docket that has included extensive litigation and advocacy on the Executive Orders banning travel to the United States for certain nationals of Muslim-majority countries, and has been a leading voice in requests for clarification and further information about the waiver process. MA regularly files FOIA requests and published information obtained pursuant to such requests in a digestible, public-facing form. We regularly receive requests about obtaining case-by-case waivers under the Proclamation and therefore has a particular interest in promoting greater transparency on the subject of this request.

IV. Application for Waiver of Fees

The Requestors seek 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 Proclamation. 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 Proclamation itself.

Moreover, the implementation of the second Executive Order and the Presidential Proclamation have generally been the subject of widespread and ongoing media attention¹⁴. 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)).

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 and the Center for Constitutional Rights 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 nonprofit 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).

V. Application for Expedited Processing

¹⁴ See e.g., Liz Robbins, 'Your Visa Is Approved,' They were Told. And Then It Wasn't., N. Y. TIMES (Jan. 17, 2018), <https://nyti.ms/2FNJmOm>; Sam Levin, Tears, despair and shattered hopes: the families torn apart by Trump's travel ban, THE GUARDIAN (Jan. 8, 2018, 5:00M), <https://www.theguardian.com/us-news/2018/jan/08/trump-travel-ban-families-affected-first-month>; Esther Yu Hsi Lee, Trump's Muslim ban has put this Stage 3 cancer patient in an impossible situation, THINKPROGRESS (Jan. 12, 2018), <https://thinkprogress.org/iranian-cyberknife-cancer-treatment-4576199d430e/>.

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 Proclamation’s implementation has received widespread media interest, in particular with regards to the confusion surrounding the waiver process.¹⁵ 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 Proclamation’s waiver provision, which at this time is the sole manner by which affected individuals from the eight countries are able to gain entry into the United States.

Reports of the Proclamation’s implementation have raised serious due-process concerns, 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 Proclamation has been shadowed in 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.

¹⁵ *See, e.g.,* Sam Levin, *Tears, despair and shattered hopes: the families torn apart by Trump’s travel ban*, THE GUARDIAN, Jan. 8, 2018, *available at* <https://www.theguardian.com/us-news/2018/jan/08/trump-travel-ban-families-affected-first-month>; Betsy Woodruff, *The Kafkaesque Hell of Being an Iranian Dissident Trying to Come to America*, THE DAILY BEAST, Jan. 3, 2018, *available at* <https://www.thedailybeast.com/the-kafkaesque-hell-of-being-an-iranian-dissident-trying-to-come-to-america>.

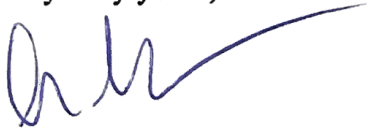
Please furnish the applicable records to:

Sirine Shebaya
MUSLIM ADVOCATES
P.O. Box 66408
Washington, DC 20035
sirine@muslimadvocates.org

If you have any questions regarding the processing of this request, please contact Sirine Shebaya at (202) 897-1894 or Diala Shamas at (212) 614-6426.

We 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).

Very truly yours,



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