

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

U.S. Department of Defense

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U.S. Citizenship and Immigration Services

Freedom of Information Act Office
500 12th Street SW
Stop 5009
Washington, DC 20536-5009

July 10, 2018

Re: Freedom of Information Act Request Regarding the U.S. Army's Discharge of Immigrant Recruits

To Whom It May Concern:

On behalf of Muslim Advocates ("Requestor"), we submit this letter to the U.S. Department of Defense, U.S. Department of the Army ("the Army"), and U.S. Citizenship and Immigration Services (collectively, "Respondents") as a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.* and related regulations, 32 C.F.R. Part 286; AR 25-55; 6 C.F.R Part 5 for documents, communications, and all other materials related to the U.S. Army's discharge of immigrant recruits who were enlisted under the Military Accessions Vital to the National Interest program. Please expedite your response pursuant to 5 U.S.C. § 552(a)(6)(E) and grant a fee waiver for this request. Please also refer the requests contained in this letter to any other agency or component agency as appropriate.

I. Background

The Military Accessions Vital to the National Interest ("MAVNI") program, created in 2008, is a special U.S. military recruiting program that allows certain immigrants with "critical skills"—such as physicians and individuals with particular linguistic and/or cultural expertise—to "join the U.S. military and apply immediately for U.S. citizenship...without first obtaining

lawful permanent residence.”¹ Since 2009, more than 10,000 individuals have been recruited into the U.S. military through the MAVNI program.² Most of these recruits have enlisted in the Army.³

Under the administration of President Donald Trump, the MAVNI program has been suspended. First, in September 2017, U.S. Army recruiters “abruptly canceled enlistment contracts” for hundreds of MAVNI recruits—a step that “upend[ed] their lives and potentially expos[ed] many to deportation.”⁴ Shortly thereafter, in October 2017, the Pentagon reportedly allowed the recruitment program itself to lapse into disuse.⁵

In July 2018, the Associated Press (“AP”) reported that the Army has also been discharging non-citizen reservists and recruits who were enlisted into military service through MAVNI.⁶ According to the AP, immigration attorneys are aware of “more than 40” such immigrant recruits “who have been discharged or whose status has become questionable, jeopardizing their futures.”⁷ These discharged immigrant service members were either “not told why there were being discharged” or were informed that they had been “labeled as security risks because they have relatives abroad or because the Defense Department had not completed background checks on them.”⁸ Further, the Army has discharged these recruits in such a way as to prevent them from becoming naturalized citizens through MAVNI: the MAVNI program requires that service members receive “honorable service designations” in order to become citizens, and the Army’s recently-discharged MAVNI recruits either had their basic training delayed and were thus ineligible for honorable discharge or were given an “‘uncharacterized discharge,’ neither honorable nor dishonorable.”⁹ The Army’s actions in this regard have created great uncertainty and distress in the lives of the immigrant service members affected.

¹ *What is MAVNI? Information for Designated School Officials*, U.S. Dep’t of Homeland Security, <https://studyinthestates.dhs.gov/what-is-mavni-information-for-designated-school-officials> (last visited July 6, 2018).

² Alex Horton, *The Pentagon tried to kill a program for immigrants. Mattis thinks it can be saved.*, Wash. Post (Oct. 13, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/10/13/the-pentagon-tried-to-kill-a-program-for-immigrants-mattis-thinks-it-can-be-saved/?utm_term=.20c2e53519ed.

³ Alex Horton, *The Pentagon promised citizenship to immigrants who served. Now it might help deport them.*, Wash. Post (June 26, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/06/26/the-pentagon-promised-citizenship-to-immigrants-who-served-now-it-might-help-deport-them/?utm_term=.f8eb6db09120.

⁴ Alex Horton, *U.S. Army kills contracts for hundreds of immigrant recruits. Some face deportation.*, Wash. Post (Sept. 15, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/09/15/army-kills-contracts-for-hundreds-of-immigrant-recruits-sources-say-some-face-deportation/?utm_term=.eddc86a59920; See also Miriam Jordan, *Fast Track to Citizenship Is Cut Off for Some Military Recruits*, N.Y. Times (Sept. 15, 2017), https://www.nytimes.com/2017/09/15/us/fast-track-to-citizenship-is-cut-off-for-some-military-recruits.html?_r=0.

⁵ Richard Sisk, *Recruits in ‘Bureaucratic Limbo’ with Citizenship Program Suspended*, Military.com (Apr. 15, 2018), <https://www.military.com/daily-news/2018/04/15/recruits-bureaucratic-limbo-citizenship-program-suspended.html>.

⁶ Martha Mendoza and Garance Burke, *US Army quietly discharging immigrant recruits*, Associated Press (July 5, 2018), <https://apnews.com/38334c4d061e493fb108bd975b5a1a5d>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

II. Description of Records

The Requestor requests disclosure of the following records¹⁰ that were prepared, received, transmitted, collected, and/or maintained by Respondents:

1. All records showing the number of service members or recruits enlisted in any branch of the U.S. military through the MAVNI program for each month, from January 2016 to the present.
2. All records indicating the number of participants in the MAVNI program who submitted N-400 Applications for Naturalization, and who requested an authorized official from command to sign Form N-426 certifying honorable service, and whether the certification was granted.
3. All records pertaining to the cancelation of enlistment contracts for foreign-born military service members or recruits created on or after January 20, 2017.
4. All records pertaining to the discharge from military service of non-citizen U.S. military service members or recruits created on or after January 20, 2017.
5. All records pertaining to the country of origin of all non-citizen U.S. military service members or recruits who have been discharged from military service, created on or after January 20, 2017.
6. Records indicating the number of military naturalization applications (i.e., applications under section 328 or 329 of the Immigration and Nationality Act) submitted from January 1, 2017 to present, including the nationality and immigration status of each applicant.
7. For each service member or recruit as described in Items 1-5, please include pages from their personnel files, with personal identifying information redacted, indicating:
 - a. Their date of enlistment or contract;
 - b. Their country of origin;
 - c. The branch of the U.S. military in which the service member or recruit is or was enlisted;

¹⁰ The term “records” is intended in the broadest possible sense and includes without limitation all records or communications preserved in electronic or written form, including but not limited to correspondence, regulations, directives, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, legal and policy memoranda, minutes or notes of meetings and phone calls, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, text communications between phones or other electronic devices (including, but not limited to, communications sent via SMS or other text, Blackberry Messenger, iMessage, WhatsApp, Signal, Gchat, or Twitter direct message), training materials or studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications and/or videotapes, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations. No category of material should be omitted from search, collection, and production.

- d. Whether or not the service member or recruit is or was enlisted through the MAVNI program;
 - e. The characterization of the service member or recruit's discharge or termination (e.g. honorable, dishonorable, uncharacterized, etc.);
 - f. The languages other than English spoken by the discharged service member or recruit, if any;
 - g. The specialization or training background of the discharged service member or recruit, if any;
 - h. The service member or recruit's immigration status in the U.S.;
 - i. Whether the service member or recruit was denied or had revoked a favorable national security eligibility determination, and any record explaining the basis for the unfavorable determination, if any;
 - j. Whether the service member or recruit was given an opportunity to be heard on the matter of discharge, and, if so, what due process was provided.
8. Records describing the processing of this request, including but not limited to records sufficient to identify the search terms used and the search queries conducted; records sufficient to identify the locations and custodians searched; any tracking sheets used to track the processing of this request; and any FOIA questionnaires or certifications completed by individual custodians or components used to determine whether they possess responsive materials or to describe how they conducted searches.

III. Description of Processing

The Requestor requests disclosure of the above-described records that were prepared, received, transmitted, collected and/or maintained by the Recipients and any other agency components thereof.

Please search all records regarding agency business. Please do not rely solely on custodian-driven searches; the government-wide requirements to manage information electronically by the end of 2016 have rendered it unreasonable to rely exclusively on custodian-driven searches.¹¹ However, please do perform custodian-driven searches; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts. Please do not exclude searches of files or emails in the personal custody of agency officials, such as personal email accounts; records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.¹² Please do not omit such searches merely because the agency has policies and procedures requiring officials to move records to official systems within a certain period of time; separate

¹¹ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

¹² See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149-50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955-56 (D.C. Cir. 2016).

searches are still necessary in case the policies or procedures were not followed.¹³ Please use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched.¹⁴ The Requestor is available to work with you to craft appropriate search terms, if necessary.

Please produce records in electronic form. Where possible, please provide responsive material in electronic format by email to sirine@muslimadvocates.org. Please furnish any responsive material being sent by mail to:

Sirine Shebaya
Senior Staff Attorney
Muslim Advocates
P.O. Box 66408
Washington, D.C. 20035

Please produce electronic records in their native format. With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the Requestor requests that responsive electronic records be provided electronically in their native file format, if possible. In particular, please produce electronic files in a format that contains the original metadata of the files.¹⁵ If the records cannot be produced in their native format, please (1) provide an explanation why the records cannot be so produced; and (2) please produce records electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and in separate, Bates-stamped files.

Please produce documents as they become available. The Requester would prefer a rolling production. We would be happy to discuss a search priority and schedule for production.

If you withhold records or parts of records, please provide the justification for the withholding. If it is your position that any portion of the requested records is exempt from disclosure, please provide an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and describe each document claimed as exempt with sufficient specificity

¹³ *See* Order, *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765,*8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)), ECF no. 31.

¹⁴ For example: agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but the agency’s archiving tools would capture that email under Capstone.

¹⁵ As a non-exhaustive list of examples: Microsoft Excel spreadsheets are to be produced as files that open in Excel, with all original data and formulas intact; Microsoft Word documents are to be produced in the same file format they are stored in, such that they contain all tracked changes and comments present in the documents; and emails are to be produced with all metadata fields intact, including but not limited to the date and time the email was sent, the full names and email addresses of all recipients, any data contained in the bcc: field, and all attachments.

“to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”¹⁶ Please ensure that the *Vaughn* index “describe[s] each document or portion thereof withheld, and for each withholding . . . discuss[es] the consequences of disclosing the sought-after information.”¹⁷ Please also “supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹⁸

If you withhold portions of a record, please produce all segregable portions. In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹⁹ Please state claims of non-segregability with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

IV. Application for Expedited Processing

Expedited processing of this request is warranted because: (1) there is an “urgency to inform the public about an actual or alleged Federal Government activity” by organizations, like the Requester, “primarily engaged in disseminating information,” 5 U.S.C. § 552(a)(6)(E)(i) & (v)(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.” 5 U.S.C. § 552(a)(6)(E)(ii).

Muslim Advocates is engaged in the dissemination of information as a primary part of its mission. Through its website, its outreach to media organizations, its advocacy in government, and its presentations to the public, Muslim Advocates helps shine a light on government practices that affect the Muslim community and others.

The records requested pertain to the U.S. Army’s discharge of immigrant recruits who had enlisted in the military under a program meant to fast-track their ability to become U.S. citizens. The Army has reportedly conducted these discharges in such a way as to prevent these recruits from obtaining naturalized U.S. citizenship through this program. As such, the information sought in the Request raises serious concerns about possible racial, ethnic, and/or religious discrimination in the federal government and the armed services, giving rise to “questions about the government’s integrity” and an “urgency to inform the public.” Further, attorneys and other services providers need to understand the relevant policies, procedures, and

¹⁶ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

¹⁷ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

¹⁸ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹⁹ *Mead Data Central, Inc.*, 566 F.2d at 261.

practices to effectively serve and advise the population of individuals potentially affected by this initiative.

Given the foregoing, the Requester has satisfied the requirements for expedited processing of this Request. Pursuant to applicable statutes and regulations, the Requester expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I).

Through my signature below, 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).

V. Application for Waiver or Limitation of Fees

The Requester requests a waiver of fees for document search, review, and duplication on the grounds that disclosure of the requested records is in the public interest and because disclosure 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). The Requester also requests a waiver of search fees on the grounds that the Requester qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

- A. *This request 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 Requestor.*

An agency must waive or limit FOIA-related fees if a request 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). This Request meets both of these requirements.

These records will shed light on current government practices. The records requested pertain to the U.S. Army’s discharge of immigrant recruits who had enlisted in the military under a program meant to fast-track their ability to become U.S. citizens. The Army has reportedly conducted these discharges in such a way as to prevent these recruits from obtaining naturalized U.S. citizenship through this program. The information contained in the requested documents has the potential to either reveal or confirm the absence of government misconduct, which is inherently in the public interest. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313-14 (D.C. Cir. 2003) (“[T]he public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted.”). News accounts²⁰ underscore the substantial public interest in the records sought through this request.

²⁰ *See, e.g.,* Mendoza and Burke, *supra* note 6; Jacqueline Thomsen, *Army discharging some immigrant recruits: report*, The Hill (July 5, 2018), <http://thehill.com/policy/defense/army/395718-army-discharging-some-immigrant-recruits-report>; Elliot Hannon, *The Trump Administration Is Quietly Discharging Immigrant Recruits Promised Citizenship in Return for Military Service*, Slate (July 5, 2018), <https://slate.com/news-and-politics/2018/07/the-trump-administration-is-quietly-discharging-immigrant-recruits-promised-citizenship-in-return-for-military->

Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance.

The Requestor is not filing this Request to further its commercial interest. Requestor Muslim Advocates is a 501(c)(3) non-profit organization. Any information disclosed by the Requestor as a result of this FOIA request will be made available to the public at no cost through a combination of outreach to media outlets and the Requestor’s website (available at www.muslimadvocates.org). Thus, granting a fee waiver for this Request would fulfill Congress’s legislative intent in amending the FOIA. *See Rossotti*, 326 F.3d at 1312 (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (internal quotation marks omitted)).

B. *The Requestor is a representative of the news media and the records are not sought for commercial use.*

The Requestor also requests a waiver of search fees on the grounds that the Requestor qualifies as “representative[s] of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Requestor meets the statutory and regulatory definitions of “representative[s] of the news media” because they gather information, exercise editorial discretion in selecting and organizing documents, and “distribute the resulting work to the public.” *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). The Requestor is therefore a “representative of the news media” for the same reasons: it is “primarily engaged in [the] dissemination of information.” 5 U.S.C. § 552(a)(4)(A)(ii)(II), (6)(E)(v)(II).

Courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the Requestor’s to be “representative[s] of the news media” as well. The Requestor has pursued FOIA litigation against many agencies that resulted in the disclosure of previously withheld information, including against the FBI in 2009 and multiple suits against DHS in 2017. *Cf. Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester); *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11-12 (D.D.C. 2003) (finding legal advocacy non-profit qualifies as news media requester).

Because these factors weigh in favor of a fee waiver, fees associated with responding to FOIA requests should be waived for the Requestor as a “representative[s] of the news media.”

service.html; Haley Britzky, *Report: Immigrant military recruits being discharged from Army*, Axios (July 5, 2018), <https://www.axios.com/report-immigrant-military-recruits-being-discharged-from-army-e997843b-8db1-41dc-97b2-973b737ea178.html>; Margaret Hartmann, *U.S. Army Is Discharging Immigrants Who Were Promised Citizenship*, New York Magazine (July 6, 2018), <http://nymag.com/daily/intelligencer/2018/07/u-s-army-is-discharging-immigrants-promised-citizenship.html>; Nick Visser, *U.S. Army Reportedly Discharging Immigrants Who Enlisted With Promises Of Citizenship*, HuffPost (July 6, 2018), <http://nymag.com/daily/intelligencer/2018/07/u-s-army-is-discharging-immigrants-promised-citizenship.html>; Dave Philipps, *They Came Here to Service. But for Many Immigrants, the Army Isn’t Interested.*, N.Y. Times (July 6, 2018), <https://www.nytimes.com/2018/07/06/us/army-immigrants-discharge.html>.

VI. Conclusion

We would welcome the chance to discuss this matter with you. If you would like to discuss any part of this Request, please contact Sirine Shebaya by email at sirine@muslimadvocates.org or by phone at 202-897-1894.

Thank you for your prompt attention to this matter.

Very truly yours,



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**Admitted in California, supervised by
members of the DC bar*