

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MUSLIM ADVOCATES
P.O. Box 66408
Washington, DC 20035

AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE
1310 L Street NW, Suite 200
Washington, DC 20005

and

SOUTHERN POVERTY LAW CENTER,
400 Washington Avenue
Montgomery, AL 36104

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
STATE
2201 C Street NW
Washington, DC 20530

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY
3801 Nebraska Avenue NW
Washington, DC 20016

and

UNITED STATES CUSTOMS AND
BORDER PROTECTION
1300 Pennsylvania Avenue NW
Washington, DC 20004

Defendants.

Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs Muslim Advocates, Americans United for Separation of Church and State (“Americans United”), and Southern Poverty Law Center (“SPLC,” and collectively with Americans United and Muslim Advocates, “Plaintiffs”) bring this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, for declaratory, injunctive, and other appropriate relief to compel the disclosure and release of documents from Defendants U.S. Department of State, U.S. Department of Homeland Security (“DHS”), and DHS’s component agency, U.S. Customs and Border Protection (“CBP,” and collectively with Department of State and DHS, “Defendants”).

2. On June 27, 2017, Plaintiffs submitted a FOIA request (the “Request”) to Defendants seeking specific information related to the waiver provisions of Executive Order 13,780 (the “Second Executive Order,” which was issued on March 6, 2017) allowing the Commissioner of CBP to determine on a case-by-case basis whether a national from one of the six majority-Muslim countries identified in the Second Executive Order may gain entry into the country. These documents and information are critical to Plaintiffs’ ability to assist and advise affected travelers, and to understand the scope of the Second Executive Order’s waiver provision and the extent to which the government has implemented or is implementing its policies in a discriminatory or unconstitutional manner.

3. To date, Defendants have failed to produce a single document or any substantive response to the Request. In short, Defendants have wholly failed to comply with their obligations under FOIA. Plaintiffs file this lawsuit to compel the production of the documents and information they seek.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1346. This Court also has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B).

5. Venue is proper in this District pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e). Venue is proper because a substantial portion of the events giving rise to this action occurred in this District, and because Defendants maintain in this District records and information subject to the Request.

PARTIES

6. Plaintiff Muslim Advocates is a not-for-profit corporation that works to ensure civil rights for Americans of all faiths through national legal advocacy, policy engagement, and civic education. Muslim Advocates submitted the Request that is the subject of this action and is a “person” within the meaning of 5 U.S.C. § 551(2).

7. Plaintiff Americans United is a nonprofit educational and advocacy organization dedicated to advancing the constitutional principle of separation of church and state as the only way to ensure freedom of religion for all Americans. Americans United submitted the Request that is the subject of this action and is a “person” within the meaning of 5 U.S.C. § 551(2).

8. Plaintiff SPLC is a non-profit organization dedicated to fighting hate and bigotry and to seeking justice for the most vulnerable members of our society. Through the use of public education, litigation, and other forms of advocacy, SPLC works toward a vision of equal justice and equal opportunity. SPLC has a longstanding commitment to defending the rights of immigrants, and it provides free legal representation to immigrants who have suffered violations of their civil rights. SPLC submitted the Request that is the subject of this action and is a “person” within the meaning of 5 U.S.C. § 551(2).

9. Defendant Department of State is an “agency” within the meaning of 5 U.S.C. § 552(f)(1). Department of State is the executive department responsible for international relations and is an agency of the United States. Department of State has possession of and control over the documents and information requested by Plaintiffs under FOIA.

10. Defendant DHS is an “agency” within the meaning of 5 U.S.C. § 552(f)(1). DHS is the executive department responsible for enforcing federal immigration laws and is an agency of the United States. DHS has possession of and control over the documents and information requested by Plaintiffs under FOIA.

11. Defendant CBP is a component agency of DHS and an “agency” within the meaning of 5 U.S.C. § 552(f)(1). CBP is the component agency of DHS responsible for the management and control of the United States’ borders. CBP has possession of and control over the documents and information requested by Plaintiffs under FOIA.

STATUTORY BACKGROUND

12. Any member of the public may request records from an agency of the United States under FOIA. An agency that receives a FOIA request must respond in writing to the requestor within 20 business days after receipt of the request. 5 U.S.C. § 552(a)(6)(A)(i). In its response, the agency must: inform the requestor as to whether it intends to comply with the request; provide reasons for its determination; and inform the requestor of his or her right to appeal the determination. FOIA provides for an extension of this deadline “[i]n unusual circumstances” but limits this extension to “ten working days.” 5 U.S.C. § 552(a)(6)(B)(i).

13. A FOIA requestor is deemed to have exhausted all administrative remedies if the agency fails to comply with the request within statutory time limits. 5 U.S.C. § 552(a)(6)(C)(i).

14. FOIA requires an agency to disclose in a timely manner, in response to a FOIA request, all records that do not fall within nine narrowly construed statutory exemptions. 5 U.S.C. § 552

(a)(3)(A); 5 U.S.C. § 552(b)(1)-(9). FOIA also requires an agency to make a reasonable search for responsive records. 5 U.S.C. § 552(a)(3)(C).

15. Upon a requestor's complaint, a district court has jurisdiction to enjoin an agency from withholding records and to order production of records subject to disclosure. 5 U.S.C. § 552(a)(4)(B).

FACTUAL BACKGROUND

16. On January 27, 2017, President Donald Trump issued Executive Order 13,769 (the "First Executive Order"), barring persons from seven majority-Muslim countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen— from entering the United States for 90 days, indefinitely blocking refugees from Syria from entering the United States, and prohibiting all refugees from entering the United States for 120 days.

17. On March 6, 2017, President Trump issued the Second Executive Order, which was to take effect on March 16, 2017. The Second Executive Order replaced the First Executive Order, and continued its general bar to entry into the United States of persons on new visas from six majority-Muslim countries—Iran, Libya, Somalia, Sudan, Syria, and Yemen—for 90 days. Exec. Order No. 13,780 § 2(c). The Second Executive Order also reinstated the prohibition on all refugees entering the United States for 120 days, and it contained increased vetting procedures for Iraqis and a requirement that the Secretary of Homeland Security review current policies 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." *Id.* at § 6(a).

18. The Second Executive Order also empowers the Commissioner of 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 Second Executive Order. *Id.* § 3(c). The First Executive Order similarly empowered the Commissioner or his designee to grant such waivers.

19. Courts entered nationwide injunctions of sections 2(c) and 6(a) of the Second Executive Order.¹ On June 26, 2017, the Supreme Court narrowed the scope of those injunctions, allowing implementation of sections 2(c) and 6(a) 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.²

20. On September 24, 2017, President Trump issued a Presidential Proclamation entitled “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats.” Among other things, the September 24, 2017 Proclamation put in place an indefinite bar to entry for most nationals of Iran, Libya, Somalia, Syria, and Yemen. *See* Presidential Proclamation, Sept. 24, 2017 §§ 1(h)(ii); 2. The Proclamation also added two countries to the list of countries whose nationals are subject to general restrictions on entry: Chad and North Korea, *see id.* §§ 2(a), (d), and imposed restrictions on entry of government officials from Venezuela. *See id.* §§ 1(h)(ii); 2(f).

21. The September 24, 2017 Proclamation provides for a waiver process nearly identical to the waiver process under the Second Executive Order. The Proclamation, like the Second Executive Order, permits consular officers to grant waivers on a “case-by-case” basis to allow entry of foreign nationals otherwise banned by the Proclamation. *See id.* § 3(c). Information

¹ *Hawaii v. Trump*, No. 17-00050 DKW-KSC, 2017 WL 1167383 (D. Haw. Mar. 29, 2017) (enjoining sections 2 and 6), *aff’d in substantial part*, 859 F.3d 741 (9th Cir. 2017); *Int’l Refugee Assistance Project v. Trump*, No. CV TDC-17-0361, 2017 WL 1018235 (D. Md. Mar. 16, 2017) (enjoining section 2(c)), *aff’d in substantial part*, 857 F.3d 554 (4th Cir. 2017).

² *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2088-89 (2017).

about the implementation of the waiver process is critical to Plaintiffs' ability to advise and assist travelers who may be affected by the Second Executive Order or the Proclamation.

PLAINTIFFS' FOIA REQUEST

22. On June 27, Plaintiffs submitted the Request to Defendants and sought expedited review and a fee waiver.³ The Request seeks records created on or after January 27, 2017, concerning interpretation, enforcement, or implementation of the waiver provisions of the Second Executive Order by DHS, CPB, the Department of State, or any component agency of the federal government, including, but not limited to:

- 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;

³ A copy of the Request is attached hereto as Exhibit A.

- i. Any guidance provided to CBP, DHS, or Department of State field personnel regarding the waiver provisions of the Second Executive Order;⁴ and
- j. Any memoranda providing guidance for the Department of State, CBP, DHS, or any other component agency of 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.

AGENCY RESPONSE AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

23. On July 12, 2017, in a letter sent by email (“DHS Letter”),⁵ Defendant DHS acknowledged that it had received the Request on July 5, 2017, and granted Plaintiffs’ request for expedited review and a fee waiver.

24. In the DHS Letter, DHS invoked a 10-day extension beyond the usual 20-day statutory limit to respond to the Request pursuant to 5 § U.S.C. 552(a)(6) and 6 C.F.R. Part 5 § 5.5(c).

25. With the 10-day extension, DHS was required to respond to the Request on or before August 4, 2017.

26. To date, Plaintiffs have received no records responsive to the Request or any substantive response to the Request from DHS.

27. To date, Plaintiffs have received no correspondence from DHS since the July 12, 2017 DHS Letter.

28. On July 11, 2017, in a letter sent by email (“CBP Letter”), Defendant CBP acknowledged that it had received the Request on July 10, 2017.⁶

⁴ 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.”).

⁵ A copy of the DHS Letter is attached hereto as Exhibit B.

29. The CBP Letter neither granted nor denied Plaintiffs' request for expedited review.

30. The CBP Letter did not address Plaintiffs' request for a fee waiver, but did state that CBP "shall charge [Plaintiffs] for records in accordance with the DHS FOIA regulations outlined on the DHS website[,] that "[b]y submitting [the Request, Plaintiffs] have agreed to pay up to \$25.00 in applicable processing fees," and that "the first 100 pages are free."

31. The CBP Letter stated that FOIA "does permit" a 10-day extension of the 20-day time period to respond to requests, but did not invoke any extension. The CBP Letter advised that "[c]urrently the average time to process a FOIA request related to 'travel/border incidents' is a minimum of 3-6 months" but did not advise whether this amount of time would be required to respond to the Request or why Plaintiffs' request for records relating to the waiver process under the Second Executive Order would be subject to any processing period for requests related to "travel/border incidents."

32. Without the 10-day extension, CBP was required to respond to the Request on or before August 7, 2017. With the 10-day extension, CBP was required to respond to the Request on or before August 21, 2017.

33. To date, Plaintiffs have received no records responsive to the Request or any substantive response to the Request from CBP.

34. To date, Plaintiffs have received no correspondence from CBP since the July 11, 2017 CBP Letter.

(footnote continued from previous page)

⁶ A copy of the CBP Letter is attached hereto as Exhibit B.

35. On August 30, 2017, Plaintiffs received a letter sent by email (“State Department Letter”), from Defendant Department of State, acknowledging that it had received the Request on August 18, 2017.⁷

36. The State Department Letter granted Plaintiffs’ request for a fee waiver.

37. The State Department Letter denied Plaintiffs’ request for expedited review.

38. The State Department Letter provided no explanation of when Plaintiffs would receive a response to the Request. Rather, the State Department Letter stated only that “[u]nusual circumstances (including the number and location of Department components involved in responding to [the R]equest, the volume of requested records, etc.) may arise that would require additional time to process [the R]equest[.]” and that Department of State “will notify [Plaintiffs] as soon as responsive material has been retrieved and reviewed.”

39. The State Department Letter neither mentioned nor invoked the 10-day extension to respond to the Request.

40. Without a 10-day extension, Department of State was required to respond to the Request by September 18, 2017.

41. With a 10-day extension, Department of State was required to respond to the Request by October 2, 2017.

42. To date, Plaintiffs have received no records responsive to the Request nor any substantive response to the Request from the Department of State.

43. To date, Plaintiffs have received no correspondence from Department of State since the August 30, 2017 State Department Letter.

⁷ A copy of the State Department Letter is attached hereto as Exhibit D.

44. Defendants have not made available any records responsive to the Request or provided any substantive response to the Request.

45. Because Defendants have failed to comply with the FOIA time-limit provision, Plaintiffs are deemed to have exhausted their administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i).

CAUSE OF ACTION: VIOLATION OF THE FREEDOM OF INFORMATION ACT

46. Defendants have violated 5 U.S.C. § 552(a)(6)(A)-(B) and applicable regulations promulgated thereunder by failing to determine whether to comply with Plaintiffs' Request within 30 days.

47. Defendants have violated 5 U.S.C. § 552(a)(3)(A) by failing to promptly release agency records in response to Plaintiffs' Request.

48. Defendants have violated 5 U.S.C. § 552(a)(3)(C)-(D) by failing to make reasonable efforts to search for records responsive to Plaintiffs' Request.

49. Injunctive relief is authorized under 5 U.S.C. § 552(a)(4)(B) because Defendants continue to improperly withhold agency records in violation of FOIA. Plaintiffs will suffer irreparable injury from, and have no adequate remedy for, Defendants' illegal withholding of government documents subject to Plaintiffs' Request.

50. Declaratory relief is authorized under 28 U.S.C. § 2201 because an actual and justiciable controversy exists regarding Defendants' improper withholding of agency records in violation of FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Muslim Advocates, Americans United, and SPLC respectfully request that judgment be entered against Defendants and that this Court:

- A. Declare that Defendants violated FOIA by failing to determine whether to comply with the Request within 30 business days and by failing to notify Plaintiffs immediately thereafter of such determination and the reasons therefor;
- B. Declare that Defendants violated FOIA by unlawfully withholding the requested records;
- C. Order Defendants to disclose the requested records to the public immediately and to make copies immediately available to Plaintiffs;
- D. Award Plaintiffs their reasonable costs and attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E); and
- E. Grant such other and further relief as this Court may deem just and proper.

Dated: October 5, 2017

Respectfully submitted,

/s/ David J. Weiner

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EXHIBIT A



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VIA CERTIFIED MAIL

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Kellie Robinson, Public Liaison
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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).



June 27, 2017

Page 8

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).

ARNOLD & PORTER
KAYE SCHOLER

June 27, 2017
Page 9

Sincerely,

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

David J. Weiner

EXHIBIT B



Homeland
Security

July 12, 2017

SENT VIA E-MAIL TO: David.Weiner@apks.com

David J. Weiner
Arnold & Porter Kaye Scholer, LLP
601 Massachusetts Ave. NW
Washington, DC 20001

Re: **2017-HQFO-01002**

Dear Mr. Weiner:

This letter acknowledges receipt of your June 27, 2017, Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), for 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: 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. 1. 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 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.. This office received your request on July 5, 2017.

As it relates to your request for expedited processing and fee waiver, your request is granted.

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Consistent with 6 C.F.R. Part 5 § 5.5(a) of the DHS FOIA regulations, the Department processes FOIA requests according to their order of receipt.

Although DHS' goal is to respond within 20 business days of receipt of your request, FOIA does permit a 10-day extension of this time period in certain circumstances pursuant to 6 C.F.R. Part 5 § 5.5(c). As your request seeks documents that will require a thorough and wide-ranging search, DHS will invoke a 10-day extension for your request pursuant to 6 C.F.R. Part 5 § 5.5(c). If you would like to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.

We have queried the appropriate component(s) of DHS for responsive records. If any responsive records are located, they will be reviewed for determination of releasability. Please be assured that one of the analysts in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

Your request has been assigned reference number **2017-HQFO-01002**. Please refer to this identifier in any future correspondence. The status of your FOIA request is now available online and can be accessed at: <https://www.dhs.gov/foia-status>, by using this FOIA request number. Status information is updated daily. Alternatively, you can download the DHS eFOIA Mobile App, the free app is available for all Apple and Android devices. With the DHS eFOIA Mobile App, you can submit FOIA requests or check the status of requests, access all of the content on the FOIA website, and receive updates anyplace, anytime.

If you have any questions, or would like to discuss this matter, please feel free to contact this office at 1-866-431-0486 or 202-343-1743.

Sincerely,



LaEbony Livingston
FOIA Program Specialist

EXHIBIT C

90 K St NE
Washington, DC 20229

David J. Weiner
Arnold & Porter Kaye Scholer, LLP
601 Massachusetts Ave, NW
Washington, DC 20001

July 11, 2017

Dear David J. Weiner:

This automated notice acknowledges receipt of your Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP) received on 07/10/2017 in which you are seeking 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. Please use the following unique FOIA tracking number CBP-2017-070988 to track the status of your request. If you have not already done so, you must create a FOIAonline account at <https://foiaonline.regulations.gov>. This is the only method available to check the status of your pending FOIA request.

Provisions of the Act allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the DHS FOIA regulations outlined on the DHS website, <https://www.federalregister.gov/documents/2016/11/22/2016-28095/freedom-of-information-act-regulations>. By submitting your request, you have agreed to pay up to \$25.00 in applicable processing fees, if any fees associated with your request exceed this amount, CBP shall contact you; however, the first 100 pages are free.

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Consistent with 6 C.F.R. Part 5 §5.5(a) of the DHS FOIA regulations, CBP processes FOIA requests according to their order of receipt. Although CBP's goal is to respond within 20 business days of receipt of your request, FOIA does permit a 10-day extension of this time period in certain circumstances pursuant to 6 C.F.R. Part 5 §5.5(c).

CBP's FOIA Division is working hard to reduce the amount of time necessary to respond to FOIA requests. Currently, the average time to process a FOIA request related to "travel/border incidents" is a minimum of 3-6 months. We truly appreciate your continued patience.

For additional information please consult CBP FOIA website please click on [FOIA Act Resources](#) or visit <http://www.cbp.gov/site-policy-notices/foia>.

Sincerely,

Jodi Drengson
U.S. Customs and Border Protection

EXHIBIT D



United States Department of State

Washington, D.C. 20520

AUG 30 2017

Dear Requester,

RE: Records regarding the interpretation and enforcement by DHS, CBP, and DOS of the second E.O. 13780 waiver provisions.

This is in response to your request dated 6-27-2017, which was received on 8-18-2017. We have assigned Case Control Number F-2017-14678 and will begin the processing of your request based upon the information provided in your communication.

The cut-off date is the date the search is initiated unless you have provided a specific timeframe.

We have considered your request for a fee waiver. Based upon the information provided in your letter, your request for a fee waiver has been granted; therefore, your request will be processed at no charge to you.

Unusual circumstances (including the number and location of Department components involved in responding to your request, the volume of requested records, etc.) may arise that would require additional time to process your request.

Our published regulations regarding expedition, 22 C.F.R. § 171.11(f), require a specific showing of a compelling need. **Expedited processing is granted only in the following situations:**

(1) imminent threat to the life or physical safety of an individual; (2) urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity and the information is urgently needed in that a particular value of the information would be lost if not disseminated quickly; (3) substantial humanitarian reasons; or (4) loss of substantial due process rights. Your request does not meet any of the established criteria. Regrettably, I must advise that you have not provided adequate justification for expedition. However, you may be assured that we will make every effort to process your request in as timely a manner as possible. For your convenience, I have enclosed a copy of the Department's expedited processing criteria.

If you wish to appeal the denial of expedition, you may write to the Requester Liaison Division, at the address below, within 90 calendar days of the date of this letter.

We will notify you as soon as responsive material has been retrieved and reviewed.

Should you want to contact us, you may call our FOIA Requester Service Center on (202) 261-8484 or send an email to FOIAstatus@state.gov. Please refer to the Case Control Number in any communication.

Sincerely,

Requester Communications Branch
Office of Information Programs & Services

Office of Information Programs and Services
U.S. Department of State, SA-2
Washington, DC 20522-8100
Website: www.foia.state.gov

Inquiries:
Phone: 1-202-261-8484
FAX: 1-202-261-8579
E-mail: FOIAstatus@state.gov

Expeditious Processing Information Sheet

Expedited processing shall be granted to a requester after the requester requests such and demonstrates a compelling need for the information. A compelling need is deemed to exist where the requester can demonstrate one of the following:

1. **A Compelling Need** means that the failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.
2. **A Compelling Need** means that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. An individual primarily engaged in disseminating information to the public. Representatives of the news media would normally qualify; however, other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public, not just to a particular segment or group.
 - (a) **Urgently Needed** means that the information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of historical interest only, or information sought for litigation or commercial activities would not qualify nor would a news media publication or broadcast deadline unrelated to the news breaking nature of the information.
 - (b) **Actual or Alleged Federal Government Activity.** The information concerns some actions taken, contemplated, or alleged by or about the Government of the United States, or one of its components or agencies, including the Congress.
3. **Substantial Due Process** rights of the requester would be impaired by the failure to process immediately; or
4. **Substantial Humanitarian** concerns would be harmed by the failure to process immediately.

A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of their knowledge.