


Mary Ellen Callahan
Tel +1 202 639 6064
Fax +1 202 661 4921
mecallahan@jenner.com

March 7, 2017

Dr. James V.M.L. Holzer
Deputy Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane, SW
STOP-0655
Washington, DC 20528-0655

Re: Freedom of Information Act Request re Border Searches of Electronic Devices

Dear Dr. Holzer:

The Roderick & Solange MacArthur Justice Center and Muslim Advocates (“Requestors”) submit this letter to The Privacy Office at the U.S. Department of Homeland Security (“DHS”) as a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* 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 U.S. Customs & Border Protection (“CBP”) as appropriate.

I. Background

On January 27, 2017, President Donald Trump issued an executive order, Executive Order 13769 (“Executive Order I”), barring persons from seven Muslim-majority 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.¹

Numerous publications reported that individuals, including U.S. citizens, originally from the seven countries covered by the Executive Order I and with Muslim-sounding names were having their electronic devices searched and potentially also seized, both physically and through the electronic duplication of their contents, in airports after arriving in the United States on international flights.² In its February 2, 2017 Q&A for Executive Order I, the CBP stated that

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

² See Joshua Kopstein, *Travelers Affected By Trump Ban Forced to Unlock Phones, Computers*, Vocativ (Jan. 30, 2017, 6:21 PM), <http://www.vocativ.com/397897/travelers-affected-by-trump-ban-forced-to-unlock-phones-computers/>; Kaveh Waddell, *A Stand Against Invasive Phone Searches at the U.S. Border*, The Atlantic (Feb. 21, 2017), <https://www.theatlantic.com/technology/archive/2017/02/ron-wyden-border-searches/517353/>; Sophia Cope, *Fear Materialized: Border Agents Demand Social Media Data from Americans*, Electronic Frontier Foundation (Jan. 25, 2017), <https://www.eff.org/deeplinks/2017/01/fear-materialized-border-agents-demand-social-media-data-americans>.

“[k]eeping America safe and enforcing our nation’s laws in an increasingly digital world depends on [the CBP’s] ability to lawfully examine all materials entering the United States” and that “inspection may include electronic devices.”³

On March 6, 2017, President Donald Trump issued another executive order (“Executive Order II”) scheduled to go into effect on March 16, 2017 that replaces Executive Order I but again generally bars persons from six Muslim-majority countries – Iran, Libya, Somalia, Sudan, Syria, and Yemen – from entering the United States on new visas for 90 days and reinstates the prohibition on all refugees from entering the United States for 120 days.⁴

II. Request for Information

The Requestors request disclosure of the following records⁵ that were prepared, received, transmitted, collected and/or maintained by DHS, and/or the CBP⁶:

1. Any and all records created on or after January 24, 2017 related to CBP’s search, review, retention, and dissemination of information located on or accessed through electronic devices⁷ in the possession of individuals who are encountered by CBP at the border, functional equivalent of the border, or extended border, including, but not limited to:
 - a. Records related to CBP’s implementation of Executive Order I with respect to CBP’s search, review, retention, and dissemination of information located on or accessed through electronic devices possessed by individuals who are encountered by CBP at the border, functional equivalent of the border, or extended border.
 - b. Records reflecting revisions of, or documents superseding, the August 25, 2009 “Privacy Impact Assessment for the Border Searches of Electronic

³ Customs and Border Patrol, Q&A for Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States (Feb. 2, 2017), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Feb/EO-QA-PDF-WEB-02.02.2017.pdf>.

⁴ Executive Order II is available at: <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

⁵ The term “records” includes 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 SMA 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.

⁶ The term “CBP” means CBP Headquarters offices, including any divisions, subdivisions or sections therein; CBP field operations offices, including any divisions, subdivisions or sections therein; CBP offices at ports of entry, including any divisions, subdivisions or sections therein; and/or any other CBP organizational structures.

⁷ The term “electronic devices” includes, but it not limited to, laptop computers, MP3 players, digital cameras, cell phones, and tablet computers.

Devices” and CBP Directive CD 3340-049, “Border Search of Documents and Electronic Devices Containing Information” (August 20, 2009).

- c. Policies, practices, and procedures that went into effect on or after January 24, 2017 regarding criteria for selecting individual travelers whose electronic information will be searched, reviewed, or retained, or will be disseminated to other components of DHS, other government agencies, or persons or entities outside the government.
- d. Policies, practices, and procedures that went into effect on or after January 24, 2017 regarding search, review, retention, or dissemination of information located on or accessed through electronic devices, including policies, practices, and procedures regarding:
 - i. The use of electronic devices to search, review, retain, and/or disseminate information found in email, located on social media, saved in the cloud, or otherwise stored on the internet that is accessible because of passwords stored on the electronic device or because the electronic device is recognized as a device that does not require a password to access such information.
 - ii. The search, review, retention, and dissemination of information that CBP officers have found not to violate the law.
 - iii. The search, review, retention and dissemination of business information.
 - iv. The protection of confidential information in travelers’ possession, such as information covered by trade secrets, attorney-client privilege, health privacy laws, or other legal protections.
- e. Policies, practices, and procedures that went into effect on or after January 24, 2017 on the questioning of travelers targeted for search of electronic devices, including policies, practices, and procedures regarding:
 - i. The questioning of travelers targeted for electronic-device search regarding political views, religious practices, and other activities potentially covered by the First Amendment.
 - ii. Responding to such travelers’ refusal to answer such questions.

- iii. Permitting a traveler targeted for electronic-device search to access legal counsel or invoke a right to remain silent during such questioning.

- f. Policies, practices, and procedures that went into effect on or after January 24, 2017 on the information given to travelers targeted for electronic-device search regarding CBP's authority to search, review, retain, and disseminate information stored on or accessed through electronic devices, including policies and procedures about information given related to travelers' rights to refuse to consent to such CBP actions, travelers' rights to access legal counsel before consenting to such CBP actions, travelers' rights to limit the scope of their consent (such as to use of the electronic device to access data not stored on the electronic device itself), and CBP's authority to continue to detain travelers if they deny CBP access.

- g. Documents, including the "Blue Paper" described in the Verge's February 12, 2017 article, "A US-Born NASA Scientist was Detained at the Border Until He Unlocked His Phone,"⁸ given on or after January 27, 2017 to travelers targeted for electronic-device search regarding CBP's authority to search, review, retain, and disseminate information stored on or accessed through electronic devices, travelers' rights to refuse to consent to such CBP actions, travelers' rights to access legal counsel before consenting to such CBP actions, travelers' rights to limit the scope of their consent (such as to use of the electronic device to access data not stored on the electronic device itself), and CBP's authority to continue to detain travelers if they deny CBP access.

- h. Policies, practices, and procedures that went into effect on or after January 24, 2017 regarding requesting travelers' passwords to their email accounts, social media accounts, cloud accounts, and other internet-based accounts, such as mobile banking accounts, including information regarding travelers' rights to refuse to provide such passwords, travelers' rights to access legal counsel before providing such passcodes, and CBP's authority to continue to detain travelers if they deny CBP such passwords.

- i. Policies, practices, and procedures that went into effect on or after January 24, 2017 regarding providing travelers targeted for electronic-device search access to interpreters, including policies, practices, and procedures regarding the information given to such travelers regarding their rights to access interpreters.

⁸ Loren Grush, *A US-Born NASA Scientist was Detained at the Border Until He Unlocked His Phone*, The Verge (Feb. 12, 2017, 12:37 PM) <http://www.theverge.com/2017/2/12/14583124/nasa-sidd-bikkannavar-detained-cbp-phone-search-trump-travel-ban>.

- j. Records reflecting the number of individuals who have had the information stored on or accessed through their electronic devices searched, reviewed, retained, and/or disseminated on or after January 27, 2017.
 - k. Records reflecting the race, ethnicity, country of origin, citizenship, and gender of individuals who have had the information stored on or accessed through their electronic devices searched, reviewed, retained, and/or disseminated on or after January 27, 2017.
 - l. Records reflecting the number of foreign nationals denied entry into the United States by CBP for refusing to consent to CBP search, review, retention, and/or dissemination of their electronic devices and/or information stored on or accessed through their electronic devices.
 - m. Records regarding the retention of electronic devices, or information accessed from or through electronic devices, by CBP on or after January 27, 2017, including the number of documents or electronic devices retained, the length of retention, the reasons for retention, and the ultimate disposition of retained material.
 - n. Records regarding the dissemination of electronic devices, or information accessed from or through electronic devices, to other components of DHS, other government agencies, or persons or entities outside the government on or after January 27, 2017.
 - o. Records regarding complaints filed on or after January 27, 2017 by individuals or organizations affected by CBP's policies or practices related to the search, review, retention, or dissemination of travelers' information.
 - p. E-mail communications among, between, or cc'ing CBP personnel at Headquarters, Office of Field Operations, and/or Office of Intelligence, sent or received on or after January 24, 2017 containing any of the following words or terms: "electronic device," "smartphone," "tablet," "laptop," "password," "e-mail account," "social media," "facebook," "twitter," and "cloud."
2. Any and all records created on or after February 27, 2017 that pertain to Executive Order II and are otherwise responsive to Request 1 above.

III. 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 MacArthur Justice Center and Muslim Advocates, "primarily engaged in disseminating

information,” 5 U.S.C. § 552(a)(6)(E)(i) & (v)(II); (2) 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 (3) 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).

Early reports about Executive Order I’s implementation have raised serious due process concerns,⁹ giving rise to “questions about the government’s integrity” and an “urgency to inform the public.” Given the similarities between Executive Order I and Executive Order II, these serious due process concerns persist. Further, attorneys and other services providers need to understand the relevant policies, procedures, and practices to effectively serve and advise the population of individuals potentially affected by Executive Order II. The requested records seek to inform the public about an urgent issue implicating thousands of individuals’ due process rights, namely, CBP’s interpretation, implementation, and enforcement of Executive Order I and Executive Order II.

These expediency concerns are heightened by Executive Order II’s ten-day delay before it goes into effect. The very moment it is enforced, Executive Order II promises to present some of the same serious due process concerns that Executive Order I presented. Thus, attorneys, other service providers, and the public urgently need these important public documents.

Given the foregoing, the MacArthur Justice Center and Muslim Advocates have satisfied the requirements for expedited processing of this Request.

IV. Application for Waiver or Limitation of Fees

The Requestors request a waiver of document search, review, and duplication fees 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 Requestors also request a waiver of search fees on the grounds that the Requestors qualify 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).

A. The 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 Requestors.

As discussed above, news accounts underscore the substantial public interest in the records sought through this Request. 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.

⁹ See, e.g., Loren Grush, *A US-Born NASA Scientist was Detained at the Border Until He Unlocked His Phone*, The Verge (Feb. 12, 2017, 12:37 PM), <http://www.theverge.com/2017/2/12/14583124/nasa-sidd-bikkannavar-detained-cbp-phone-search-trump-travel-ban>.

The Requestors are not filing this Request to further their commercial interest. Any information disclosed by the Requestors as a result of this FOIA Request will be made available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending the FOIA. *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 requesters.” (internal quotation marks omitted)).

B. The Requestors are representatives of the news media and the records are not sought for commercial use.

The Requestors also request a waiver of search fees on the grounds that the Requestors qualify 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 Requestors meet 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 Requestors are therefore “representative[s] of the news media” for the same reasons they are “primarily engaged in [the] dissemination of information.” 5 U.S.C. § 552(a)(4)(A)(ii)(II), (6)(E)(v)(II).

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the Requestors' to be “representative[s] of the news media” as well. Requestor Muslim Advocates, for instance, joined with the American Civil Liberties Union in disseminating the records obtained from the CBP in response to a joint 2010 FOIA request.¹⁰ Additionally, in 2009 requestor Muslim Advocates pursued FOIA litigation against the FBI that resulted in public disclosure of previously withheld information.¹¹ *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).¹²

On account of these factors, fees associated with responding to FOIA requests should be waived for the requestors as “representative[s] of the news media.”

* * *

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the Requestors request that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, Requestors request that the records be provided electronically in a text-

¹⁰ *See* ACLU, *Invasive Questioning at the Border* (last visited Mar. 2, 2017), <https://www.aclu.org/invasive-questioning-border?redirect=free-speech-national-security-racial-justice-religion-belief/invasive-questioning-border>.

¹¹ *See* Muslim Advocates, *Press Advisory: U.S. Department of Justice Continues to Cloak Public Access to Guidelines on FBI Surveillance of Mosques & Communities*, (Oct. 15, 2009), https://d3n8a8pro7vhmx.cloudfront.net/muslimadvocates/pages/191/attachments/original/1361200382/10-15-09_Amended_Complaint_Press_Release.pdf?1361200382.

¹² Courts have found these organizations to be “representative[s] of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information / public education activities. *See, e.g., Judicial Watch, Inc.*, 133 F. Supp. 2d at 53–54.

March 7, 2017

Page 8 of 8 – FOIA Request re Border Searches of Electronic Devices

searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

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).

If the Request is denied in whole or in part, the Requestors ask that you justify all deletions 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 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. Due to the exigent circumstances surrounding this request, Requestors are amenable to narrowing the request if it would accelerate production.

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

Mary Ellen Callahan
Jenner & Block LLP
1099 New York Avenue NW
Suite 900
Washington, DC 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).

Sincerely,



Mary Ellen Callahan