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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 Revocation of Trusted Traveler Status**

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”) and the Transportation Security Administration (“TSA”), 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.<sup>1</sup>

Several news organizations reported that, in the days and weeks after President Trump issued the Executive Order I, CBP revoked the Trusted Traveler Program memberships of a number of individuals – including U.S. citizens – from the seven countries covered by the Executive Order as well as others with Muslim-sounding names.<sup>2</sup>

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

<sup>2</sup> See Andrew Sheivachman, *Muslim-American Travelers Are Quietly Having Global Entry Privileges Revoked*, Skift, (Feb. 18, 2017), <https://skift.com/2017/02/18/muslim-american-travelers-are-quietly-having-global-entry-privileges-revoked/>; Shanifa Nasser, *Some Nexus Cards Revoked On Both Sides Of Border Following U.S. Executive Order*, CBC News, (Feb. 3, 2017, 5:00 AM), <http://www.cbc.ca/news/canada/toronto/nexus-cards-revoked-1.3964819>; Sarah Harvard, *US Customs Is Revoking Muslim American Travelers’ Global Entry Cards, Lawyers Say*,

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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.<sup>3</sup>

## II. Request for Information

The Requestors request disclosure of the following records<sup>4</sup> that were prepared, received, transmitted, collected and/or maintained by DHS, CBP,<sup>5</sup> and/or the TSA<sup>6</sup>:

1. Any and all records created on or after January 24, 2017 related to eligibility for Trusted Traveler Programs – including Global Entry, Nexus, SENTRI, and FAST – and TSA PreCheck, and the revocation and/or reinstatement of Trusted Traveler Program and TSA PreCheck memberships, including, but not limited to:
  - a. Records related to CBP review of individual accounts for revocation or reinstatement of Trusted Traveler Program membership, pursuant to the review process described by a CBP spokesperson in a statement published in Skift’s February 18, 2017 article, “Muslim-American Travelers Are Quietly Having Global Entry Privileges Revoked”<sup>7</sup>;
  - b. Records related to CBP’s and TSA’s implementation of Executive Order I with respect to Trusted Traveler Program and TSA PreCheck memberships;
  - c. 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

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Mic, (Feb. 16, 2017), <https://mic.com/articles/168606/us-customs-is-revoking-muslim-american-travelers-global-entry-cards-lawyers-say#.01tfdBoRr>.

<sup>3</sup> 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>.

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> The term “TSA” means TSA Headquarters offices, including any divisions, subdivisions, or sections therein.

<sup>7</sup> Andrew Sheivachman, *Muslim-American Travelers Are Quietly Having Global Entry Privileges Revoked*, Skift, Feb. 18, 2017, available at <https://skift.com/2017/02/18/muslim-american-travelers-are-quietly-having-global-entry-privileges-revoked/>.

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words or terms: “Trusted Traveler,” “Global Entry,” “NEXUS,” “SENTRI,” or “FAST” AND any of the following additional words or terms: “executive order,” “eligib!,” “ineligib!,” “qualif!,” “revo!,” “national security,” “muslim,” “arab,” or “risk;”<sup>8</sup>

- d. E-mail communications among, between, or cc’ing TSA personnel sent or received on or after January 24, 2017 containing any of the following words or terms: “PreCheck” or “Pre Check” AND any of the following additional words or terms: “executive order,” “eligib!,” “ineligib!,” “qualif!,” “revo!,” “national security,” “muslim,” “arab,” or “risk;”
  - e. Records reflecting the number of individuals who had their Trusted Traveler Program or TSA PreCheck memberships revoked on or after January 27, 2017;
  - f. Records reflecting the number individuals who had their Trusted Traveler Program or TSA PreCheck memberships reinstated after being revoked on or after January 27, 2017;
  - g. Records reflecting the number of individuals who had their Trusted Traveler Program or TSA PreCheck memberships revoked on or after October 1, 2016;
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.
  3. Any and all records created on or after February 27, 2017 regarding the development and implementation of the guidance provided in the answer to question 14 in the DHS Office of Public Affairs March 6, 2017 document titled “Q&A: Protecting the Nation From Foreign Terrorist Entry to the United States,” which addresses Executive Order II’s impact on Trusted Traveler Program membership.<sup>9</sup>

### 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

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<sup>8</sup> The “!” character is intended to capture any combination of letters that complete the partial word provided. For instance, “revo!” would capture documents with the word “revocation,” “revocable,” “revoke,” “revoking,” “revoked,” etc. If it is not possible to perform searches with Boolean logic, please use similar terms and search procedures.

<sup>9</sup> The Q&A document is available at: <https://www.dhs.gov/news/2017/03/06/qa-protecting-nation-foreign-terrorist-entry-united-states>.

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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,<sup>10</sup> 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.

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.

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

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<sup>10</sup> See, e.g., Andrew Sheivachman, *Muslim-American Travelers Are Quietly Having Global Entry Privileges Revoked*, Skift, (Feb. 18, 2017), <https://skift.com/2017/02/18/muslim-american-travelers-are-quietly-having-global-entry-privileges-revoked/>.

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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.<sup>11</sup> Additionally, in 2009, Muslim Advocates pursued FOIA litigation against the FBI that resulted in public disclosure of previously withheld information.<sup>12</sup> *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).<sup>13</sup>

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.”

<sup>11</sup> See ACLU, *Invasive Questioning at the Border* (last visited Mar. 2, 2017, 7:00 PM), <https://www.aclu.org/invasive-questioning-border?redirect=free-speech-national-security-racial-justice-religion-belief/invasive-questioning-border>.

<sup>12</sup> 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](https://d3n8a8pro7vhmx.cloudfront.net/muslimadvocates/pages/191/attachments/original/1361200382/10-15-09_Amended_Complaint_Press_Release.pdf?1361200382).

<sup>13</sup> 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.

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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-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