

## U.S. Customs & Border Protection

Sabrina Burroughs

FOIA Officer

1300 Pennsylvania Avenue, NW, Room 3.3D

Washington, D.C. 20229

June 25, 2018

To whom it may concern:

On behalf of Muslim Advocates (“Requester”), I submit this letter to the United States Customs and Border Protection (“CBP”) as a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* and the Department of Homeland Security FOIA regulations, 6 C.F.R. ch. 5. I ask that this request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E) and that Muslim Advocates be granted a fee waiver. I also ask that CBP refer the requests contained in this letter to any other agency or component agency as appropriate.

### I. Background

On January 27, 2017, President Donald Trump issued an executive order, Executive Order 13,769,<sup>1</sup> 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.

Several news organizations reported that, in the days and weeks after President Trump issued the Executive Order 13,769, 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>

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<sup>1</sup> Exec. Order No. 13,769, 82 F. 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, Mic (Feb. 16, 2017), <https://mic.com/articles/168606/us-customs-is-revoking-muslim-american-travelers-global-entry-cards-lawyers-say#.O1tfdBoRr>.

On March 7, 2017, in response to these reports, Muslim Advocates filed a request under the Freedom of Information Act requesting certain information related to the processing of Trusted Traveler credentials.<sup>3</sup> When CBP and DHS failed to produce any documents before the statutory deadline, Muslim Advocates brought suit.<sup>4</sup>

The litigation is ongoing. However, the documents already produced in the litigation have formed the basis of additional news articles concerning the processing of Trusted Traveler credentials.<sup>5</sup> Other documents obtained through a Freedom of Information Act lawsuit by the American-Arab Anti-Discrimination Committee were similarly covered in the press.<sup>6</sup>

## II. Instructions

The Requester requests disclosure of the following records<sup>7</sup> 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 exclude searches of files or emails in the personal custody of agency officials, such as personal email accounts.

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<sup>3</sup> FOIA request no. CBP-2017-047818.

<sup>4</sup> Complaint ¶ 14-18, *Muslim Advocates v. Dep't of Homeland Sec.*, No. 17-cv-820 (D.D.C. May 3, 2017), ECF no. 1.

<sup>5</sup> Justin Bachman, “The Mad U.S. Scramble to Dump ‘Trusted Travelers,’” *Bloomberg* (Feb. 8, 2018), <https://www.bloomberg.com/news/articles/2018-02-08/how-trump-s-travel-ban-hurt-trusted-travelers>.

<sup>6</sup> Sarah A. Harvard, “Hundreds of Travelers Had Their Global Entry Airport Privileges Revoked – Lawyers Say It’s Another Muslim Ban,” *The Intercept* (Dec. 14, 2017), <https://theintercept.com/2017/12/14/global-entry-trump-travel-ban-muslims/>.

<sup>7</sup> The terms “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 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. No category of material should be omitted from search, collection, and production.

Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.<sup>8</sup> It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; the Requester has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.<sup>9</sup> The government-wide requirements to manage information electronically by the end of 2016 have rendered it unreasonable to rely exclusively on custodian-driven searches.<sup>10</sup> Furthermore, 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. Accordingly, Requester insists that the agency 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. The Requester is available to work with you to craft appropriate search terms. However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

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<sup>8</sup> 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).

<sup>9</sup> See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at \*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)).

<sup>10</sup> 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>.



**Please produce records in electronic form.** Where possible, please provide responsive material in electronic format by email to [matthew@muslimadvocates.org](mailto:matthew@muslimadvocates.org). Please furnish any responsive material being sent by mail to:

Matthew Callahan  
Muslim Advocates  
P.O. Box 66408  
Washington, DC 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 Requester requests that responsive electronic records be provided electronically in their native file format, if possible. In particular, electronic records are to be produced in an electronic, native format that contains the original metadata of the files. 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. If the records cannot be produced in their native format, the Requester asks (1) an explanation why the records cannot be so produced; and (2) 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.

**Please produce documents as they become available.** The Requester would prefer a rolling production. I 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.** Agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”<sup>11</sup> If it is your position that any portion of the requested records is exempt from disclosure, the Requester requests that you provide an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”<sup>12</sup> Moreover, the *Vaughn* index “must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information.”<sup>13</sup> Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a

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<sup>11</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

<sup>12</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

<sup>13</sup> *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223—24 (D.C. Cir. 1987) (emphasis in original).

particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.”<sup>14</sup>

**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.<sup>15</sup> Claims of non-segregability must be made 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.

### III. Description of Records

The term “Programs” as used below refers to Global Entry, NEXUS, Sentri, FAST North, FAST South, and TSA PreCheck.

1. Records reflecting the number of individuals who applied for membership in each of the Programs on or after January 1, 2008, as well as the individual’s country of citizenship, country of birth, and date of application.
2. Records reflecting the number of individuals who were granted memberships in each of the Programs on or after January 1, 2008, as well as the individual’s country of citizenship, country of birth, date of admission, and any notations related to the admission.
3. Records reflecting the number of individuals who were denied memberships in each of the Programs on or after January 1, 2008 as well as the individual’s country of citizenship, country of birth, date of denial, and reason for denial.
4. Records reflecting the number of individuals who had their memberships in each of the Programs revoked on or after January 1, 2008 as well as the individual’s country of citizenship, country of birth, date of revocation, and reason for revocation.
5. Records reflecting the number of individuals who had their memberships in each of the Programs reinstated on or after January 1, 2008 as well as the individual’s country of citizenship, country of birth, date of reinstatement, and reason for reinstatement.
6. The operative version of the Consolidated Trusted Traveler Program Handbook.

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<sup>14</sup> *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)).

<sup>15</sup> *Mead Data Central, Inc.*, 566 F.2d at 261.

7. Any and all versions of the Consolidated Trusted Traveler Program Handbook that previously formed the policy of CBP.
8. CBP guidance or memoranda that include directions or instructions related to the processing of applications, denials, revocations, and/or reinstatements of memberships in the Programs.
9. 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.

#### **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.” 6 C.F.R. § 5.5(e)(1)(iv); 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.<sup>16</sup> 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 information released by the Requester’s previous FOIA lawsuit over similar data—combined with a number of recent actions by the federal government that have been found unconstitutional by the courts—raises serious concerns about possible religious discrimination in the federal government, 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 practices to effectively serve and advise the population of individuals potentially affected by this initiative—which runs to the many tens of thousands. The requested records seek to inform the public about an urgent issue implicating the privacy and law enforcement prospects of thousands of people.

Further, Muslim Advocates’ previous FOIA request on this topic has generated news coverage.<sup>17</sup> As Department of Homeland Security regulations recognize, “[t]he existence of

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<sup>16</sup> Note that Department of Homeland Security regulations state that a requester may still qualify for expedited processing under 6 C.F.R. § 5.5(e)(1)(ii) even if information dissemination is not the sole occupation of a requester. 6 C.F.R. § 5.5(e)(3).

<sup>17</sup> See footnotes 2, 5, and 6, *supra*.

numerous articles published on a given subject can be helpful to establishing the requirement that there be an ‘urgency to inform’ the public on the topic.” 6 C.F.R. § 5.5(e)(3).

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 Requester.*

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 these requirements.

These records will shed light on current government practices regarding a significant program administered by CBP that directly affects large numbers of Americans and travelers to America. Documents produced in response to the Requester’s previous FOIA request revealed that, as of August 2017, there were over 6.6 million active Trusted Traveler credentials and the program was adding new applicants at a rate of thousands of travelers per month. Further, because both this administration as a whole and CBP in its administration of the Trusted Traveler program have been accused of discriminatory practices, the information in these 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 accounts<sup>18</sup> underscore the substantial public interest in the records sought through this request.

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<sup>18</sup> *See* footnotes 2, 5, and 6, *supra*.

As noted above, some news accounts were based on the 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 Requester is not filing this Request to further its commercial interest. Requester Muslim Advocates is a 501(c)(3) non-profit organization. Any information disclosed by the Requester 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 Requester's website (available at [www.muslimadvocates.org](http://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 Requester is a representative of the news media and the records are not sought for commercial use.*

The Requester also requests a waiver of search fees on the grounds that the Requester 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 Requester 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 Requester 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 Requester's to be "representative[s] of the news media" as well. The Requester 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 Requester as a "representative[s] of the news media."

## VI. Conclusion

I would welcome the chance to discuss this matter with you. If you would like to discuss any part of this Request, please contact Matthew Callahan at [matthew@muslimadvocates.org](mailto:matthew@muslimadvocates.org) or (202) 897-2622.

Thank you for your prompt attention to this matter.

Very truly yours,



Matthew Callahan\*

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