



September 22, 2017

*Via E-Mail and U.P.S.*

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Dear FOIA Officers:

Make the Road New York (MRNY), Make the Road Connecticut (MRCT), and the National Immigration Law Center (NILC) (collectively, “Requestors”) make this request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, for records regarding the termination of the Deferred Action for Childhood Arrivals (DACA) program held by the United States Department of Homeland Security (DHS); DHS Office of Civil Rights and Civil Liberties (OCRCL); United States Citizenship and Immigration Services (USCIS); U.S. Immigration and Customs Enforcement (ICE); U.S. Customs and Border Protection (CBP); White House Office of Management and Budget (including the Office of Information and Regulatory Affairs (OMB)); United States Department of Justice (DOJ); Office of the Attorney General (OAG); DOJ Civil Division (CIV); Office of the Solicitor General (OSG); and Office of Legal Counsel (DOJ-OLC).

### **BACKGROUND**

Since its creation in 2012, the DACA program has empowered nearly 800,000 young people to participate more fully in their communities by offering them protection from deportation and the opportunity to obtain work authorization. DACA established a process through which DHS would consider certain individuals who came to the United States as children for deferred action, an exercise of prosecutorial discretion. On a showing of economic necessity, DACA recipients are also eligible to receive work authorization.<sup>1</sup>

On September 5, 2017, DHS terminated the DACA program and initiated a “wind-down period.”<sup>2</sup> As of September 5, 2017, USCIS no longer accepts new applications for DACA, and it

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<sup>1</sup> 8 C.F.R. § 274a.12(c)(14).

<sup>2</sup> Memorandum from Elaine C. Duke, Acting Sec’y of Homeland Security to James W. McCament, Acting Director, U.S. Citizenship and Immigration Servs., *Memorandum on Rescission of Deferred Action For Childhood Arrivals (DACA)*, Sept. 5, 2017, [https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca#\\_ftnref1](https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca#_ftnref1).

will accept renewal applications from certain DACA holders until October 5, 2017. DHS justified this termination of the DACA program by reference to threatened litigation by several state attorneys general.<sup>3</sup>

The abrupt termination of the DACA program leaves many questions unanswered, particularly for DACA holders who have only a few weeks to apply, despite the uncertainty on whether USCIS will apply existing Standard Operating Procedures to renewal applications, or how USCIS will treat information gathered during the DACA application process. Moreover, the rationale for ending the program appears inconsistent, unclear, and confusing to many observers.

### **Records Requested**

The Requestors seek DHS, OCRCL, ICE, CBP, USCIS, OMB, DOJ, DOJ-OLC, OAG, CIV, and OSG records<sup>4</sup> related to or referring to the process and decision to terminate the DACA program. The time frame for this request is January 20, 2017 to the present.

These records include, but are not limited to:

1. Any records, including but not limited to reports, memoranda, analyses, or communications, developed regarding the decision to terminate the DACA program, including
  - a. Any records related to or referring to the legality, lawfulness or perceived legal infirmities of the DACA program;
  - b. Any communication or analyses related to or referring to the OLC's November 19, 2014 Memorandum entitled "The Department of Homeland Security's

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<sup>3</sup> Letter from Jeff Sessions, U.S. Attorney General, to Elaine Duke, Acting Secretary of Homeland Security, September 4, 2017, [https://www.dhs.gov/sites/default/files/publications/17\\_0904\\_DOJ\\_AG-letter-DACA.pdf](https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf); *see also* Letter from Ken Paxton, Attorney General of Texas, et al., to Jeff Sessions, U.S. Attorney General, June 29, 2017,

[https://www.texasattorneygeneral.gov/files/epress/DACA\\_letter\\_6\\_29\\_2017.pdf](https://www.texasattorneygeneral.gov/files/epress/DACA_letter_6_29_2017.pdf).

<sup>4</sup> The term "records" as used herein includes but is not limited to all records or communications preserved in electronic or written form, including but not limited to correspondence, including but not limited to intra-governmental correspondence, documents, data, videotapes, audio tapes, faxes, files, forms, e-mails, guidance, guidelines, evaluations, legal opinions, instructions, analyses, directives, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, questionnaires, studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications and/or video tapes, or any other sub-regulatory guidance.

Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others”;<sup>5</sup>

- c. Any records relied on to support the statement that “while the DACA denial notice indicates the decision to deny is made in the unreviewable discretion of USCIS, USCIS has not been able to identify specific denial cases where an applicant appeared to satisfy the programmatic categorical criteria as outlined in the June 15, 2012 memorandum, but still had his or her application denied based solely upon discretion”;<sup>6</sup>
  - d. Any records relating to alternative proposals for the DACA program, other than rescission of the June 15, 2012 memorandum; and
  - e. Any records regarding the selection of specific dates for the “wind-down” period of the DACA program, including the October 5, 2017 deadline for renewal applications and the March 5, 2018 date for termination of the DACA program.
2. Any records regarding *Texas, et al., v. United States, et al.*, No. 1:14-cv-00254 (S.D. Tex.), including but not limited to:
    - a. Any communications between DOJ, CIV, OAG, OSC, or DOJ-OLC and the state attorney general plaintiffs or their staff, offices, and affiliates regarding the *Texas v. U.S.* litigation, the DACA program, and the DAPA and expanded DACA programs.<sup>7</sup>
  3. Any communications relating to or referring to the DACA program sent to or received from any of the following individuals or organizations:
    - a. John Kelly; Elaine Duke; Claire M. Grady; Chad Wolf; Katharine Gorka; Thomas Homan; Peter Edge; Thomas Blank; Matthew Albence; James McAment; Tracy Renaud; Daniel Renaud; Kevin McAleenan; Ronald Vitiello; Jeff Sessions; Stephen Miller; Steve Bannon; Sebastian Gorka; Jon Feere; Julie Kircher; Brandon Judd; Brent Bombach; Kevin Carroll; Ben Cassidy; Kevin Chmielewski; Tiffany Cissna; Daniel Cox; Thomas Dinanno; Mario Flores; Gene Hamilton; Harold Hanson; Matt Hayden; Jonathan Hoffman; Roman Jankowski; Elizabeth Johnson; James Johnson; Quinn Jones O'Brien; Julie Kirchner; Kathy Nuebel Kovarik; Scott Krause; David Lapan; Cora Mandy; Michael McKeown; Alan

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<sup>5</sup> Available at <https://www.justice.gov/file/179206/download>.

<sup>6</sup> Duke Memorandum, at n.1.

<sup>7</sup> The state attorney general plaintiffs in *Texas v. U.S.* include: Attorney General Ken Paxton, Attorney General of Texas; Steve Marshall, Attorney General of Alabama; Leslie Rutledge, Attorney General of Arkansas; Lawrence G. Wasden, Attorney General of Idaho; C.L. “Butch” Otter, Governor of Idaho; Derek Schmidt, Attorney General of Kansas; Jeff Landry, Attorney General of Louisiana; Doug Peterson, Attorney General of Nebraska; Alan Wilson, Attorney General of South Carolina; Herbert Slatery III, Attorney General and Reporter of Tennessee; and Patrick Morrisey, Attorney General of West Virginia.

Metzler; Jayne Neumann; Emily Newman; Kirstjen Nielsen; Lora Ries; Dimple Shah; Tracy Short; Craig Symons; Thomas Szold; Kaitlin Vogt; Erin Waters; Chad Wolf; Frank Wuco; Kris Kobach; the National ICE Council; the Center for Immigration Studies; the National Border Patrol Council; the National CIS Council, or the Federation for American Immigration Reform.

4. Any records relating to or referring to the DACA program sent to or received from any member of Congress, Congressional committee, or Congressional staff, and any records created in preparation for or support of a communication with a member of Congress, Congressional committee, or Congressional staff.
5. Any records relating to or referring to the DACA program sent to or received from any governor of a United States state or territory, gubernatorial staff, or association of governors or state officials (e.g. the National Governors Association, National Conference of State Legislatures), and any records created in preparation for or support of such communication.
6. Any records relating to the standards or procedures for adjudicating DACA applications, including but not limited to:
  - a. Any proposed or actual changes to the National Standard Operating Procedures for DACA applications, including for renewal applications and applications where DACA status has already expired;
  - b. Any training, guidance, or other communications to USCIS supervisors, officers, employers, contractors, or consultants regarding the adjudication of DACA applications, including initial applications, renewals, and applications by individuals whose DACA status had expired;
  - c. Any proposed or actual changes to adjudication standards for individual applications for deferred action or other forms of prosecutorial discretion; and
  - d. Any training, guidance, or other communications to USCIS, CBP or ICE supervisors, officers, employers, contractors, or consultants regarding the adjudication of individual applications for deferred action or other forms of prosecutorial discretion.
7. Any records relating to the sharing and retention of information from DACA and work authorization applications under DACA eligibility, including but not limited to:
  - a. Any records describing policies for sharing information from DACA and work authorization applications under DACA eligibility, whether received before or after September 5, 2017, with other components of DHS, such as CBP or ICE, or with other government agencies, including state, local, or tribal law enforcement agencies;
  - b. Any training, guidance, or other communications to USCIS supervisors, officers, employers, contractors, or consultants regarding policies for sharing information from DACA and work authorization applications under DACA eligibility with

- other components of DHS, such as CBP or ICE, or with other government agencies, including state, local, or tribal law enforcement agencies;
- c. Any training, guidance or other communications to ICE or CBP supervisors, officers, employers, contractors, or consultants regarding the use of information from DACA and work authorization applications under DACA eligibility; and
  - d. Any USCIS policies concerning data retention for DACA applications or for visa or immigration relief programs that are no longer operational.
8. Any records relating to the processing of Advance Parole applications or Advance Parole benefits granted, including but not limited to:
- a. Any records describing changes in eligibility requirements for Advance Parole applications filed by September 5, 2017; and
  - b. Any training, guidance, or other communications to CBP officers regarding policies on how to treat DACA recipients entering the United States with Advance Parole.
9. Any records or communications relating to the following documents on DACA:
- a. Talking Points – DACA Rescission and Talking Points – President Trump Directs Phased Ending of DACA;
  - b. Fact Sheet: Rescission of Deferred Action for Childhood Arrivals (DACA);
  - c. Frequently Asked Questions on the September 5, 2017 Rescission of the Deferred Action for Childhood Arrivals (DACA) Program; and
  - d. Top Five Messages.
10. Any records describing the process, procedures, channels of review, and allocations of responsibility for policy development, including for promulgating a legislative rule, interpretive rule, general statement of policy, or guidance that was in effect during the review period. For this item, Requestors seek policies that were in effect during the review period, even if they were created prior to the review period.
11. A list of all search terms used and databases accessed to respond to this FOIA request.

### **FEE WAIVER**

The Requestors request a waiver of all costs pursuant to the public interest/benefit fee waiver established by 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge . . . if disclosure of the information 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.”). The public interest/benefit fee waiver provisions of the FOIA are to be “liberally construed” and are “consistently associated with requests from journalists, scholars, and non-profit interest groups who it was intended to benefit.” *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 fee waivers for

noncommercial requesters.’”) (citation omitted); *see also Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 814 (2d Cir. 1994) (reversing a fee waiver denial that was based on an “unduly restrictive construction [of] the public interest fee waiver provision”).

MRNY is a nonprofit, membership-based 501(c)(3) organization dedicated to empowering immigrant, Latino, and working class communities in New York City. MRNY has more than 19,000 dues-paying members residing in New York City and Long Island, many of whom have applied for DACA renewals or submitted first-time applications, obtained DACA themselves, or have family members with DACA. Since the fall of 2012, MRNY has conducted 335 DACA clinics and has submitted more than 1,956 DACA applications on behalf of its clients. MRNY assists DACA-eligible clients with initial applications as well as renewals.

MRNY’s mission includes educating the public about civil rights issues affecting working-class and immigrant communities through electronic newsletters, reports, fact sheets, trainings, curricula, classes, and other educational and informational material. MRNY disseminates information and analyses on pending and proposed legislation and mobilizes community members to advocate to their legislators.

MRNY also engages in organizing and public-policy advocacy efforts, including research on issues affecting the community it serves as well as substantial outreach to policymakers and the media. MRNY regularly conducts research and publishes reports, fact sheets, and other informational material on issues important to the immigrant, Latino, and working class communities it serves. Additionally, MRNY frequently releases media statements and disseminates information about local, state, and national issues to its thousands of members and to the public at large.

MRCT is a non-profit, membership-based 501(c)(3) organization dedicated to empowering immigrant, Latino, and working-class communities in Bridgeport CT. MRCT launched in December 2014, when Bridgeport residents began meeting regularly, learning about the Make the Road New York model, and defining their own goals for building the membership of their new organization and addressing the needs of low wage workers, youth, and immigrants in their community. Two years later, MRCT has become a hub of organizing in Bridgeport with five active campaigns that focus on the well-being of the immigrant community in the city. MRCT has fought and won the implementation of sanctuary city policies and language access protections for the city and is currently working with youth and day laborers on transportation and work-related safety issues while maintaining a strong presence on statewide and national immigration efforts.

In its short time, MRCT has reached more than 300 dues-paying members residing in Bridgeport, many of whom are DACA recipients. To support its DACA members MRCT has conducted outreach in our area that includes leafletting, information sessions, fundraising, and direct action, as well as partnering with other organizations to hold DACA Clinics.

MRCT has also developed materials to support our immigrant community that include popular education manuals and one pagers, and has performed hundreds of know your rights sessions in its offices and in its members' homes through its work with Comites de Defensa and its member Committees. Additionally, MRCT frequently releases media statements, and disseminates information about local, state, and national issues to its thousands of members and to the public at large.

NILC is a nonprofit national legal advocacy organization that engages in policy analysis, advocacy, education, and litigation to promote and advance the rights of low-income immigrants and their families. NILC serves as an important resource to a broad range of immigrant advocacy groups, community organizations, legal service organizations, and the general public. As part of its work, NILC disseminates information to the public through electronic newsletters, news alerts, issue briefs, trainings, and other educational and informational materials. In addition, NILC disseminates information to individuals, tax-exempt organizations, not-for-profit groups, and members through its website (<http://www.nilc.org>). NILC's website receives approximately 4,100 visits per day, and many visitors actively download NILC's reports, brochures, and fact sheets. NILC's email listserv has about 70,000 subscribers. NILC's Twitter account has over 51,000 followers.

The records requested are not sought for commercial use, and the Requestors plan to disseminate the disclosed information to the public at no cost. *See* 6 C.F.R. § 5.11(k); 28 C.F.R. § 16.10(k). Disclosure of the requested records is likely to contribute significantly to public understanding of the changes to the DACA program. The requested information is of great interest to the public at large, but it is not available in the public domain.

In the alternative, we request a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II). (“[F]ees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by ... a representative of the news media.”). *See also* 6 C.F.R. § 5.11(d); 28 C.F.R. § 16.10(d). If the fee waiver request is denied, while reserving our right to appeal the denial, the Requestors agree to pay fees up to \$50. If fees are estimated to exceed this limit, please inform us to obtain consent to incur additional fees.

### **EXPEDITED PROCESSING**

Expedited processing is warranted because there is “an urgency to inform the public about an actual or alleged federal government activity” by organizations “primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II). The loss of eligibility to obtain prosecutorial discretion and work authorization threatens “the loss of substantial due process rights.” 6 C.F.R. § 5.5(e)(1)(iii); 28 C.F.R. § 16.5(e)(1)(iii). Moreover, the termination of the DACA program has been “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.” 6

C.F.R. § 5.5(e)(1)(iv); 28 C.F.R. § 16.5(e)(1)(iv). Should you determine that expedited processing is not warranted, while reserving our right to appeal that decision, the Requestors expect a response within the twenty-day time limit set forth under 5 U.S.C. § 552(a)(6)(A)(ii).

Disclosure of information regarding the rescission of DACA is particularly urgent given the short period of time DACA holders have to decide whether to apply for renewal of their DACA status and work authorizations. Further, questions about the rationales and consequences of the termination of DACA sow misunderstanding, fear, panic, and distrust in the community.

If this Request is denied in whole or in part, please provide a written explanation for that denial, including reference to the specific supporting statutory provisions. To the extent that any requested records are redacted, please redact only the necessary portions and immediately provide us with the remaining portions. If any records, or portions thereof are withheld, please state the exemption claimed and provide a list of the records being withheld.

Finally, without waiving any other appeal rights, the Requestors reserve the right to appeal a constructive denial of this Request as well as decisions to deny expedited processing, to withhold any information, to deny a waiver of fees, or to deny a limitation of processing fees. MRNY and NILC also reserve the right to challenge the adequacy of the search for responsive documents, the withholding of any documents, as well as any redactions in the materials produced in response to this Request.

I certify that the information contained in this request is true and correct to the best of my knowledge. *See* 6 C.F.R. § 5.5(e)(3); 28 C.F.R. § 16.5(e)(3).

/s Joshua A. Rosenthal

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