

June 8, 2018

Via Online Request Form

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, DC 20530-0001

**RE: *Make the Road New York, et al. v. Dept. of Homeland Security, et al.,
No. 1:18-cv-2445***

Dear Mr. Hibbard:

I write on behalf of Make the Road New York (MRNY) and Make the Road Connecticut (MRCT) to request information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, for records regarding communications between United States Department of Justice (DOJ), including the Office of the Attorney General, Office of the Deputy Attorney General, Office of the Associate Attorney General, and the “front office” of the Civil Division, and certain states that threatened to bring litigation challenging the legality of the Deferred Action for Childhood Arrivals (DACA) program.

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.¹

¹ 8 C.F.R. § 274a.12(c)(14).

On June 29, 2017, the attorneys general of ten states, led by the state of Texas, sent a letter to Attorney General Jefferson Beauregard Sessions III threatening to challenge the legality of the DACA program.² The federal government terminated the DACA program on September 5, 2017.³ USCIS stopped accepting new applications for DACA, and accepted renewal applications only from certain DACA holders for a limited time.

Three courts have ruled that the decision to terminate DACA was conducted in an arbitrary and capricious manner.⁴ Two of these courts issued preliminary injunctions requiring USCIS to accept DACA applications from individuals who had previously received DACA, while the other court ordered the vacatur of the DACA termination memorandum, effective July 23, 2018.

After these court orders, Texas led a coalition of states to file a lawsuit challenging the initial DACA memorandum. The alignment between the current federal government position and the litigation by the states has raised questions about potential coordination or even collusion between the states and the federal government.⁵

RECORDS REQUESTED

The Requestors seek all DOJ records⁶ reflecting communications (including emails, email attachments, text messages, messages on messaging platforms such as Signal, WhatsApp,

² 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.

³ 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.

⁴ *NAACP v. Trump*, 2018 WL 1920079 (D.D.C. Apr. 24, 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437–38 (E.D.N.Y. 2018); *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1026 (N.D. Cal. 2018).

⁵ Letter from Sen. Dick Durbin to Jeff Sessions, U.S. Attorney General, May 2, 2018, <https://www.durbin.senate.gov/newsroom/press-releases/durbin-raises-questions-about-possible-collusion-between-us-and-texas-attorneys-general-in-termination-of-daca>.

⁶ 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.

Slack, GChat or Google Hangouts, Lync, or Skype), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, any handwritten or electronic notes taken during any communications, summaries of any oral communications, or other materials) regarding the Deferred Action for Childhood Arrivals (DACA) program and/or the *Texas v. United States*, 1:18-cv-68 (S.D. Tx.) litigation between

- (A) The U.S. Department of Justice, including but not limited to Attorney General Jeff Sessions, Chad Readler, Jesse Panuccio, Danielle Cutrona, or Gene Hamilton, and
- (B) The Texas Attorney General's office, including but not limited to Ken Paxton, Scott Keller, and Michael Toth; any of the Attorney General's offices for the states of Alabama, Arkansas, Idaho, Kansas, Louisiana, Nebraska, South Carolina, Tennessee, and West Virginia; or Governor C.L. "Butch" Otter of Idaho.⁷

The time frame for this request is from June 1, 2017 until a complete search is conducted.

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.

⁷ These records are also responsive to an earlier request submitted to DOJ by Make the Road New York and Make the Road Connecticut. They submit this separate, additional request for these records due to the urgent need for transparency regarding any communications between DOJ and the states involved in anti-DACA litigation.

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 5 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 its 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.

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 the nature of the recent litigation against 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). The DOJ Office of Public Affairs has previously determined, in response to Requestors’ prior FOIA request, that the DACA termination and related matters are a “matter of widespread and exceptional media interest.” *See* DOJ Office of Public Affairs Expedited Processing Determination (Oct. 17, 2017), attached as Exhibit A. The discussion of potential collusion between the *Texas* plaintiff states and DOJ in turn raise significant “possible questions about the government’s integrity that affect public confidence.”

Moreover, 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). 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).

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 MRCT 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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