

VIA E-MAIL

Oct. 18, 2017

U.S. Citizenship and Immigration Services  
National Records Center, FOIA/PA Office  
P.O. Box 648010  
Lee's Summit, MO 64064-8010  
[uscis.foia@uscis.dhs.gov](mailto:uscis.foia@uscis.dhs.gov)

Dear FOIA Officer:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to Department of Homeland Security (“DHS”) component U.S. Citizenship and Immigration Services (“USCIS”).

EPIC seeks records in possession of USCIS concerning the agency’s policies for handling personal data submitted by applicants to the rescinded Deferred Action for Childhood Arrivals (“DACA”) program.

### Documents Requested

EPIC seeks three categories of records related to the rescission of the DACA:

- (1) Any Privacy Impact Assessment or other privacy assessment related to the DACA program conducted after January 20, 2017;
- (2) All terms, policy, or guidance for carrying out DHS termination of DACA, including, but not limited to, the terms submitted to DOJ for review referenced in DHS’s Sept. 5, 2017 Data Rescission Memorandum;
- (3) All terms, policy, or guidance explaining the application or implementation of the Fair Information Practice Principles (FIPPs) to DACA recipients or applicants pursuant to DHS’s April 25, 2017 Privacy Policy Guidance Memorandum.

### Background

Initiated in 2012, DACA permitted immigrants brought into the United States as children without documentation to apply for deferred deportation and eligibility to work in the U.S.<sup>1</sup> Since

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<sup>1</sup> Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David Aguilar, Acting Comm’r, U.S. Customs and Border Prot., et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

2012, about 800,000 individuals submitted personally identifiable biographic and biometric data to USCIS, which oversaw DACA, to apply for relief.<sup>2</sup> This information included birth certificates, employment records, bank records, housing records, transcripts, medical records, religious information, military records, information related to interactions with law enforcement, insurance documents, signatures, descriptive information such as height, weight, and ethnicity, biometric photos, and full fingerprints.<sup>3</sup>

On Sept. 5, 2017, President Trump announced the rescission of the DACA program, and DHS issued a memorandum officially rescinding the program the same day.<sup>4</sup> In this memo, Acting Secretary Duke stated that, to facilitate “efficient and orderly” termination of the program, the Department of Justice had “reviewed the terms on which our Department will [end DACA]” in light of “in light of the administrative complexities” of termination.<sup>5</sup> However, the memo rescinding DACA failed to address the privacy risks associated with the use of data collected from DACA application.

For instance, USCIS has published no new or updated Privacy Impact Assessment (“PIA”) explaining what will happen with the personal data collected for the purposes of determining eligibility for deferred action, as required where an agency “[u]pdat[es] a system that results in new privacy risks.”<sup>6</sup> DHS has also failed to make concrete assurances that it will maintain the protections promised in the last full PIA for DACA in 2012 – that data in DACAs “mixed system of records” will be subject to the Privacy Act<sup>7</sup> - or those in the I-821D form and instructions – that the data will not be disclosed to ICE and U.S. Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings.<sup>8</sup> DHS has stated only that personal data provided by DACA participants:

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<sup>2</sup> U.S. Citizenship and Immigration Services, Dep’t of Homeland Sec., Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012-2017 (June 30), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_performancedata\\_fy2017\\_qtr3.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr3.pdf).

<sup>3</sup> See U.S. Dep’t of Homeland Sec., DHS/USCIS/PIA-045, Privacy Impact Assessment for the Deferred Action for Childhood Arrivals (DACA) (2012), [https://www.dhs.gov/sites/default/files/publications/privacy/privacy\\_pia\\_uscis\\_daca.pdf](https://www.dhs.gov/sites/default/files/publications/privacy/privacy_pia_uscis_daca.pdf) [hereinafter DHS/USCIS/PIA-045]; U.S. Dep’t of Homeland Sec., DHS/USCIS/PIA-045(a), Privacy Impact Assessment Update for the Deferred Action for Childhood Arrivals (DACA) (2014), [https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-dacaupdate-april2014\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-dacaupdate-april2014_0.pdf) [hereinafter DHS/USCIS/PIA-045(a)].

<sup>4</sup> Memorandum from Elaine C. Duke, Acting Sec’y, Dep’t of Homeland Sec., to James W. McCammet, Acting Dir., U.S. Citizen and Immigration Services, et. al. (Sept. 5, 2017), [https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca#\\_ftnref7](https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca#_ftnref7).

<sup>5</sup> *Id.* See also, Letter from Jefferson Sessions, U.S. Att’y Gen., Dep’t of Justice, to Elaine Duke, Acting Sec’y, Dep’t of Homeland Sec. (Sept. 4, 2017), <https://www.justice.gov/opa/speech/file/994651/download>.

<sup>6</sup> 44 U.S.C. § 3501 note; *Privacy Act Assessments*, DHS (Aug. 24, 2015), <https://www.dhs.gov/privacy-impact-assessments>.

<sup>7</sup> See DHS/USCIS/PIA-045, *supra* note 3, at 16.

<sup>8</sup> *Frequently Asked Questions: Rescission of Deferred Action for Childhood Arrivals (DACA)*, DHS (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca>.

will not be proactively provided to ICE and CBP for the purpose of immigration enforcement proceedings, unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance.<sup>9</sup>

Finally, when Executive Order No. 13768 removed of Privacy Act protection for non-U.S. persons a DHS Privacy Policy Guidance Memorandum stated DHS “will now treat all persons, regardless of immigration status, consistent with the Fair Information Practice Principles (FIPPs).”<sup>10</sup> However, this memo only described principles for DHS FIPP application with a high level of generality, offering little concrete guidance for individuals who submitted data under DACA.

### Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA and the DHS's FOIA regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(e)(1)(ii). Specifically, this request is entitled to expedited processing because, first, there is an “urgency to inform the public about an actual or alleged federal government activity,” and, second, because the request is “made by a person who is primarily engaged in disseminating information.” § 5.5(e)(1)(ii).

First, there is an “urgency to inform the public about an actual or alleged federal government activity.” § 5.5(e)(1)(ii). The “actual” federal government activity at issue is DHS-USCIS handling of personal data submitted under the DACA program following the program's Sept. 5, 2017 rescission. It is undisputed that USCIS received DACA applications and managed since its initiation in 2012 and received personal data from DACA applicants to carry out the program.<sup>11</sup>

“Urgency” to inform the public about this activity is also clear given the vast quantity of personal data submitted to the federal government DACA applicants and grave uncertainty about policies and procedures now governing handling of the data. From 2012 to 2017, over 800,000 DACA applicants submitted their personally identifiable biographic and biometric information to DHS – data ranging from bank records to fingerprints.<sup>12</sup> Applicants provided this information for the sole purpose of being considered for deferred action, with the explicit understanding that their personal information would be subject to Privacy Act protections. These guarantees were not only rescinded by Executive Order No. 13768, but, without a new or updated PIA published since DACA's rescission, hundreds of thousands of individuals are left with little assurance that their data will be used exclusively for the purposes it was disclosed. The public must know whether and how this biographic and biometric information will be used or disseminated by USCIS to assess compliance with the Privacy Act, the FIPPs, and long standing U.S. privacy norms.

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<sup>9</sup> *Id.*

<sup>10</sup> Memorandum from Jonathan R. Cantor, Acting Chief Privacy Officer, Dep't of Homeland Sec., to Dep't of Homeland Sec. personnel (April 25, 2017), [https://www.dhs.gov/sites/default/files/publications/PPGM%202017-01%20Signed\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/PPGM%202017-01%20Signed_0.pdf).

<sup>11</sup> *See, e.g.*, DHS/USCIS/PIA-045, *supra* note 3; DHS/USCIS/PIA-045(a), *supra* note 3.

<sup>12</sup> *See* DHS/USCIS/PIA-045, *supra* note 3.

Second, EPIC is an organization “primarily engaged in disseminating information.” 6 C.F.R. § 5.5(e)(1)(ii). As the Court explained in *EPIC v. DOD*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. 6 C.F.R. § 5.5(e)(3); 5 U.S.C. § 552(a)(6)(E)(vi).

#### Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Further, any duplication fees should also be waived because (i) “disclosure of the requested information is in the public interest because it is likely to contribute to the public understanding of the operations or activities of the government” and (ii) “disclosure of the information is not primarily in the commercial interest” of EPIC, the requester. 6 C.F.R. § 5.11(k)(1); 5 U.S.C. § 552(a)(4)(A)(iii). EPIC’s request satisfies this standard based on the DHS’s considerations for granting a fee waiver. 6 C.F.R. §§ 5.11(k)(2-3).

*(1) Disclosure of the requested information is likely to contribute to the public understanding of the operations or activities of the government.*

First, disclosure of the requested documents is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 6 C.F.R. § 5.11(k)(2). DHS components evaluate the following four considerations to determine whether this requirement is met: (i) the “subject of the request must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated”; (ii) disclosure “must be meaningfully informative about government operations or activities in order to be ‘likely to contribute’ to an increased public understanding of those operations or activities”; (iii) “disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester,” and (iv) “[t]he public’s understanding of the subject in question must be enhanced by the disclosure to a significant extent.” *Id.*

As to the first consideration, the subject of the request self-evidently concerns “identifiable operations or activities of the federal government.” 6 C.F.R. § 5.11(k)(2)(i). The requested documents directly concern the details of agency action to carry out the termination of DACA, a federal initiative managed USCIS – DHS.<sup>13</sup>

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<sup>13</sup> *Id.*

As to the second consideration, disclosure would also be “meaningfully informative about” these operations or activities and is thus “‘likely to contribute’ to an increased understanding of government operations or activities.” 6 C.F.R. § 5.11(k)(2)(ii). Aside from a handful of high level phrases in press releases and memoranda, USCIS has not published details of its policy or procedures for handling the personally identifiable information of DACA recipients or applicants.. Despite significant changes to the record system, USCIS has not, for instance, released a new PIA.

As to the third consideration, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject” because, as provided in the DHS FOIA regulations, DHS components will “presum[e] that a representative of the news media will satisfy this consideration.” 6 C.F.R. § 5.11(k)(2)(iii).

Finally, as to the fourth consideration, the public’s understanding will “be enhanced by the disclosure to a significant extent” because, as previously described, there are few public details about how USCIS plans to treat the personal data of tens of thousands of DACA recipients stored in federal databases.

*(2) Disclosure of the information is not primarily in the commercial interest of the requester*

Second, “[d]isclosure of the information is not primarily in the commercial interest” of EPIC. § 5.11(k)(3). In determining whether this second requirement is met, DHS components evaluate the following two considerations: (i) whether there is “any commercial interest of the requester . . . that would be furthered by the requested disclosure”; and/or (ii) whether “the public interest is greater than any identified commercial interest in disclosure,” and “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.*

As to the first consideration, there is not “any commercial interest of the requester . . . that would be furthered by the requested disclosure.” 6 C.F.R. § 5.11(k)(3)(i). EPIC has no commercial interest in the requested records. EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.<sup>14</sup>

As to the second consideration, “the public interest is greater than any identified commercial interest in disclosure.” 6 C.F.R. § 5.11(k)(3)(ii). Again, EPIC has no commercial interest in the requested records and has established that there is significant public interest in the requested records. Moreover, USCIS should presume that EPIC has satisfied 6 C.F.R. § 5.11(k)(3)(ii). DHS FOIA regulations state “[c]omponents ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester.” *Id.* EPIC is a news media requester and, as set out above, this request satisfies the public interest standard.

For these reasons, a full fee waiver should be granted for EPIC’s request.

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<sup>14</sup> *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

Conclusion

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), I anticipate your determination on our request within ten calendar days. I can be contacted at Zhou@epic.org, cc: FOIA@epic.org, 202-483-1140, extension 104.

Respectfully submitted,

/s/ Enid Zhou

Enid Zhou  
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