



(304) 345-9246  
www.acluwb.org

P O Box 3952  
Charleston WV 25339-3952

August 7, 2017

**Via Facsimile & U.S. Certified Mail**

West Virginia Attorney General  
State Capitol Complex,  
Bldg. 1, Room E-26  
Charleston, WV 25305  
304-558-0140 (fax)

Re: Freedom of Information Act Request

Mr. Morrissey:

This is a records request pursuant to the West Virginia Freedom of Information Act, W. Va. Code § 29B-1-1 *et seq.* (“WV-FOIA”), regarding any communications<sup>1</sup> between the West Virginia Office of the Attorney General and the federal government about the Deferred Action for Childhood Arrivals (“DACA”) program.

The DACA program is a critical lifeline for nearly 800,000 young immigrants who came to this country as children and know the United States as their home. DACA provides individuals permission to live and work in the country on a renewable, two-year basis.<sup>2</sup> Since its creation five years ago, DACA has enabled hundreds of thousands of young men and women nationwide<sup>3</sup> to attend school, support their families, buy homes, begin careers, contribute to their communities, and pursue their dreams.

---

<sup>1</sup> This request includes but is not limited to: all records or communications preserved in electronic or written form, including but not limited to correspondence, data, directives, documents, videotapes, audio tapes, e-mail, text messages, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, or studies.

<sup>2</sup> See generally, USCIS, Consideration of Deferred Action for Childhood Arrivals (DACA), <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>.

<sup>3</sup> Nicole Prchal Svajlenka, Tom Jawetz, and Angie Bautista-Chavez, *A New Threat to DACA Could Cost States Billions of Dollars*, Ctr. for Amer. Progress (July 21, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/07/21/436419/new-threat-daca-cost-states-billions-dollars/>.

On June 29, 2017, the Attorneys General of the States of Texas, Alabama, Arkansas, Idaho, Kansas, Louisiana, Nebraska, South Carolina, Tennessee, and West Virginia, along with the Governor of Idaho (hereinafter, “the States”), sent a letter to U.S. Attorney General Jeff Sessions, requesting that the Secretary of Homeland Security “phase out the DACA program by rescinding the June 15, 2012 DACA memorandum and ordering that the Executive Branch will not renew or issue any new DACA or Expanded DACA permits in the future.”<sup>4</sup> Should the Secretary not rescind the program by September 5, 2017, the States intend to seek to amend the complaint in *Texas v. United States*, No. 1:14-cv-254 (S.D. Tex.) to challenge the lawfulness of the DACA program.

The United States has repeatedly—and successfully—defended the legal validity of the DACA program. Indeed, every legal challenge to the DACA program has failed.<sup>5</sup> As the United States has argued in several cases,<sup>6</sup> DACA is a lawful exercise of the enforcement discretion that Congress delegated to the Executive Branch. The Secretary of Homeland Security’s authority to grant deferred action derives from the Immigration and Nationality Act (“INA”), which charges the Secretary with “the administration and enforcement” of the country’s immigration laws.<sup>7</sup> The United States has defended the Executive’s authority to establish national immigration enforcement policies and priorities as central to implementing—rather than violating—its constitutional obligation to “take Care that the Laws be faithfully executed.”<sup>8</sup> Thus, any refusal by the Sessions Justice Department to defend the DACA program would require a complete reversal of the United States’ own consistent legal positions.

However, it remains unclear whether the United States will maintain its defense of the DACA program. Attorney General Sessions has opposed the DACA program since its inception, testifying before the Senate Judiciary Committee in January 2017 that DACA is “very questionable, in my

---

<sup>4</sup> Letter from Ken Paxton, Attorney General of Texas, et. al. to the Hon. Jeff Sessions, Attorney General of the United States, June 29, 2017, available at [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>5</sup> See *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015) (affirming order dismissing suit for lack of standing); *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015) (same).

<sup>6</sup> See, e.g., Amicus Br. of the United States at 22-27, *Ariz. Dream Act Coalition v. Brewer*, No. 15-15307 (9th Cir. filed Aug. 28, 2015); Br. of the United States at 46-50, *Arpaio v. Obama*, No. 14-5325 (D.C. Cir. filed Mar. 2, 2015).

<sup>7</sup> 8 U.S.C. § 1103(a)(1); see also *id.* § 1103(a)(3).

<sup>8</sup> U.S. Const. art. II, § 3.

opinion, constitutionally.”<sup>9</sup> Responding to the States’ June 2017 letter, Attorney General Sessions remarked: “I like it that states and localities are holding the federal government to account and expecting us to do our responsibility to the state and locals, and that’s to enforce the law.”<sup>10</sup> Former DHS Secretary John Kelly reportedly told members of Congress earlier this month that “he can’t guarantee that the administration would defend [the DACA program] in court.”<sup>11</sup> These statements raise serious questions regarding the United States’ commitment to defending the legality of DACA program against the States’ threatened litigation, as well as questions about possible communications regarding the *Texas* litigation between the States and members of the Trump administration.

This records request seeks records regarding any communications between personnel of the West Virginia Office of the Attorney General and the Sessions Justice Department and Trump administration regarding the DACA program. Specifically, we request:

1. All records related to communications between employees of the West Virginia Office of the Attorney General and employees of the U.S. Department of Justice regarding the DACA program from January 20, 2017 to the date of the response to this request, including but not limited to the States’ plans to challenge the legality of the DACA program in *Texas v. United States*, No. 1:14-cv-254 (S.D. Tex.).
2. All records related to communications between employees of the West Virginia Office of the Attorney General and employees of the U.S. Department of Homeland Security regarding the DACA program from January 20, 2017 to the date of the response to this request, including but not limited to the States’ plans to challenge the legality of the DACA program in *Texas v. United States*, No. 1:14-cv-254 (S.D. Tex.).
3. All records related to communications between employees of the West Virginia Office of the Attorney General and employees of the White House regarding the DACA program

---

<sup>9</sup> Seung Min Kim & Josh Gerstein, *Sessions denies racism charges as Dems hold their fire*, POLITICO.com (Jan. 10, 2017), <http://www.politico.com/story/2017/01/jeff-sessions-confirmation-hearing-233394>.

<sup>10</sup> Fox News, *Fox & Friends*, June 30, 2017, available at <https://www.youtube.com/watch?v=X0T9ZVH4lfk&feature=youtu.be>.

<sup>11</sup> Ted Hesson, *Kelly Won’t Commit to Defending DACA in Court*, POLITICO.com (July 12, 2017), <http://www.politico.com/story/2017/07/12/john-kelly-daca-legal-challenge-240470>.

from January 20, 2017 to the date of the response to this request, including but not limited to the States' plans to challenge the legality of the DACA program in *Texas v. United States*, No. 1:14-cv-254 (S.D. Tex.).

4. All records related to communications between employees of the West Virginia Office of the Attorney General and employees of other state governments regarding the DACA program to the date of the response to this request, including but not limited to the States' plans to challenge the legality of the DACA program in *Texas v. United States*, No. 1:14-cv-254 (S.D. Tex.).
5. All records related to communications between employees of the West Virginia Office of the Attorney General and members of the Trump administration transition team regarding the DACA program to the date of the response to this request, including but not limited to the States' plans to challenge the legality of the DACA program in *Texas v. United States*, No. 1:14-cv-254 (S.D. Tex.).

If you are not technically the custodian of the documents described in this request, I ask that you forward the request to the custodian(s) or advise me of the identity of the custodian(s) so that I can make the request directly to that person or those persons.

Please note that W. Va. Code § 29B-1-3 requires agencies to respond to requests for public records within **five business days**. If you anticipate that it will take longer than five business days, or have questions about the scope of this request, please call me at (304)-345-9246.

Additionally, while W. Va. Code § 29B-1-3(5) permits public agencies to assess fees associated with the reproduction of public records, as a not-for-profit advocacy organization we request a waiver of any fees associated with the furnishing of these documents. To limit costs, electronic production of documents would be acceptable. If you do intend to assess fees, however, please contact me for authorization of any fees in excess of \$100.

The WV-FOIA "shall be liberally construed with the view of carrying out" a policy of disclosure, while exemptions are to be narrowly construed. W. Va. Code §29B-1-1. Any party claiming that an exemption applies bears the burden of proving its applicability. *See Daily Gazette v. W. Va. Dev. Office*, 482 S.E.2d 180, 187 (W. Va. 1996). Documents regarding policies of public agencies after the policies have been formulated are not subject to the "internal memoranda or letters" exemption to the WV-FOIA provisions. *See id.* at 192. Finally, for any undisclosed or redacted records, we request a *Vaughn* index.

Thank you in advance for your prompt response. Please furnish all records to:

Jamie Lynn Crofts  
ACLU of WV Foundation  
P.O. Box 3952  
Charleston, WV 25339-3952

If you have any questions or concerns, I can be reached at (304) 345-9246, ext. 102, or [jcrofts@acluwv.org](mailto:jcrofts@acluwv.org).

Regards,

Jamie Lynn Crofts  
Legal Director, ACLU-WV