

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUSTICE ACTION CENTER,
P.O. Box 27280
Los Angeles, CA 90027,

Plaintiff

vs.

Case No. 1:20-cv-0067

U.S. DEPARTMENT OF HOMELAND
SECURITY,
Office of the General Counsel
245 Murray Lane, SW
Mail Stop 0485
Washington, DC 20528-0485

and

U.S. CITIZENSHIP AND IMMIGRATION
SERVICES,
111 Massachusetts Avenue, NW
Washington, DC 20001,

Defendants.

COMPLAINT
(Freedom of Information Act)

Plaintiff, the Justice Action Center (“JAC”), brings this action against United States Department of Homeland Security (“DHS”) and its component, the United States Citizenship and Immigration Services (“USCIS”), to compel compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

As further alleged below, Plaintiff has sought information from USCIS about the Deferred Action for Childhood Arrivals (“DACA”) program directly relevant to Plaintiff’s mission to fight for greater justice for immigrant communities by combining litigation and storytelling. While the Supreme Court scrutinizes the Trump Administration’s attempts to end

the program, USCIS seems to be implementing deeply troubling, unexplained changes in DACA renewal policy and practices, such as refusing to review renewal applications until just 150 days (or less) before the expiration deadline and doubling renewal fees. Coupled with an unprecedented backlog of unprocessed renewal applications, these changes significantly hinder the ability of DACA recipients to maintain their current status and threaten the DACA program itself. Given the ongoing public debate about the treatment of immigrant communities and the pending Supreme Court decision, the information we seek is of tremendous public importance. The public has a right to know what USCIS is doing and why.

Yet despite the clear statutory requirement that an agency respond to a FOIA request within 20 days, and despite Plaintiff's repeated inquiries, Defendants have produced no documents in response to the FOIA request that Plaintiff properly submitted over six months ago. Defendants have not claimed that the requested information is subject to any FOIA exceptions or privilege and have advanced no other reason why it should not be disclosed. Plaintiff seeks to compel Defendants to comply with their obligations under the FOIA and promptly produce the requested information.

Plaintiff further alleges as follows:

PARTIES

1. Plaintiff, The Justice Action Center, is a 501(c)(3) nonprofit corporation incorporated under the laws of California, and headquartered in Los Angeles, California.

2. Defendant DHS is an agency of the United States of America under 5 U.S.C. § 552(f)(1) and 5 U.S.C. § 551(1). DHS — and specifically its component, USCIS — is the federal agency with possession, custody, and control of the requested records and is responsible for fulfilling JAC's FOIA request.

JURISDICTION & VENUE

3. This Court has jurisdiction over this claim under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

4. Venue is proper under 5 U.S.C. § 552(a)(4)(B).

STATEMENT OF FACTS

5. JAC is a nonprofit organization dedicated to advancing the civil and human rights of immigrants in the United States through a combination of impact litigation, communications, and digital strategies. It provides related support to select partner nonprofit organizations that have immigrant members or that provide direct legal services to immigrant communities. JAC, in partnership with other nonprofits, conducts substantial work on DACA and with DACA recipients. It is part of the leadership of Home is Here (www.homeishere.us), a national campaign highlighting the legality of DACA, and the many benefits it brings to our communities and our Nation's economy. JAC seeks the information at issue to ensure the DACA recipient community has the most current information on DACA processing in order to make the best choices about renewals at this important time in the lifespan of the program.

6. Since January 2018, several DACA program recipients have reported that their DACA renewal applications are not being reviewed in the order in which they are received by USCIS. Instead, their applications are placed in a queue and are not reviewed until within 150 days of the expiration of their current approval period ("150-day queue"). This practice deviates from USCIS's established practice of reviewing DACA renewal applications in the order in which they are received.

7. Before January 2018, there was no queue or holding period and USCIS processed DACA renewals on a first-in, first-out basis. If an application was reviewed and approved

before the original grant of deferral's expiration date, the renewal period would begin on the approval date rather than on the original expiration date of the deferred action grant. This effectively truncated the DACA recipient's prior two-year deferral period and started a new two-year deferral period from the date of approval.

8. DACA recipients could, thus, make their own decisions about when to submit their renewal applications based on estimated processing times. They could weigh the risk of shortening their overall period of eligibility by submitting their application early against the risk of waiting too long to submit and having their DACA grant and work authorization lapse. Now, however, it appears that no matter when a DACA recipient submits an application, the agency will not even begin considering it until, at most, 150 days before expiration of the deadline. And 150-days does not seem to be enough time for the agency to process the renewal request.

9. Since January 1, 2017, DACA renewal applications have become severely backlogged. For example, the USCIS Nebraska Service Center, which processes the bulk of DACA renewals, is currently processing renewals in "5 Months to 7 Months" (*i.e.*, 150 to 210 days); and renewals at the Vermont Service Center are taking "26 Months to 34 Months" (*i.e.*, approximately 2 to 3 *years*).

10. In combination with the 150-day queue policy, these backlogs have increased the likelihood that a DACA recipient will not receive a renewal in time and that her status will lapse. Such a lapse has serious consequences. If a DACA recipient's status lapses, her Employment Authorization Document also expires. The loss of work authorization can result in the loss of employment and income that will endure for as long as the recipient's status remains lapsed. During that time, the DACA recipient is also at risk of detention and deportation. Although ICE has claimed that it will not bring enforcement action against most individuals with pending

DACA renewal requests, there have been troubling reports of DACA recipients being placed in removal proceedings and detained after minor interactions with law enforcement. Thus, any lapse in status will very likely be life-altering for a DACA recipient.

11. Together with changes in processing times, USCIS has proposed a significant fee increase on DACA renewal applications. In a transparent attempt to reduce program participation, USCIS has doubled the required fee, making renewal cost prohibitive for many DACA recipients—and all the more important that each renewal application receives prompt and timely processing.

12. Adding to this confusion, the U.S. Supreme Court recently heard oral arguments over the fate of the DACA program. It is expected to make a decision no later than June 2020.

13. Currently, there are approximately 105,420 DACA recipients whose deferrals are expiring between now and June 2020—only 20,550 of whom have a renewal application pending. Another 3,940 DACA recipients have deferrals expiring this month. Most recent data reveals that more DACA recipients are seeking to renew their DACA four or five months before their current DACA's expiration. These DACA recipients now, more than ever, need to understand their renewal options and have a right to understand how and when USCIS will process their renewal applications.

14. To remedy this information deficit, JAC filed a FOIA Request to gain critical information necessary to inform and advise these DACA recipients. JAC will use the requested information to educate the public—including DACA recipients considering renewing their status and DACA legal service providers assisting with DACA renewals.

A. JAC'S FOIA REQUEST

15. On June 24, 2019, JAC submitted a FOIA request ("the JAC FOIA Request") to DHS and USCIS, seeking six categories of requested records:

- (1) All reports, including data in the "Echo" database, showing any of the following: (a) DACA renewal processing times; (b) the number of DACA renewal requests submitted more than 150 days before expiration of their current status since September 5, 2017; (c) the dates on which the DACA grants of deferral referred to in request (1)(b) are/were scheduled to expire; (d) if applicable, the dates on which the DACA grants of deferral referred to in request (1)(b) were reviewed; and (e) if applicable, the dates on which those applications were approved.
- (2) All reports, including data in the "Echo" database, showing percent change in Requests For Evidence issued on DACA renewals since September 5, 2017.
- (3) All policies, guidance, or correspondence related to a 150-day queue or related to deferring review of DACA renewal requests rather than reviewing them in the order in which they are received.
- (4) All policies, guidance, or correspondence issued since September 5, 2017 related to the processing of DACA renewals.
- (5) All documents and correspondence discussing the legality of proposals to implement a 150-day queue, otherwise discussing a 150-day queue, or otherwise discussing the deferral of review of DACA renewal requests rather than reviewing them in the order in which they are received.
- (6) All documents, correspondence, and statistical analyses discussing the impact of proposals to: (a) hold DACA renewal requests for review until within 150 days of their expiration or (b) defer review of DACA renewal requests rather than reviewing them in the order in which they are received.

16. The JAC FOIA Request also included a fee waiver request.

17. A true and correct copy of the JAC FOIA Request is attached as Exhibit A.

B. USCIS'S FAILURE TO RESPOND TO JAC'S FOIA REQUEST

18. On July 11, 2019, USCIS acknowledged that it had received the JAC FOIA Request sent directly to USCIS and assigned it control number COW2019500734. At the same time, USCIS granted JAC's fee waiver request.

19. In the same July 11, 2019 letter, USCIS granted itself a 10-day extension to respond to the JAC FOIA Request because it "will need to locate, compile, and review responsive records from multiple offices, both at headquarters and in the field."

20. On August 2, 2019, JAC emailed USCIS asking about the status of USCIS's response to COW2019500734.

21. USCIS responded to that email on August 12, 2019, stating that "COW2019500734 is open and inline to be processed."

22. On September 19, 2019, JAC sent another email to USCIS asking about the status of USCIS's response.

23. USCIS responded to that email on September 23, indicating that its estimated completion date was May 10, 2020 and referring JAC to <https://first.uscis.gov/#/check-status> for future status checks.

24. On November 6, 2019, JAC checked the website provided by USCIS and learned that USCIS estimated that it would not complete its response until March 12, 2020.

25. USCIS also acknowledged receiving a copy of the JAC FOIA Request as a referral from DHS. It assigned the referred version control number COW2019500684. On November 12, 2019, USCIS notified JAC that it was administratively closing COW2019500684 because it was a duplicate of COW2019500734.

26. JAC has received no further response from USCIS.

27. Pursuant to FOIA, within 20 business days of receipt of Plaintiff's request plus another 10 working day extension for unusual circumstances — that is, no later than August 6, 2019 — USCIS was required to “determine . . . whether to comply with such request” and to “immediately notify” Plaintiff of “such determination and the reasons therefor,” and, in the case of an adverse determination, to notify Plaintiff of its appeal rights. 5 U.S.C. § 552(a)(6)(A)(i).

28. USCIS has not made a determination on the JAC FOIA Request within the time limits prescribed by FOIA, 5 U.S.C. § 552(a)(6)(A)(i). Indeed, that deadline passed more than five months ago.

COUNT I - FAILURE TO COMPLY WITH FOIA

29. JAC incorporates each of the foregoing paragraphs of this Complaint.

30. Pursuant to FOIA, 5 U.S.C. § 552(a), JAC has a statutory right to access requested agency records.

31. USCIS has failed to comply with the time limits prescribed by FOIA, 5 U.S.C. §§ 552(a)(6)(A)(i).

32. USCIS has failed to conduct a reasonable search for records responsive to the JAC FOIA Request.

33. USCIS has failed to properly respond to the JAC FOIA Request, as required by 5 U.S.C. §§ 552(a)(6)(A)(i).

PRAYER FOR RELIEF

WHEREFORE, the Justice Action Center respectfully requests that this Court enter a judgment for Plaintiff and award the following relief:

- a. Order Defendants, by a date certain, to conduct a search that is reasonably likely to lead to the discovery of any and all records responsive to Plaintiff's request;

- b. Order Defendants, by a date certain, to demonstrate that they have conducted an adequate search;
- c. Order Defendants, by a date certain, to produce to Plaintiff all non-exempt records or portions of records responsive to Plaintiff's request, as well as a *Vaughn* index of any records or portions of records withheld due to a claim of exemption;
- d. Enjoin Defendants from withholding the requested records;
- e. Award Plaintiff its costs and attorney fees reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- f. Grant Plaintiff such other and further relief as the Court may deem just and proper.

January 10, 2020

Respectfully submitted,

/s/ Kevin T. Barnett

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ATTORNEYS FOR PLAINTIFF

*Pro hac vice applications forthcoming

EXHIBIT

A

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By Electronic Mail

June 24, 2019

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P.O. Box 648010
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Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
STOP-0655
Washington, D.C. 20528-0655
foia@hq.dhs.gov

Re: FREEDOM OF INFORMATION ACT REQUEST

Dear Sir or Madam:

On behalf of our client, Justice Action Center (“JAC”), and pursuant to the provisions of the Freedom of Information Act (“FOIA”) 5 U.S.C. § 552 et seq., as amended, and the applicable agency regulations, I request copies of the records identified in the numbered paragraphs below.

BACKGROUND

Since January 2018, several Deferred Action for Childhood Arrivals (“DACA”) program recipients have reported that their DACA renewal applications are not being reviewed in the order in which they are received by U.S. Citizenship and Immigration Services (“USCIS”). Instead, their applications are placed in a queue and are not reviewed until within 150 days of the expiration of their current approval period (“150-day queue”). This practice deviates from USCIS’s established practice of reviewing DACA renewal applications in the order in which they are received.¹

RECORDS REQUEST

- (1) All reports, including data in the “Echo” database, showing any of the following: (a) DACA renewal processing times; (b) the number of DACA renewal requests submitted more than 150 days before expiration of their current status since September 5, 2017;

¹ Prior to January 2018, if an application was reviewed and approved prior to the original grant of deferral’s expiration date, the renewal period would begin on the date that the renewal was approved rather than on the original date that the grant of deferred action was set to expire; this effectively truncated the original two-year deferral period and started a new two-year deferral period from the date of approval. See USCIS, Frequently Asked Questions, at § III, Q50 (March 8, 2018), <https://www.uscis.gov/archive/frequently-asked-questions>.

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- (c) the dates on which the DACA grants of deferral referred to in request (1)(b) are/were scheduled to expire; (d) if applicable, the dates on which the DACA grants of deferral referred to in request (1)(b) were reviewed; and (e) if applicable, the dates on which those applications were approved.
- (2) All reports, including data in the “Echo” database, showing percent change in Requests For Evidence issued on DACA renewals since September 5, 2017.
- (3) All policies, guidance, or correspondence related to a 150-day queue or related to deferring review of DACA renewal requests rather than reviewing them in the order in which they are received.
- (4) All policies, guidance, or correspondence issued since September 5, 2017 related to the processing of DACA renewals.
- (5) All documents and correspondence discussing the legality of proposals to implement a 150-day queue, otherwise discussing a 150-day queue, or otherwise discussing the deferral of review of DACA renewal requests rather than reviewing them in the order in which they are received.
- (6) All documents, correspondence, and statistical analyses discussing the impact of proposals to: (a) hold DACA renewal requests for review until within 150 days of their expiration or (b) defer review of DACA renewal requests rather than reviewing them in the order in which they are received.

FORMAT AND PRODUCTION REQUESTS

We request that responsive documents are produced *in their entirety*, including all attachments, enclosures, and exhibits. If it is determined that a document contains material or information that falls within a statutory exemption to mandatory disclosure, we ask that such material or information be reviewed for possible discretionary disclosure, consistent with the presumption of openness codified in the Freedom of Information Act Improvement Act of 2016. Pub. L. 114-185.

The burden is on the government to provide a determination within 20 working days. Given the focused nature of the request, we do not expect your office to have any difficulty meeting the statutory deadlines. But in the event your office will be unable to meet the deadline, we are willing to discuss an appropriate schedule for rolling productions. To the extent you have any questions after reviewing our request, do not hesitate to contact undersigned counsel.

FEE WAIVER REQUEST

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), JAC requests a fee waiver. JAC is a non-profit corporation, 501(c)(3) application pending, dedicated to advancing the civil and human rights of immigrants in the United States through a combination of impact litigation, communications and digital strategies. It provides related support to select partner non-profit organizations that have immigrant members or that provide direct legal services to immigrant communities. JAC

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employs an innovative model that advances the rights of immigrant communities by connecting cutting-edge impact litigation and compelling narrative and communications content.

JAC has developed a multi-pronged approach to use information obtained through FOIA requests to educate the public and further the aforementioned goals. First, JAC uses the expertise and experience of its own staff to target members of the public most affected by the information. For example, it advises DACA recipients on their rights and obligations and will use its own social media and website resources to publish the information. Second, JAC partners with well-established immigration advocacy groups to ensure dissemination to key communities, such as FWD.us and United We Dream. Finally, JAC works with newspaper and broadcast media to report on the released information. Using this same multi-pronged approach, JAC will educate the public with the information it obtains through this FOIA request.

According to the applicable agency regulations, fees shall be waived or reduced when it is determined, based upon the submission of the requester, that the information 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 C.F.R. §5.11(k)(1) (DHS FOIA regulations on fee waivers). Thus, USCIS must waive or reduce the JAC's fees because it has no commercial interest in the requested information and, instead, requests this information to educate the public at large regarding the Department of Homeland Security's operations and activities to share information about the funding of immigration policy and enforcement activities with other organizations throughout the country. *See id.*

This firm and the undersigned will be responsible for the reasonable cost of locating and reproducing the requested documents to the extent required by your regulations and not otherwise waived. If such cost will exceed \$150, please contact us before incurring it.

Please direct all correspondence related to this request to:

Leah Saris
Covington & Burling LLP
One CityCenter
850 Tenth Street NW
Washington, D.C. 20001
lsaris@cov.com
202-662-5241

Thank you in advance for your assistance with this matter.

Respectfully submitted,

Leah Saris

cc: Karen Tumlin