

Via facsimile to 501-682-1382

August 7, 2017

The Honorable Asa Hutchinson
Governor of the State of Arkansas
State Capitol Room 250
500 Woodlane Avenue
Little Rock, AR 72201

RE: Public Records Request re: DACA

Dear Governor Hutchinson:

This is a public records request pursuant to the Arkansas Freedom of Information Act for all public documents in the possession, custody or control of the Arkansas Governor's office including all public documents: 1/ by or between the federal government or its agents, contractors, officials or employees about the Deferred Action for Childhood Arrivals ("DACA") program and 2/ by or between any other Arkansas or other state's offices, agencies, boards, commissions, contractors, officials or employees about the DACA program, as set forth more specifically below.

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.¹ Since its creation five years ago, DACA has enabled hundreds of thousands of young men and women nationwide—including over 5,000 immigrants in Arkansas²—to attend school, support their families, buy homes, begin careers, contribute to their communities, and pursue their dreams.

On June 29, 2017, the Attorneys General of the States of Alabama, Arkansas, Idaho, Kansas, Louisiana, Nebraska, South Carolina, Tennessee, Texas, 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

¹ See generally, USCIS, Consideration of Deferred Action for Childhood Arrivals (DACA), <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>.

² 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/>.

permits in the future.”³ Should the Secretary not rescind the program by September 5, 2017, reports indicate that 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.⁴ As the United States has argued in several cases,⁵ 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.⁶ 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.”⁷ 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 opinion, constitutionally.”⁸ Responding to the States’ June 2017 letter, Attorney General Sessions remarked: “I like 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.”⁹ 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.”¹⁰ 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 the Arkansas Governor’s Office and any and all state or federal government offices, entities,

³ 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

⁴ 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).

⁵ 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).

⁶ 8 U.S.C. § 1103(a)(1); see also *id.* § 1103(a)(3).

⁷ U.S. Const. art. II, § 3.

⁸ 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>.

⁹ Fox News, Fox & Friends, June 30, 2017, *available at* <https://www.youtube.com/watch?v=X0T9ZVH4lfk&feature=youtu.be>.

¹⁰ 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>.

boards, commissions, agencies, employees, officials or contractors, including the Sessions Justice Department and Trump administration regarding the DACA program. Specifically, we request:

- All public records¹¹ related to communications between the Arkansas Governor's Office and 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.).
- All public records related to communications between the Arkansas Governor's Office and 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' challenge and plans to challenge the legality of the DACA program in *Texas v. United States*, No. 1:14-cv-254 (S.D. Tex.).
- All public records related to communications between the Arkansas Governor's Office and employees or agents of the White House, including any members or agents of the Presidential transition team, 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.).
- All records related to communications between the Arkansas Governor's Office and persons with any other state, or Arkansas state office, agency, board, commission, employee, official or contractor 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.).

If you are unable to comply with any portion of this request, we request reasonable access to the identified public records and reasonable facilities for the full exercise of the right to inspect and copy those records. If you find that certain records are exempt from disclosure, please cite precisely why such records are exempt. Pursuant to Arkansas Code Ann. § 25-19-105(f)(2), where the requested information is commingled with exempt information, the ACLU requests that "any reasonably segregable portion of a record be provided after deletion of the exempt information."

As a non-profit corporation organized under §501(c)(3) of the Internal Revenue Code, the ACLU respectfully request that all paper documents be provided free of cost or at reduced cost pursuant to Arkansas Code Ann. § 25-19-105(d)(3)(A)(iv), which

¹¹ For the purposes of this request, "Records" are collectively defined to include, but are not limited to: text communications between phones or other electronic devices (including, but not limited to, communications sent via SMS or other text, Blackberry Messenger, iMessage, WhatsApp, Signal, Gchat, or Twitter direct message); e-mails; images, video, and audio recorded on cell phones; voicemail messages; social-media posts; instructions; directives; guidance documents; formal and informal presentations; training documents; bulletins; alerts; updates; advisories; reports; legal and policy memoranda; contracts or agreements; minutes or notes of meetings and phone calls; correspondence; and memoranda of understanding.

authorizes reproduction fee waivers for the disclosure of information that is sought primarily for noncommercial purposes and where a fee waiver is in the public interest. The ACLU is our nation's guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. The records sought in this are in the public interest and are not sought for commercial purposes.

In the event that the recipient of this letter is not the proper person or office holder to which this Freedom of Information Act Request should be submitted, please provide us the name of the appropriate person to whom the request should be submitted. Arkansas Code Ann. § 25-19-105(a)(3).

Please send this information to:

Arkansas Civil Liberties Union Foundation, Inc.
Attn: Holly Dickson
904 West 2nd Street, Suite 1
Little Rock, AR 72201

If you have any questions regarding this Arkansas Freedom of Information Request, or to arrange for an extension of time in which to respond, please contact me. Thank you for your prompt attention to this matter.

Respectfully,

Holly Dickson