

October 2, 2017

Senator Chuck Grassley, Chairman  
Senator Dianne Feinstein, Ranking Member  
U.S. Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510-6050

Dear Chairman Grassley and Ranking Member Feinstein:

In advance of the “Oversight of the Administration’s Decision to End Deferred Action for Childhood Arrivals” hearing,<sup>1</sup> we write to you regarding the privacy of the personal data of over 800,000 individuals who have applied for Deferred Action for Childhood Arrivals (“DACA”).<sup>2</sup>

The Electronic Privacy Information Center (“EPIC”) is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.<sup>3</sup> EPIC is a leading advocate for civil liberties and democratic values in the information age, and works closely with a distinguished Advisory Board, with specific expertise in the Privacy Act of 1974.<sup>4</sup>

After the September 5, 2017 Department of Homeland Security memo rescinding the program, EPIC has been paying close attention to the privacy risks associated with the scheduled end of DACA.<sup>5</sup> DACA was established by a 2012 Department of Homeland Security (“DHS”) memo.<sup>6</sup> The 2012 Department of Homeland Security (“DHS”) Privacy Impact Assessment (“PIA”) for DACA assured that:

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<sup>1</sup> *Oversight of the Administration’s Decision to End Deferred Action for Childhood Arrivals*, 115<sup>th</sup> Cong. (2017), S. Comm. on the Judiciary, <https://www.judiciary.senate.gov/meetings/oversight-of-the-administrations-decision-to-end-deferred-action-for-childhood-arrivals> (October 3, 2017).

<sup>2</sup> 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 (March 31), U.S. Citizenship and Immigration Services, [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_performancedata\\_fy2017\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr2.pdf)

<sup>3</sup> See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

<sup>4</sup> See EPIC Advisory Board, [https://epic.org/epic/advisory\\_board.html](https://epic.org/epic/advisory_board.html).

<sup>5</sup> See EPIC, *About EPIC*, <https://epic.org/epic/about.html>; *Deferred Action for Childhood Arrivals (DACA)*, <https://www.epic.org/privacy/daca/>; and *End of DACA Program Poses Privacy Risks to Dreamers*, <https://epic.org/2017/09/end-of-daca-program-poses-priv.html>.

<sup>6</sup> Memorandum from Janet Napolitano, Secretary, DHS to David Aguilar, Acting Comm’r, CBP, et al., “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” available at <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

Information provided in this request is protected from disclosure to ICE and CBP for the purpose of immigration enforcement proceedings unless the individual meets the guidelines for the issuance of a Notice to Appear (NTA) or a referral to ICE under the guidelines set forth in USCIS’s Notice to Appear guidance ([www.uscis.gov/NTA](http://www.uscis.gov/NTA)). Individuals whose cases are deferred pursuant to the consideration of deferred action for childhood arrivals process will not be referred to ICE.<sup>7</sup>

This protection was extended to “family members and guardians, in addition to the individual.” The 2012 PIA describes the information management systems containing DACA applicant’s information as “mixed systems” and explicitly states that:

As a matter of DHS policy, any PII that is collected, used, maintained, and/or disseminated in connection with a mixed system by DHS are to be treated as a System of Records subject to the Privacy Act regardless of whether the information pertains to a U.S. citizen, Legal Permanent Resident, visitor, or alien.<sup>8</sup>

Between 2012 and 2017, over 800,000 DACA applicants submitted their personally identifiable biographic and biometric information to DHS.<sup>9</sup> This information includes 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>10</sup>

The Privacy Act of 1974 was enacted to address the privacy risks posed by the collection of personal information by the federal government.<sup>11</sup> The Privacy Act requires government agencies to comply with Fair Information Practices as set out in the 1973 report “Records,

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<sup>7</sup> See DHS/USCIS/PIA-045, Privacy Impact Assessment for the Deferred Action for Childhood Arrivals (DACA) at 3.3, available at

[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).

<sup>8</sup> See DHS/USCIS/PIA-045, Privacy Impact Assessment for the Deferred Action for Childhood Arrivals (DACA) at 7.1, available at

[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).

<sup>9</sup> 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 (March 31), U.S. Citizenship and Immigration Services,

[https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_performancedata\\_fy2017\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr2.pdf)

<sup>10</sup> See DHS/USCIS/PIA-045, Privacy Impact Assessment for the Deferred Action for Childhood Arrivals (DACA), available at

[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); and

DHS/USCIS/PIA-045(a), Deferred Action for Childhood Arrivals (DACA) – April 2014, available at

[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).

<sup>11</sup> See EPIC, The Privacy Act of 1974, available at <https://epic.org/privacy/1974act/>; and The Privacy Act of 1974, 5 U.S.C. § 552a available at [https://epic.org/privacy/laws/privacy\\_act.html](https://epic.org/privacy/laws/privacy_act.html).

Computers and the Rights of Citizens.”<sup>12</sup> The Privacy Act establishes a range of rights for data subjects. The Privacy Act also places restrictions on how agencies can share an individual's data with other people and agencies. Finally, the Act lets individuals sue the government for violating its provisions.<sup>13</sup> The Privacy Act is the foundation of privacy protection in the United States.<sup>14</sup>

Instructions for the I-821D form, to be filled by DACA applicants, states specifically that the information provided was to “to request consideration of Initial DACA or Renewal of DACA.”<sup>15</sup> The form also specifically states that “[i]nformation provided in this request is protected from disclosure to ICE and U.S. Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings[.]”<sup>16</sup> The I-821D form itself states specifically that applicants “authorize the release of any information from my records that USCIS may need to reach a determination on my deferred action request.”<sup>17</sup>

The Code of Fair Information Practices establishes the principle that “[t]here must be a way for a person to prevent information about the person that was obtained for one purpose from being used or made available for other purposes without the person’s consent.”<sup>18</sup> It also establishes the principle that organizations that collect, use, and disseminate identifiable personal information “must assure the reliability of the data for the intended use and must take precautions to prevent misuses of the data.”<sup>19</sup>

DACA applicants submitted their information to DHS for the exclusive purpose of being considered for deferred action. This disclosure was made with the explicit understanding that their personal information would be subject to Privacy Act protections.

The memo rescinding DACA fails to address the privacy risks associated with the use of data collected from DACA application. There is no new or updated PIA stating what will happen with the personal data collected for the purposes of determining eligibility for deferred action. In addition, DHS has failed to make concrete assurances that it will maintain the protections promised in the 2012 PIA and set out usage described in the I-821D form and instructions. In a September 5, 2017 website update, DHS stated:

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<sup>12</sup> See, EPIC, *The Code of Fair Information Practices*, available at [https://epic.org/privacy/consumer/code\\_fair\\_info.html](https://epic.org/privacy/consumer/code_fair_info.html)

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

<sup>14</sup> EPIC has also called for Privacy Act modernization - see, EPIC, *Supplemental Letter on S. 1732, “Privacy Act EPIC Modernization for the Information Age Act of 2012”* available at <https://epic.org/privacy/1974act/EPIC-Supp-S1732-Priv-Act-Modernization.pdf>.

<sup>15</sup> Instructions for Consideration of Deferred Action for Childhood Arrivals, under see sections - What is the Purpose of this Form?, When Should I used Form 1-821D?, and USCIS Privacy Act Statement, available at <https://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf>

<sup>16</sup> *Id.* at USCIS Privacy Act Statement, pg. 13.

<sup>17</sup> I-921D, OMB 1615-0124, available at <https://www.uscis.gov/i-821d>.

<sup>18</sup> See, EPIC, *The Code of Fair Information Practices*, [https://epic.org/privacy/consumer/code\\_fair\\_info.html](https://epic.org/privacy/consumer/code_fair_info.html), and U.S. Dep’t. of Health, Education and Welfare, *Secretary’s Advisory Committee on Automated Personal Data Systems, Records, computers, and the Rights of Citizens* viii (1973).

<sup>19</sup> *Id.*

Information provided to USCIS in DACA requests 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 ([www.uscis.gov/NTA](http://www.uscis.gov/NTA))..<sup>20</sup>

Acting Secretary of Homeland Security Elaine Duke stated that DHS will not promise to use DACA applicants' information exclusively for the purposes it was collected.<sup>21</sup> This failure to ensure that information will be used exclusively for the purposes it was disclosed implicates the legal rights set out in the Privacy Act.

In addition, the President, in a January 25, 2017 Executive Order, has mandated that “[a]gencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.”<sup>22</sup> This statement, as applied to information provided by DACA applicants, goes completely against the Code of Fair Information Practices principles and is an assault on established U.S. privacy norms.

EPIC urges this committee to ask Mr. James McCament from DHS about the privacy risks resulting from changes to DACA.<sup>23</sup>

- ***Will the personal information provided by DACA applicants be used exclusively for its intended purpose of determining deferred action eligibility, as stated in the original Privacy Impact Assessment for the program?***
- ***Will Privacy Act of 1974 protections be extended to all information collected using I-821D forms, or in connection with the DACA application process?***
- ***Will DHS issue a new or updated PIA describing the privacy implications of its decision to rescind DACA and outlining its strategy for insuring that information provided by DACA recipients will be safe from misuse?***

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<sup>20</sup> See *Frequently Asked Questions: Rescission Of Deferred Action For Childhood Arrivals (DACA)*, available at <https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca>.

<sup>21</sup> Sam Sacks, *DHS Chief Can't Promise She Won't Hand Over Dreamer Data to ICE*, truthout.com, (September 28, 2017), <http://www.truth-out.org/news/item/42092-dhs-chief-can-t-promise-she-won-t-hand-over-dreamer-data-to-ice>.

<sup>22</sup> *Enhancing Public Safety in the Interior of the United States* at Sec. 14, 82 FR 8799, available at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>23</sup> *President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration*, available at <https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law/>

We ask that this Statement from EPIC be entered in the hearing record. EPIC looks forward to working with the Committee on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg

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EPIC President

/s/ Caitriona Fitzgerald

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