



Practice Pointer: DHS Freedom of Information Act Requests

August 31, 2020

A Freedom of Information Act (FOIA) request is made to obtain records and information from a government agency about yourself or about others.¹ Generally, any person can make a FOIA request, regardless of their immigration status. In the immigration context, noncitizens or their advocates are entitled to make a FOIA request to the Department of Homeland Security (DHS) for their immigration records. Immigration records can include their entire immigration file, known as their “A-File”, records relating to entries and exits, and records relating to any other encounters with immigration officials. FOIA records can assist advocates in determining whether there is anything in their client’s immigration history that could affect their eligibility for an immigration benefit. Having your client’s complete immigration history is of utmost importance given the high stakes involved² when submitting an application or petition for immigration status.

A. Which Agency Has the Records You Need.

Generally, there are four DHS agencies with immigration related records.

1. **US Citizenship and Immigration Service** – USCIS maintains the following records:
 - A-file
 - Border apprehension records through 2000, detention records and removal/deportation records
 - Prior immigration applications or petitions and supporting documents
 - USCIS decisions including I-94 proof of immigration status if issued by USCIS
 - Advance parole obtained through USCIS

2. **Customs and Border Protection** – CBP maintains records related to:
 - Interactions, apprehensions and detentions at the border as of 2000
 - Interactions with CBP in the interior U.S.
 - Form I-94 entry/departure records
 - Voluntary return records
 - Expedited removal orders
 - Advance parole obtained through CBP

3. **Immigration and Customs Enforcement** – ICE maintains records related to:
 - Interactions with ICE
 - Investigation records
 - SEVIS records

¹ [5 U.S.C. § 552](#).

² [USCIS policy](#) allows officers to issue a Notice to Appear (NTA) initiating removal proceedings upon denial of an immigration application for noncitizens who are not lawfully present or who are otherwise inadmissible.



- ICE Arrest and detention records
 - Notice to Appear for removal proceedings
 - Bond requests
 - ICE detainers or warrants
4. **Office of Biometric Identity Management**³ – OBIM’s biometric system can retrieve data for an individual tied to a CBP log of an entry into the United States, Department of State (DOS) visa application, and an immigration status change with USCIS.

B. FOIA Request Format.

There is no specific form that must be used to make a FOIA request. However, the request must be in writing and must follow the particular agency’s rules. The request must also reasonably describe the information sought. If you need to request records by mail, USCIS, CBP and ICE recommend completing Form G-639 and then submitting it by mail, fax or email.⁴ This method will result in a longer wait than using an online system.

Generally, submitting your request online should result in a faster FOIA response. Each immigration component of DHS has its own online FOIA system:

- USCIS – [FIRST: FOIA Immigration Records System](#)
- CBP - [FOIAOnline](#)
- ICE – [Online FOIA Request Form](#)
- OBIM – [DHS FOIA/Privacy Act Request Submission Form](#)

The online systems will prompt you for the information needed to complete the FOIA request. In addition, the systems allow submission Form G-28, Notice of Entry of Appearance as Attorney or Representative, as an attachment to your FOIA request. DHS will not provide records to a representative who submits an online FOIA request without a Form G-28 or notarized consent form as evidence of your client’s consent to allow you access to their records.

C. Exemptions.

Congress established nine exemptions⁵ from disclosure to protect against invasion of personal privacy or harm to law enforcement investigations. The FOIA authorizes agencies to withhold information when they reasonably foresee that disclosure would harm an interest protected by one of the nine exemptions:

1. Information that is classified to protect national security.
2. Information related solely to the internal personnel rules and practices of an agency.

³ Requests must include an original fingerprint card (FD-258).

⁴ For a complete list of DHS FOIA Contact Information, visit <https://www.dhs.gov/foia-contact-information>.

⁵ 5 U.S.C. § 552(b)(1) through (b)(9).



3. Information that is prohibited from disclosure by another federal law.
4. Trade secrets or commercial or financial information that is confidential or privileged.
5. Privileged communications within or between agencies, including those protected by the:
 - a. Deliberative Process Privilege (for records were created less than 25 years before the date requested);
 - b. Attorney-Work Product Privilege; or
 - c. Attorney-Client Privilege
6. Information that, if disclosed, would invade another individual's personal privacy.
7. Information compiled for law enforcement purposes that:
 - a. Could reasonably be expected to interfere with enforcement proceedings.
 - b. Would deprive a person of a right to a fair trial or an impartial adjudication.
 - c. Could reasonably be expected to constitute an unwarranted invasion of personal privacy.
 - d. Could reasonably be expected to disclose the identity of a confidential source.
 - e. Would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.
 - f. Could reasonably be expected to endanger the life or physical safety of any individual.
8. Information that concerns the supervision of financial institutions.
9. Geological information on wells.

A frequently exemption is 5 U.S.C. § 552(b)(6), redacted because of the potential of invading other's privacy. However, if you review the redactions, you'll often find that the redactions relate to the requestor and subject of the record themselves. Or through (b)(9)

D. Exclusions.

FOIA excludes access to three categories of law enforcement and national security records under the exemption at §552(b)(7)(A). Records falling within an exclusion are not subject to the requirements of the FOIA. An agency response will encompass only those records that are subject to the FOIA.

1. The first exclusion protects the existence of an ongoing criminal law enforcement investigation when the subject of the investigation is unaware that it is pending, and disclosure could reasonably be expected to interfere with enforcement proceedings.



2. The second exclusion is limited to criminal law enforcement agencies and protects the existence of informant records when the informant's status has not been officially confirmed.
3. The third exclusion is limited to the FBI and protects the existence of foreign intelligence or counterintelligence, or international terrorism records when the existence of such records is classified.

E. USCIS Keystroke FOIA.⁶

Over the last two years, we have seen an increase in the number of noncitizens who did not receive notices that USCIS claims to have sent. The lack of notice resulted in missed filing deadlines and denials for abandonment.

To verify whether USCIS actually issued and mailed a Request for Evidence (RFE), Notice of Intent to Deny (NOID), Notice of Intent to Revoke (NOIR) or Notice of Decision, consider submitting Freedom of Information Act (FOIA) requests for the affected client's keystroke records and/or EPMS, CLAIMS, CRIS, or ECHO records. Either the keystroke records or the specified databases should contain records of when and whether USCIS generated a notice as well as when and whether it was mailed. If USCIS generated a notice, but there is no record that it was mailed, that could support an argument that your client did not receive the notice. Unfortunately, there is no way to prove that a notice that was mailed was not put in the wrong envelope or somehow lost.

1. USCIS uses [several correspondence generator systems](#) to generate, print, and track the mailing of notices and documents, including RFEs, NOIDs, and denial notices. Practitioners may consider doing FOIA requests regarding these systems; however, we have not yet seen examples of results of FOIA requests for records from these systems. Nonetheless, given their function in processing RFEs, we believe these systems are likely to contain information on whether and when an RFE was generated, printed, and mailed. If you file a FOIA request related to these databases, please keep ASISTA informed via our technical assistance channels. These systems include:
 - a. Enterprise Print Manager System (EPMS): Generates notices, including Form I-797 and supports the printing of notices and documents
 - b. Computer Linked Application Information Management System (CLAIMS): Creates receipt, approval, and reminder notices
 - c. Customer Relationship Interface System (CRIS): Contains delivery status information for documents mailed by USCIS

⁶ The Keystroke FOIA section of this practice advisory is an update of a section from our March 2020 practice pointer on missing USCIS notices. For a full discussion on handling missing USCIS notices, please review ASISTA's [Practice Pointer: What If You Do Not Receive an RFE or Denial Notice?](#) For a sample keystroke FOIA, see the Appendix of the March 2020 Practice Pointer.



- d. Enterprise Correspondence Handling Online (ECHO): A web-based application that USCIS officers use to write multiples types of correspondence to applicants
2. “Keystroke records” refers to the electronic recording of the actions taken by USCIS. These electronic records are part of the A-file, but typically are not included in a regular FOIA request for the A-file. Results of a “keystrokes” FOIA should include the issuance and mailing date of any notices, including RFEs.
 - a. A request for your client’s keystroke records is more likely to be deemed a simple request and placed in Track 1 for faster processing as long as you do not combine the keystroke records request with a more complex request. If you need other records pertaining to your client, consider submitting a separate FOIA request for the more complex records to avoid delay in receiving the keystroke records.
3. To file the FOIA, you can [submit the request online](#), which may speed up processing.
4. Upload a copy of your signed Form G-28 or notarized consent form
5. Describe the records that you want:
 - a. *Keystroke*: “I am requesting a copy of all keystroke records pertaining to [Client’s name]’s pending [name of pending application] [form names and receipt number(s)].”
 - b. *Correspondence Generator systems*: “I am requesting a copy of all records contained in USCIS’s Correspondence Generator systems, including, but not limited to, EPMS, CLAIMS, ECHO, and CRIS pertaining to [Client’s name]’s pending [name of pending application] [form names and receipt number(s)].”

F. DHS FOIA Administrative Appeal.

A requestor has the right to file an appeal from an agency’s denial or partial denial of a FOIA request.⁷ If you receive a response to a FOIA request that results in the denial of information citing an exemption to FOIA, stating that the agency does not have any responsive records or stating the agency cannot confirm or deny the existence of records, you may appeal that denial. An agency’s final response letter should contain information on where to send the appeal and give the time limit for filing the appeal. This information is agency-specific, so you will want to confirm it for the agency at issue prior to filing the appeal.

In your appeal, you should state that you are appealing the agency’s release determination, reference the agency’s FOIA request number and the date of the correspondence. You should also include why you believe the agency’s response was improper and explain why you believe you should receive the records requested. After submitting your appeal, you should receive an acknowledgment from the agency that it has been received and you may be assigned a FOIA

⁷ 5 U.S.C. § 552(a)(6)(A)(i).



appeal number that is separate from your FOIA request number. You should reference that number when contacting the agency to check the status of your appeal.

Sample CBP FOIA appeal filed through the online CBP FOIA portal.⁸

“Requestor sought entry records pertaining to three separate entries into the United States made by Subject of Record: (1) an entry in approximately [MONTH/YEAR], (2) an entry on approximately [MONTH/YEAR], and (3) an entry on approximately [MONTH/YEAR].

CBP did produce records relating to this third and most recent entry, which records show occurred on [DATE]. However, CBP failed to produce records relating to the first two entries, occurring on or about [MONTH/YEAR] and on or about [MONTH/YEAR]. Please search CBP's records more thoroughly and produce any and all existing records associated with these entries.”

For questions about this advisory, please contact ASISTA at questions@asistahelp.org.

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⁸ Thanks to Kate Mullins of Centro Legal for sharing her sample CBP FOIA appeal request.