Practice Advisory

Nightingale v. USCIS and FOIA Requests for Immigration Case Files (A-Files)

December 16, 2022

In December 2020, a federal district court issued a permanent injunction in the nationwide class action Nightingale v. USCIS ordering the Department of Homeland (DHS), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE) to cease violating the Freedom of Information Act (FOIA) deadlines for adjudicating requests for immigration case files (known as A-Files), to eliminate USCIS’ and ICE’s backlogs, and to provide quarterly compliance reports to the court and class counsel.\(^3\) See 507 F. Supp. 3d 1193 (N.D. Cal. 2020). While USCIS has reduced its backlog and increased FOIA staff and resources, it has yet to sustain substantial compliance with the injunction. Defendants moved to partially stay the injunction for six months as to A-File FOIA requests in Tracks 1 and 2,\(^4\) but on October 25, 2022, the court denied the motion.

Recently, USCIS changed Form G-639, the form used to submit A-File FOIA requests, and the interface on FIRST,\(^5\) the online web portal that USCIS claims facilitates the quickest response to

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2 Specifically, the court ordered the agencies to cease failing to adhere to 5 U.S.C. § 552(a)(6)(A) and (B), which require determinations within 20 business days or, in the case of “unusual circumstances,” within 30 business days, respectively.

3 The agencies must report the number and percentage of A-File FOIA requests filed and timely completed as well as the number and percentage of requests that remain pending beyond the 20- or 30-day statutory periods. The quarterly compliance reports are posted here and a chart summarizing the results reported is here (see pages 3 to 4).

4 USCIS “uses a three-track system to process FOIA requests for A-File material” and defines Track 1 as “[s]imple requests,” Track 2 as “[c]omplex inquiries that normally require additional search and review time,” and Track 3 as “[r]equests by individuals scheduled for a hearing before an immigration judge.” USCIS, Check Status of FOIA Request, https://first.uscis.gov/#/check-status (last visited Dec. 14, 2022).

FOIA requests. Both now state that USCIS will “usually” process the request faster if it is not a request for a “large set of records, such as an entire A-File.” **Notwithstanding these statements, USCIS is obligated by the Nightingale injunction to process FOIA requests for an entire A-File within the statutory deadlines, i.e., no later than 20-30 business days after receipt of the request.**

Consequently, whether a request is for part of an A-File or for the entire A-File should have little to no impact on processing time.

This practice advisory explains the ways to submit a FOIA request for a client’s A-File, provides suggestions for avoiding agency rejections of the requests, and identifies issues related to the Nightingale injunction that class counsel are monitoring. A-File requests are filed with USCIS even though an A-File generally is comprised of records compiled by USCIS and/or ICE. Thus, there is no need to send a separate A-File FOIA request to ICE, as ICE would forward it to USCIS. However, separate FOIA requests are required to obtain records held by other agencies, such as the Executive Office for Immigration Review or U.S. Customs and Border Protection.

Critically, FOIA regulations state that requests made on behalf of third parties **must** include a statement verifying the third party’s identity in accordance with 6 C.F.R. § 5.21(e) and an agreement to release records to the requestor. **See** 6 C.F.R. § 5.21(g). In turn, 6 C.F.R. § 5.21(e) states that verification of identity requires name, address, and date and place of birth.

I. **Submitting a FOIA Request for an A-File**

“DHS has a decentralized system for responding to FOIA requests, with each component designating a FOIA office to process records from that component. All components have the capability to receive requests electronically, either through email or a web portal.” 6 C.F.R. § 5.3(a)(1). Effective December 16, 2022, USCIS will no longer accept FOIA requests by fax or email. Submission via USCIS’ web portal (FIRST) and mail are discussed below.

A. **Submission through the FIRST Portal**

A requestor seeking a client’s A-File may submit a request for an A-File through FIRST, USCIS’ online portal for submitting and tracking FOIA requests. Correspondence regarding difficulties or rejected requests may be emailed to USCIS at foiapquestions@uscis.dhs.gov.**

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6 **See** DHS, Privacy Act of 1974, 87 Fed. Reg. 68599, 68599, 68608 (Nov. 16. 2022) (amending Appendix A to 6 C.F.R. Part 5 to provide that USCIS FOIA requests “should be mailed . . . or submitted electronically through the USCIS FOIA Portal”); **see also** USCIS, Request Records through the Freedom of Information Act or Privacy Act, https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act (updated Dec. 9, 2022).

To submit a FOIA request to USCIS on behalf of a client, begin by setting up an online MyUSCIS account to track requests and receive records digitally. A FOIA request submitted through FIRST is a five-step process that requires entering identifying information about the client. The system will not accept an online FOIA submission if it lacks certain information, including the client’s country of birth and mailing address. If providing this identifying information may harm a client’s case, consider submitting Form G-639 or a letter without the potential harmful information via mail.

After setting up an online MyUSCIS account, an attorney or accredited representative begins the process by indicating that the request is “About Someone Else.”

**Step 1: Details About the Third-Party Requester**

Check the box indicating that the third-party requestor is “an attorney or accredited representative.” Though this section contains spaces for name, address, phone number, and mailing address, only a name is required to move to the next step.

**Step 2: Nature of the Records Requested**

Indicate the nature of records requested. Note, there is no option for requesting a complete A-File, so the requestor must check “Other” and write “Entire contents of A-File” in the blank field. Importantly, this section asks the requestor to indicate if the request is an expedited request and whether the client whose files are requested has upcoming immigration court proceedings. If the client is in removal proceedings and the attorney/accredited representative uploads documentary evidence of this (such as a Notice to Appear, hearing notice, or Notice of Appeal, see infra Step 4), USCIS should place that request on Track 3, an accelerated track for processing the A-File request.

**Step 3: Details About the Subject of Record**

Provide information about the client, including name and any aliases, parents’ names, A-Number, country of birth, date of birth, and any application, petition, or receipt numbers. The A-Number field is optional, but the other fields must be inputted to proceed. Next, upload documents that provide verification of the client’s identity and consent. See 6 C.F.R. § 5.21(g).

Two options for demonstrating consent that have proven successful for some advocates:

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8 Available at: https://myaccount.uscis.gov/.

9 In practice, some advocates have obtained A-Files without providing the place of birth.

10 For more information about different A-File processing tracks, see American Immigration Council, Freedom of Information Act and Immigration Agencies, 25-26 (May 2021).

11 Though this information may help USCIS locate records, there may be a strategic reason not to provide information that may be harmful to a client’s immigration case, for example, where alienage is denied or is the subject of a motion to suppress. If so, it may be preferable to submit the FOIA request by mail.
• Upload Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative and a signed consent to release records. A sample consent to release records is attached as Addendum A. Alternatively, Form G-639 is sufficient to establish consent because the form expressly requires the client’s signed consent (see p. 8-9).

• Upload Form G-28 and a government-issued document proving client’s identity (e.g., driver’s license, employment authorization card, or passport) and input either the client’s email address or phone number into the online form. Be advised that by providing the client’s email or phone number, USCIS will contact the client directly for authorization to release records. It is advisable to tell clients that USCIS’ authorization emails may go to their spam folder.12

Step 4: Supporting Information for Track 3 Request and/or Expedited Processing

Upload documentation in support of a Track 3 request if the client is in removal proceedings and has a scheduled hearing with an immigration judge (IJ). One of the following must be provided:

• Form I-862, Notice to Appear, documenting the upcoming date of the client’s IJ hearing;
• Form I-122, Order to Show Cause, documenting the upcoming date of the client’s IJ hearing;
• Form I-863, Notice of Referral to Immigration Judge; or
• A written notice of continuation of a future scheduled IJ hearing.13

Documentation also may be submitted in support of a request for expedited processing, even if the client is not in removal proceedings. 6 C.F.R. § 5.5(e)(1).

Step 5: Review and Electronic Signature

Indicate agreement to pay the costs of the search and review of documents up to $25 and provide an electronic signature.

B. Submission by Mail

1. Form G-639

Although an A-File FOIA request may submitted without Form G-639 (last revised 11/3/2022), USCIS is accustomed to receiving requests on this form. The form itself states that correspondence from the agency in response to a Form G-639 request will be released through

12 Some advocates have reported that USCIS has rejected their request if the client did not immediately respond to USCIS’ verification email or text. Consequently, it may be advisable to coordinate timing with the client if using this option.

U.S. mail and, unless otherwise specified, sent on a CD-ROM. This section addresses issues related to completing the form.

*Part 1: Nature of the Request*

In Part 1, question 1, check box “B,” indicating that the request is for “[i]nformation from another person’s immigration record.”

In Part 1, question 2, check “Other” (the last option in the list) and then write “Entire contents of A-File” in the blank field.

Part 1, questions 3 through 5 provide an opportunity to request expedited processing and provide information supporting that request.

*Part 2: Subject of the Request*

Part 2 asks for identifying information about the subject of the record, including the client’s A-number, parent’s names, date of birth, and country of birth. Though this information may help USCIS locate records, there may be a strategic reason not to provide information that may be harmful to a client’s immigration case, for example, where alienage is denied or is the subject of a motion to suppress.

*Part 3: Certification of Request and Consent to Release Records*

The client should sign Form G-639 in this section as the “requestor.” In the past, attorneys have signed the form as the requestor. This change has caused confusion as attorneys have continued to include their own signature in this section of the form, causing the agency to reject the request.\(^{14}\)

Part 3 also requires the requester to consent to pay up to $25 in fees.

*Part 4: Third-Party Requester*

Part 4 requires contact information for the third-party requestor. In Part 4, question 3, check box “A” indicating that the requestor is an “an attorney or accredited representative, acting on behalf of the subject of record.” The client must consent to release records to the requestor either by signing under penalty of perjury or via a notarized affidavit.

2. **Written Requests Without Form G-639**

\(^{14}\) If the attorney signs as the “requester” on behalf of the client, it is advisable to include the client’s signed consent authorizing the attorney both to act as the requester and to receive records on the client’s behalf.
An A-File FOIA request also may be submitted by in writing by mail without Form G-639. The written request must include a description of the records sought. See 6 C.F.R. § 5.21(b). Here, the description would be “the entire contents of the client’s A-File.” Third party requestors also must provide the client’s consent to release records to the requestor as well as verification of the client’s identity. See 6 C.F.R. § 5.21(g) (referencing 6 C.F.R. § 5.21(e) regarding identity verification requirements). In addition, if applicable, include a request for expedited treatment and documentation to support that request as discussed above.

3. Mail Address

An A-File FOIA request submitted by mail should be sent to the following address:

National Records Center (NRC)
FOIA/PA Office
P.O. Box 648010
Lee’s Summit, MO 64064-8010

II. Contact the Nightingale Litigation Team

As mentioned above, USCIS prioritizes processing of A-File FOIA requests where the subject of the request is in removal proceedings with a hearing scheduled before an IJ by placing the requests in an accelerated track, known as Track 3. This prioritization stems from the agency’s acknowledgment that individuals in removal proceedings have an immediate need for access to information that is in the government’s possession. USCIS indicates that a requester must submit proof of an upcoming hearing date to qualify for Track 3 processing, listing the types of satisfactory documentation as a Notice to Appear (NTA) (Form I-862) or an Order to Show Cause (Form I-122) that include the individual’s upcoming hearing date, a Notice of Referral to Immigration Judge (Form I-863), or a written notice of continuation of a scheduled hearing in the future before the immigration judge.

The Nightingale litigation team is aware of instances where USCIS has failed to place an A-File FOIA request on Track 3 for expedited processing, including where there currently is no hearing scheduled or the immigration judge’s decision is on appeal. The team believes, and practitioners well know, that all individuals in removal proceedings have an immediate need for access to their A-File even if they do not have an upcoming hearing date. This includes individuals with:

- defective NTAs that do not include a hearing date;

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16 Id.
• administrative appeals pending before the Board of Immigration Appeals (BIA); and
• petitions for review (PFR) pending before a circuit court of appeals.

If USCIS fails to place in Track 3 an A-File FOIA request made on behalf of a client in removal proceedings where the requestor has submitted a defective NTA as proof of placement in removal proceedings or a proof of a pending BIA appeal or PFR, please contact Nightingale class counsel by email at info@immigrationlitigation.org. Please include the receipt number, a copy of the documentation submitted, the agency’s response, and any subsequent correspondence with the agency to correct the error.
Addendum A

CONSENT BY SUBJECT OF RECORD TO RELEASE RECORDS TO THIRD-PARTY REQUESTOR

I, [subject of records], consent to U.S. Citizenship and Immigration Services’ releasing all my records, including the entire contents of my A-File and all records bearing my name, to my [attorney/accredited representative], [name of attorney/accredited representative], from [name of law firm/organization], [address of law firm/organization].

I certify, swear, or affirm, under penalty of perjury under the laws of the United States of America, that the information in this request is complete, true, and correct.

[Signature of Subject of Record] [Name of Subject of Record]  Date of Signature (mm/dd/yyyy)