



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

September 28, 2015

Department of Homeland Security
Office of the Chief Privacy Officer
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Submitted via www.regulations.gov

RE: Comments on Notice of Proposed Rulemaking Concerning
the U.S. Department of Homeland Security's FOIA Regulations,
Docket No. DHS-2009-0036, RIN 1601-AA00

To Whom It May Concern:

The American Immigration Lawyers Association (“AILA”) is pleased to provide comments in response to the Notice of Proposed Rulemaking published in the Federal Register on July 29, 2015 (80 Fed. Reg. 45,101) concerning proposed amendments to the Department of Homeland Security’s (“DHS”) regulations under the Freedom of Information Act (“FOIA”).

AILA is a national association of more than 14,000 attorneys and law professors, established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. AILA member attorneys represent U.S. families seeking permanent residence for close family members, as well as U.S. businesses seeking talent from the global marketplace. AILA members also represent foreign students, entertainers, athletes, and asylum seekers, often on a *pro bono* basis. Founded in 1946, AILA is a nonpartisan, not-for-profit organization. AILA files FOIA requests and administrative appeals with DHS, and has litigated FOIA issues against DHS.

General Comments

The Government Should Increase its Efforts to Proactively Share Information to Avoid Wasting Time and Resources. In some cases, it is more efficient for a government agency to proactively share information than it is to require an individual to file a FOIA request to obtain that information. For example, in the interest of fairness and due process for individuals in removal proceedings, DHS should amend the regulations to require Immigration and Customs Enforcement (ICE) to share with the respondent, all documents in the respondent’s “Alien-file” (A-file). This would go far in conserving government resources by reducing the number of these FOIA requests, and improving the efficiency of the immigration court docket by reducing

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requests for continuances for the sole purpose of allowing respondents time to obtain and review these documents through FOIA. The Ninth Circuit has held that INA §240(c)(2) – which provides that the alien “shall have access” to non-confidential A-file documents – compelled the government to release such documents without requiring the alien to file a FOIA request.¹ However, ICE has stated that it will only follow this policy in the Ninth Circuit, as it believes that FOIA is the appropriate mechanism for obtaining A file documents.²

Allow Electronic Filing of FOIA Requests for All DHS Agencies: DHS should facilitate the filing of FOIA requests and FOIA administrative appeals by e-mail and by facsimile for all of its sub-agencies, and provide clear instructions for doing so. As the agency is well-aware, the filing of communications by first class mail leads to processing delays and uncertainty on the part of requesters concerning the date on which the agency credits receipt.

Specific Comments

6 C.F.R. § 5.3 (Requirements for Making Requests): Experience has shown that DHS inconsistently requires attorneys for requesters to formally provide notice of their representation of a party, either through the filing of (1) a DHS Form G-28 “Notice of Entry of Appearance as Attorney or Accredited Representative,” (2) a signed statement on letterhead of the entity for which the FOIA request is made, or (3) a signed statement by the actual requester. This formality is unnecessary if a FOIA request clearly states that it is being made by an attorney on behalf of a client.

AILA thus requests that the text of § 5.3 as proposed by DHS be further amended as follows (with added text underlined):

(d) When it is clear on the face of a request, or any subsequent communication related thereto, that the request or communication is made by an attorney on behalf of a client, it will be treated as if the attorney represents the interests of the client with respect thereto and no further proof will be required.

6 C.F.R. § 5.6 (Responses to Requests): If DHS fails to timely provide a response to a FOIA request, that lack of response can be construed as a constructive denial of the FOIA request from which the requester may administratively appeal. *See* 5 U.S.C. § 552(a)(6)(A); *see also Nurse v. Secretary of Air Force*, 231 F.Supp.2d 323, 328 (D.D.C. 2002) (“The FOIA is considered a unique statute because it recognizes a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines.”), *citing Spannus v. U.S. Dep’t of Justice*, 824 F.2d 52, 58 (D.C. Cir. 1987).

¹See [Dent v. Holder](#), 627 F.3d 365 (9th Cir. 2010). For more information on the ruling and its implementation, see The Legal Action Center’s Practice Advisory [Dent v. Holder and Strategies for Obtaining Documents from the Government During Removal Proceedings](#) (June 12, 2012).

² [AILA/ICE Liaison Meeting Minutes \(04/14/11\)](#), AILA Doc No. 11051260, available at <http://www.aila.org/infonet/ice-liaison-minutes-04-14-11>.

Requesters whose requests have been constructively denied are not informed how to administratively appeal the denial; specifically, to whom the administrative appeal should be addressed and where may it be sent, including mailing address, FAX number, and e-mail address.

AILA thus requests that DHS further amend the proposed text of § 5.6(b) as follows (with added text underlined):

Acknowledgments of requests. A component shall acknowledge the request and assign it an individualized tracking number if it will take longer than ten working days to process. Components shall include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests, and identify a mailing address, facsimile number, and email address for use in lodging an administrative appeal with respect to the request.

6 C.F.R. § 5.8 (Administrative Appeals): The FOIA regulations suffer from a lack of specificity concerning when an appeal is considered timely.

First, experience has shown that even when a FOIA appeal is hand-delivered (served) on a DHS component (e.g., U.S. Immigration and Customs Enforcement, Office of Principal Legal Advisor, U.S. Department of Homeland Security, Freedom of Information Act Office, 500 12th Street, S.W., Stop 5009, Washington, D.C. 20536-5009) before the close of business—even with service acknowledged in writing by personnel from that office at the time of hand-delivery—the requester has *not* been credited with the date of hand-delivery as the date of receipt of the administrative appeal. Instead, the DHS component has assigned a later date to the appeal. In other words, it appears that the agency, at least sometimes, credits the date that a FOIA appeal arrives, internally, at “the desk” of a particular individual as the date of receipt, rather than the date the agency actually receives the appeal. This practice is improper.

Second, the FOIA regulations do not specify exactly when the “60 business days” runs for purposes of filing a timely administrative appeal. Are electronically filed administrative appeals considered timely if filed no later than 11:59:59 p.m., and in which U.S. time zone?

AILA thus requests that § 5.8(a)(1) be amended as follows (with added text underlined):

A requester may appeal adverse determinations . . . An appeal must be in writing, and to be considered timely it must be delivered, postmarked or, in the case of electronic submissions, transmitted to the Appeals Officer within 60 business days, by 11:59:59 p.m. Eastern Time Zone (ET), after the date of the component’s response. . . .

Appendix I to Subpart A—FOIA Contact Information: The list of DHS components provided in Appendix I of the proposed rule does not provide complete contact information for each of the

components. In particular, one or more of a telephone number, fax number, and e-mail address are missing for the DHS Chief FOIA Officer, DHS Deputy Chief FOIA Officer, CBP, CRCL, and FEMA.

AILA recommends that all components identified in Appendix I include (1) a mailing address, (2) a telephone number, (3) a fax number, and (4) an e-mail address.

Conclusion

We appreciate the opportunity to provide comments and look forward to a continuing dialogue with the Department on these matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION