

IMPLEMENTATION OF SECTION 1367 INFORMATION PROVISIONS IN THE PROCESSING OF FREEDOM OF INFORMATION ACT AND PRIVACY ACT REQUESTS

I. Purpose

This Instruction implements the Department of Homeland Security (DHS) Directive 002-02, *Implementation of Section 1367 Information Provisions* (Directive), and complements DHS Instruction No. 002-02-001, Rev.1, Implementation of Section 1367 Information Provisions. The Directive established a single DHS policy for implementing the confidentiality protections described in Title 8, United States Code (U.S.C.), Section 1367 and meets the guidance requirement under 8 U.S.C. § 1367(d).

DHS Instruction 002-02-001, Rev. 1, Implementation of Section 1367 Information Provisions, provides guidance consistent with Section 1367 of Title 8 as to the implementation of eight statutory exceptions.¹ DHS Instruction 002-02-002 pertains to the protection of Section 1367 information under the FOIA and is a complement to DHS Instruction 002-02-001, Rev. 1.

II. Scope

This instruction applies throughout DHS, including to all employees who process FOIA and Privacy Act requests for statutorily protected information.

III. References

- A. Title 5, United States Code (U.S.C.), Section 552, “Public Information; Agency Rules, Opinions, Orders, Records, and Proceedings” [Freedom of Information Act].
- B. Title 5, U.S.C., Section 552a, “Records maintained on individuals” [Privacy Act of 1974].
- C. Title 6, U.S.C., Section 142, “Privacy Officer.”

¹ The statutory exceptions are listed in DHS Instruction 002-02-001, Section VI, paragraph A.1.d.

- D. Title 6, Code of Federal Regulation (C.F.R.), Part 5, “Disclosure of Records and Information.”
- E. Violence Against Women Act (VAWA) of 1994, Public Law 103-322; Violence Against Women and Department of Justice Reauthorization Act of 2005, Public Law 109-162; and Section 817 (VAWA 2005); Violence Against Women Reauthorization Act of 2013, Public Law 113-4; Section 810, (VAWA 2013).
- F. Public Law 106-386, Victims of Trafficking and Violence Protection Act of 2000 (VTVPA).
- G. Sections 101(a)(15)(T), 101(a)(15)(U), and 101(a)(51) of the Immigration and Nationality Act (INA) (8 U.S.C. §§ 1101(a)(15)(T), 1101(a)(15)(U), 1101(a)(51)), “Definitions.”
- H. Section 103 of the INA (8 U.S.C. § 1103), “Powers and duties of the Secretary, the Under Secretary, and the Attorney General.”
- I. Title 8, U.S.C., Section 1367, “Penalties for disclosure of information” (originally enacted as Section 384 of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA)).
- J. Title 42, U.S.C., Section 13925(a), “Definitions and grant provisions” (as re-designated and amended by Section 3 of VAWA 2013) (transferred to 34 U.S.C. § 12291).
- L. Section 239(e) of the INA (8 U.S.C. § 1229(e)), “Certification of compliance with restrictions on disclosure.”
- M. Section 240A(b)(2) of the INA (8 U.S.C. §1229b(b)(2)), “Special Rule for Battered Spouse or Child.”
- N. DHS Delegation 13001, Revision Number 001, “Delegation to the Chief Privacy Officer / Chief Freedom of Information Act Officer.”
- O. DHS Designation 00-13002, “Designation to the Chief Privacy Officer as the Chief Freedom of Information Act Officer.”
- P. DHS Delegation 19004, Delegation of Authority to Issue Guidance and Implement 8 United States Code Section 1367.
- Q. DHS Directive 262-11, “Freedom of Information Act Compliance.”
- R. DHS Directive 002-02, Revision 00.1, “Implementation of Section 1367

Information Provisions.”

S. DHS Instruction 002-02-001, Revision 00.1, “Implementation of Section 1367 Information Provisions.”

T. DHS Instruction Manual 047-01-007 Rev. #03, “Handbook for Safeguarding Sensitive Personally Identifiable Information (PII).

U. DHS Instruction Guide 047-01-008, Rev. 00.1, “Privacy Incident Handling Guidance.”

IV. Definitions

A. **Personally Identifiable Information**: any information that permits the identity of an individual to be directly or indirectly inferred, including any other information that is linked or linkable to that individual, regardless of whether the individual is a U.S. citizen, legal permanent resident, visitor to the U.S., or employee or contractor to the Department.

B. **Section 1367 Information**:

1. Any information relating to aliens who are seeking or have been approved for immigrant status as (1) battered spouses, children and parents under provisions of VAWA; (2) victims of a severe form of human trafficking who generally are cooperating with law enforcement authorities; or (3) victims who have suffered substantial physical or mental abuse and are cooperating with law enforcement authorities. This definition includes information that does not specifically identify the individual as an applicant or beneficiary of the T Nonimmigrant Status (“T Visa”), U Nonimmigrant Status (“U Visa”), or VAWA protections.

2. Section 1367 covers information relating to beneficiaries of applications for a number of immigration benefits For the purpose of this Instruction if an alien is the beneficiary of a pending or approved application, or an initially denied application pending final adjudication, for one or more of the victim-based benefits described below, the requirements of 8 U.S.C. 1367 will be followed:

a. VAWA self-petitioner, which incorporates the following applications or petitions:

(1) I-360 Self-Petition - *Petition for Amerasian, Widow, or Special Immigrant*; where the petition is filed as the self-petitioning spouse, parent, or child of a U.S. citizen or lawful permanent resident.

(2) I-751, *Petition to Remove the Conditions of Residence*, where a waiver of the joint petition requirement is requested because of battery or extreme cruelty by certain family members.

(3) VAWA Cuban Adjustment Act (CAA) - abused CAA Applicants.

(4) I-485, Application to Register Permanent Residence or Adjust status, where the application is filed by an abused dependent spouse or child under the Haitian Refugee Immigration Fairness Act (HRIFA).

(5) Nicaraguan Adjustment and Central American Relief Act (NACARA) – filing as an abused dependent spouse or child under NACARA.

(6) VAWA Suspension of Deportation.

b. Form I-765V, Employment Authorization for Abused Nonimmigrant Spouse, which also falls within 8 U.S.C. § 1367 information pursuant to INA § 106, Violence Against Women and Department of Justice Reauthorization Act of 2005 (“VAWA 2005”), Pub. L. No. 109-162, Title VIII, Subtitle B, §814(c) (2006).

c. VAWA Cancellation of Removal applicants under INA 240A(b)(2).

d. Form I-914 T Nonimmigrant Status - victim of a severe form of trafficking in persons under INA 101(a)(15)(T).

e. Form I-918 U Nonimmigrant Status - victim of qualifying criminal activity under INA 101(a)(15)(U).

C. **U Nonimmigrant Status**: U nonimmigrant status for victims of criminal activity designated in INA § 101(a)(15)(U) (qualifying crimes) who have suffered substantial mental or physical abuse as a result of being a victim of criminal activity, possess information concerning the crime, and have been helpful, are being helpful, or are likely to be helpful to federal, state, or local law enforcement officials, prosecutors, judges, and other authorities in the investigation or prosecution of the criminal activity. U status allows victims to remain in the United States for up to four years (or longer if a limited exception applies), receive work authorization, and, if certain conditions are met, apply for adjustment of status to that of a lawful permanent resident (LPR).

D. **T Nonimmigrant Status**: T nonimmigrant status for victims of a severe

form of trafficking in persons, as defined in Section 103 of the VTVPA of 2000, who are physically present in the United States on account of trafficking and who have complied with any reasonable requests for assistance in a law enforcement investigation or prosecution (with limited exceptions). See INA § 101(a)(15)(T). T nonimmigrant status allows victims of human trafficking to remain in the United States for up to four years (or longer in limited situations), receive work authorization, and, if certain conditions are met, apply for adjustment of status to that of an LPR.

E. **VAWA Self-Petitioner(er)**: Under VAWA, as amended, certain persons who have been battered or subjected to extreme cruelty by a qualifying relative may self-petition or submit an application to apply for LPR status as an approved VAWA self-petitioner, and eventually apply for naturalization. VAWA self-petitioners include: the spouse, child or parent of an abusive U.S. citizen; the spouse or child of an abusive LPR; the conditional permanent resident spouse or child of an abusive U.S. citizen or LPR; the spouse or child of an abusive alien eligible for relief under the CAA, the HRIFA, or the NACARA; and the spouse or child eligible for suspension of deportation or cancellation of removal due to abuse by a U.S. citizen or LPR. See INA § 101(a)(51) (defining “VAWA self-petitioner”) and INA § 204(a).

F. **VAWA Cancellation**: Victims of domestic violence who are in removal proceedings may be eligible to apply for relief with the immigration court in the form of VAWA cancellation of removal. See INA § 240A(b)(2) (prescribing eligibility requirements).

V. Responsibilities

A. **Chief FOIA Officer** is the senior DHS official, as designated by the DHS Secretary, with primary responsibility for compliance with the FOIA and also serves as the Chief Privacy Officer.

B. **Deputy Chief FOIA Officer** reports to the Chief FOIA Officer and serves as the DHS principal point of contact and agency representative on FOIA-related matters.

C. **Officer for Civil Rights and Civil Liberties (CRCL)** directs and oversees the implementation of the integration of civil rights and civil liberties across the Department, and provides DHS-wide guidance and oversight on the implementation of 8 U.S.C. § 1367 confidentiality and prohibited source provisions (relating to applicants for and beneficiaries of Violence Against Women Act (VAWA), T nonimmigrant status, or U nonimmigrant status protections) in accordance with 8 U.S.C. § 1367(d) and v 810 of the VAWA Act of 2013. CRCL has delegated authority to issue Directive 002-02, Revision 00.1 and Instruction 002-02-001, Revision 00.1.

D. **General Counsel** is responsible for ensuring legal compliance and has final authority and responsibility for legal determinations within the Department and its Components.

E. **Component Heads** that maintain Section 1367 information within their Component will implement and execute all applicable policies and procedures set forth in this Instruction and will develop any necessary implementing FOIA instructions or other policy guidance to the extent permitted by and consistent with their authorities and any restrictions imposed by statute, executive order, presidential or other Instruction, or national or departmental policy.

F. **FOIA Officer** refers to a designated DHS official appointed by the Component Head to receive FOIA requests and to provide assistance in administrative matters pertaining to FOIA request processing.

VI. Content and Procedures

A. **General Policy:**

1. Disclosure of Section 1367 Protected Information Generally Prohibited.

a. All DHS employees, including those who process FOIA and Privacy Act requests, are generally prohibited from disclosing information about a beneficiary of a pending or approved application for victim-based immigration benefits to anyone except to a sworn officer or employee of DHS, the Department of State (DOS), or the Department of Justice (DOJ). This includes a VAWA self-petitioner, VAWA cancellation of removal or suspension of deportation case, or T or U nonimmigrant status, including the fact that they have applied for such benefits. It also includes information about an individual contained in a DHS database as well as information that has not yet been included in a database, such as the location of beneficiary. See 8 U.S.C. § 1367(a)(1)(A)-(F).

b. The nondisclosure provision provides protection as soon as a DHS employee has reason to believe that the alien may be the beneficiary of a pending or approved victim-based application or petition, and the limitation ends when the application for relief is denied *and* all opportunities for appeal of the denial have been exhausted. See 8 U.S.C. § 1367(a)(2).

c. There are specified statutory exceptions to the general nondisclosure requirement allowing for disclosure of protected

information in limited circumstances.² See 8 U.S.C. § 1367(b)(1)-(8). In addition to the enumerated statutory exceptions, there may be instances in which disclosure of protected information is mandated by court order or constitutional requirements.

B. FOIA and Privacy Act Policy:

1. The Department routinely receives and processes FOIA and Privacy Act requests for information involving an individual's immigration-related records, which may contain information that is protected from disclosure in accordance with 8 U.S.C. § 1367.
2. In processing a request, Government Information Specialists (GIS) make determinations on releasability of information in accordance with the FOIA and the Privacy Act. Government Information Specialists must determine what exemptions must be applied to protect personally identifying information – such as FOIA Exemptions 6, 7(a) and 7(c), -- that should be withheld to protect the identity of the 1367 beneficiary.
3. The Department will generally respond to a third-party request for information about an individual, with no consent for disclosure from the request subject, by refusing to either confirm or deny the existence of records about the individual.
4. Information relating to a beneficiary of a pending or approved application for victim-based immigration benefits may be released to the individual if the request is made for that individual's own records, or if the individual has waived the non-disclosure restriction. The waiver must be signed by all adult petitioners/beneficiaries listed on the application.

C. Training requirement: All DHS employees and contractors who, through the course of their work, come into contact with, or have access to, information covered by 8 U.S.C. § Section 1367 are required to complete the computer-based training module, which is available on the Components' Learning Management System (LMS).

1. All current GIS employees must complete this training within 90 days of the effective date of this Instruction.
2. All new GIS employees must complete this training within 30 days of their entry-on-duty date.
3. Component Heads, or their designee, must annually report to the DHS Deputy Chief FOIA Officer the rate of compliance with this training

² The statutory exceptions are defined in DHS Instruction 002-02-001, Section VI, paragraph A.

requirement.

D. **Notification of Unauthorized Disclosures:**

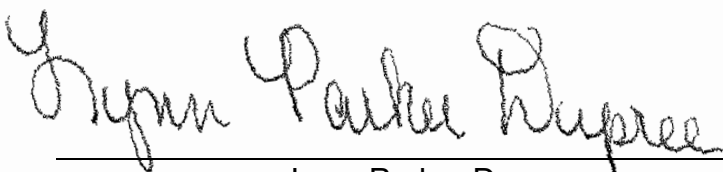
1. If disclosure of Section 1367 protected information occurs, the Component Head must (1) notify the Chief Privacy Officer and the Officer for Civil Rights and Civil Liberties as soon as is practicable, but no later than 24 hours after discovery of the unauthorized disclosure, (2) satisfy the requirements of the DHS Privacy Incident Handling Guidance, and (3) submit an after action report to the DHS Chief Privacy Officer within 30 days.

2. If the Component Head is informed by a recipient of unauthorized possession of Section 1367 information, the Component Head must (1) notify the Chief Privacy Officer and the Officer for Civil Rights and Civil Liberties as soon as is practicable, but no later than 24 hours after discovery of the unauthorized disclosure, (2) satisfy the requirements of the DHS Privacy Incident Handling Guidance, and (3) submit an after action report to the DHS Chief Privacy Officer within 30 days.

E. **Penalties:** The law provides for civil penalties and/or disciplinary action for certain violations of 8 U.S.C. § 1367: “Anyone who willfully uses, publishes, or permits information to be disclosed in violation of [8 U.S.C. §1367] shall be subject to appropriate disciplinary action and subject to a civil money penalty of not more than \$5,000 for each such violation.” 8 U.S.C. § 1367(c).

VII. Questions

Direct questions or concerns to the DHS Deputy Chief FOIA Officer or the Component FOIA Officer.



Lynn Parker Dupree
DHS Chief FOIA Officer

9/2/2021

Date