



LAW OFFICES OF  
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## Practice Advisory<sup>1</sup>

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

April 17, 2023

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)<sup>2</sup> 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.<sup>3</sup> *See* 507 F. Supp. 3d 1193 (N.D. Cal. 2020). Defendants moved to partially stay the injunction for six months as to A-File FOIA requests in Tracks 1 and 2,<sup>4</sup> but on October 25, 2022, the court [denied](#) the motion. In 2023, after increasing FOIA staff and resources, USCIS has begun to sustain substantial compliance with the injunction. However, although timely, requestors are increasingly reporting problems with the quality of USCIS' responses.

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<sup>2</sup> 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.

<sup>3</sup> 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).

<sup>4</sup> 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).

In July 2002 and again in November 2022, USCIS changed Form G-639, the form traditionally used to submit A-File FOIA requests, and the interface on [FIRST](#),<sup>5</sup> the online web portal that USCIS claims facilitates the quickest response to 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, potential options when USCIS’ determination is inadequate (e.g., no records found, response is incomplete), and also 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.<sup>6</sup> Submission via USCIS’ web portal (FIRST) and mail are discussed below.

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<sup>5</sup> Available at: <https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act> (last visited Dec. 14, 2022).

<sup>6</sup> *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).

## 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 [foiapaquestions@uscis.dhs.gov](mailto:foiapaquestions@uscis.dhs.gov).<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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 the third-party requestor's 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 requester to indicate if the request is an expedited request and/or 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.<sup>10</sup>

### *Step 3: Details About the Subject of Record (Verification of Identity and Consent)*

Provide information about the client, including name and any aliases,<sup>11</sup> parents' names, A-

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<sup>7</sup> See [Request Records through the Freedom of Information Act or Privacy Act, Contact the USCIS FOIA Program](#), <https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act> (lasted updated Dec. 9, 2022).

<sup>8</sup> Available at: <https://myaccount.uscis.gov/>.

<sup>9</sup> In practice, when submitting a request via U.S. mail, some advocates have obtained A-Files without providing the place of birth.

<sup>10</sup> For more information about A-File processing tracks, see American Immigration Council, [Freedom of Information Act and Immigration Agencies](#), 25-26 (May 2021).

<sup>11</sup> Requestors increasingly report that USCIS claims that no records exist, so it is important to list all potential aliases or variations of a name that the client may have used.

Number, country of birth, date of birth, and any application, petition, or receipt numbers.<sup>12</sup> The A-Number field is optional, but the other fields must be inputted to proceed.

FIRST's interface does not require a requester to upload documents when all steps are completed electronically. However, this means providing contact information for the client (i.e., client's email or phone number), which allows USCIS to contact the client directly to verify identity and consent.

Attorneys who are understandably concerned or hesitant to provide their client's contact information directly to USCIS may upload documents that provide verification of the client's identity and consent. *See* 6 C.F.R. § 5.21(g).

Examples of identity documents include U.S. or foreign government-issued immigration documents or driver's licenses. Because requestors are reporting an increase in USCIS responses claiming no records exist, some requestors have begun uploading immigration documents from the client's file to preempt such a response.

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

- 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.
- Upload a November 2022 version of [Form G-639](#) with a client signature on Part 4. The client signature on Part 4 demonstrates consent. Note that USCIS has rejected filings using this option if the client's telephone number or address have been inputted online, so it is advisable not to include that information when utilizing this option.
- 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.<sup>13</sup>

#### ***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

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<sup>12</sup> 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.

<sup>13</sup> 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.

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.<sup>14</sup>

Documentation also may be submitted in support of a request for expedited processing, even if the client is not in removal proceedings. The documentation must meet the requirements of the regulation. 6 C.F.R. § 5.5(e)(1). As a practical matter, requesting expedited processing is futile.<sup>15</sup>

### ***Step 5: Review and Electronic Signature***

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

#### **B. Submission by Mail**

##### **1. Form G-639**

Although an A-File FOIA request may be 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 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.

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<sup>14</sup> 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), <https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act> (updated Dec. 9, 2022).

<sup>15</sup> In fiscal year 2022, USCIS only granted 5 expedited processing requests while denying 11,707. Department of Homeland Security, Fiscal Year 2022 Freedom of Information Act Report to the Attorney General of the United States and Director of the Office of Government Information Services, at 26, <https://www.dhs.gov/sites/default/files/2022-03/FY%2021%20DHS%20Annual%20FOIA%20Report.pdf> (Feb. 2022).

## ***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***

It is important to use the November 3, 2022 version of [Form G-639](#). 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.<sup>16</sup>

Attorneys report that USCIS has recently changed its long-standing practice of accepting G-639 Forms containing electronic signatures, including Adobe signatures, and has begun rejecting them.<sup>17</sup> Due to these recent reports, it is advisable to avoid electronic signatures unless and until USCIS changes its position. A PDF scan of a wet signature is acceptable.

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 requester. 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. A client signature on Part 4 of the

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<sup>16</sup> If the prior, now outdated, July 2022 version of Form G-639 lacked a client signature, USCIS would reject the request.

<sup>17</sup> In relevant part, USCIS' Policy Manual provides: "For benefit requests filed electronically as permitted by form instructions, USCIS accepts signatures in an electronic format. Benefit requestors must follow the instructions provided to properly sign electronically." The regulation on which the Policy Manual relies, 8 C.F.R. § 103.2(a)(2), provides: "Unless otherwise specified in this chapter, an acceptable signature on a benefit request that is being filed with the USCIS is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format." The instructions to Form G-639 do not address electronic signatures. Rather, with respect to the requester's certification in Part 3, the instructions simply provide that "[a] stamped or typewritten name in place of a signature is not acceptable." USCIS, Freedom of Information Act/Privacy Act Request, <https://www.uscis.gov/sites/default/files/document/forms/g-639.pdf>, at 7 (updated Nov. 3, 2022). Thus, although electronic signatures are neither specifically permitted nor disallowed, because of reports USCIS rejects electronic signatures, practitioners are advised to avoid using them.

November 2022 form satisfies both verification of identity and consent to release records.<sup>18</sup>

## 2. Written Requests Without Form G-639

An A-File FOIA request also may be submitted by in writing by mail without Form G-639.<sup>19</sup> 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<sup>20</sup>

## II. Inadequate Responses to A-File FOIA Requests

Prior to the *Nightingale* injunction, USCIS did not process A-File FOIA requests for weeks, months, or even years due to its backlog. In that situation, where the agency simply failed to respond, attorneys need not exhaust administrative remedies and can file a lawsuit in federal district court after the statutory period for a response has elapsed. *See* 5 U.S.C. § 552(a)(6)(A)-(C).

Following the *Nightingale* injunction, USCIS is processing A-File FOIA requests in a more timely manner, but as noted, attorneys and accredited representatives increasingly report that USCIS’ responses are inadequate. For example, USCIS is increasingly issuing final determinations which claim that no records exist or releasing incomplete productions when the requestor knows or has reason to believe that some or additional records exist, respectively.

A requestor who wishes to challenge an adverse USCIS response must first exhaust administrative remedies through an administrative appeal. 5 U.S.C. § 552(a)(6)(A)(ii); 6 C.F.R. § 5.8. Although administrative appeals are reviewed by a different FOIA officer, presumably a more experienced officer, they are not covered by the *Nightingale* injunction and therefore may

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<sup>18</sup> The prior, now outdated, July 2022 version of Form G-639 required the attorney, as the third-party requestor, to sign Part 4.

<sup>19</sup> USCIS, [Request Records Through the Freedom of Information Act or Privacy Act, Where to Make Your Request](https://www.uscis.gov/records/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).

<sup>20</sup> *Id.*

linger. If the agency denies the appeal in whole, in part, or does not respond within in the statutory timeframe, counsel may file a lawsuit in federal district court challenging, inter alia, the adequacy of the search, improper redactions, and/or the failure to produce segregable information.<sup>21</sup>

Because the *Nightingale* injunction requires USCIS to make determinations within 30-business days, it may be faster to submit a new A-File FOIA request that attaches additional documentation evidencing the existence of the records USCIS previously claimed did not exist or failed to find when conducting its prior search.

### III. 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.<sup>22</sup>

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;
- 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](mailto: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.

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<sup>21</sup> See *supra* n.10, at 19-22. A template FOIA complaint with these claims is available on the practice advisory page of NILA's website.

<sup>22</sup> USCIS, [Request Records Through the Freedom of Information Act or Privacy Act, How to Get Results Faster](https://www.uscis.gov/records/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).

**Addendum A**

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

My name is [full name of the subject of the records]. I was born on [date of birth] in [place of birth]. I currently reside at [address].

I hereby 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)