



# FOIA ALERT ON PROCESSING CHANGES

By Peggy Gleason and Liz Taufa

In recent months, practitioners have been reporting troubling new patterns in Freedom of Information Act (FOIA)<sup>1</sup> processing of A-file requests. Some people report unusually high rejection rates on FOIA requests for reasons related to address requirements. Rejections due to “no record” also have been reported even where the requester is sure that there is a record because they have a partial paper trail of contacts with U.S. Citizenship and Immigration Services (USCIS). Other practitioners have experienced over redaction of FOIA responses. This alert will focus on the address issue and suggest how to respond.

## I. Rejections of FOIA due to address requirements

USCIS is sometimes rejecting FOIAs based on address requirements for the subject, that is, the noncitizen whose record is being sought by a representative. The rejections have happened where the representative lists the noncitizen’s address as care of (c/o) the attorney for the FOIA, a practice that has been accepted until recently.

We are still investigating details of these rejections and will publish further guidance later. For now, we advise people to file individual administrative appeals in such cases. If additional information on a requester, such as residential address, is already in the possession of USCIS (i.e., the address of the requester was part of a filing for and immigration benefit with USCIS), then responding with the further address information may be an option where the rejection was based on an address deficiency. If not, then an administrative appeal may be filed.

## II. What address is required for subject of record (the noncitizen)?

The practice of using a care of (c/o) address to list a representative’s address rather than a requester’s address has been accepted by USCIS until recently. What address is required? The Form G-639 *Freedom of Information Act/Privacy Act Request* states that a “contact address” is sufficient for a FOIA and its instructions give examples of alternative addresses. The regulations require a “current address” without defining whether that is a postal address, residential address, contact address, or a c/o address. In the rejections, USCIS has been pointing to the regulations cited below without further explanation.

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<sup>1</sup> 5 U.S.C. § 552.

The FOIA regulations state at 6 CFR 5.3(a):

*“(3) A requester who is making a request for records about him or herself must comply with the verification of identity provision set forth in subpart B of this part.*

*“(4) Where a request for records pertains to a third party, a requester may receive greater access by submitting either a notarized authorization signed by that individual, in compliance with the verification of identity provision set forth in subpart B of this part, or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual, authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (e.g., a copy of a death certificate or an obituary). As an exercise of its administrative discretion, each component can require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.”*

FOIA regulations expressly incorporate Subpart B, which are the Privacy Act regulations, particularly 6 C.F.R. § 5.21(g), referencing 6 C.F.R. § 5.21(e) which states that for verification of identity:

*“The individual must provide their full name, current address, date and place of birth, and country of citizenship or residency.”*

Thus, FOIA regulations require a “current address,” but do not define whether that is a contact address, a c/o address, a physical address, or a residential address.

In contrast, USCIS’s Form G-639, *FOIA/ Privacy Act Request* states that for the address of subject of record the noncitizen should list a contact address, including a P.O. (post office) Box or other way that the person receives mail.<sup>2</sup> The form gives examples of permissible addresses, and a c/o address is one of those specifically listed.<sup>3</sup> As noted, in the FOIA statute and regulations, “address” is not defined as to physical, residential, mailing or contact address.

If you are experiencing rejections based on the address issue, and the current address of the noncitizen is already in USCIS’s possession because of previous filings, then supplying a residential address with a re-filed FOIA may be an option instead of appealing. This may be the fastest way to obtain a result to your FOIA.

However, if you do not want to disclose information that is not yet known to the government, then another option is to file an administrative appeal over the interpretation of “address,” citing the intent of the statute, the language in the G-639, and the relevant regulations.

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<sup>2</sup> USCIS, Form G-639. *FOIA/Privacy Act Request* states at p. 5, “Subject of Record’s Mailing Address and Contact Information 8. List the subject’s contact information. You may list a valid residence, Army Post Office (APO), Fleet Post Office (FPO), or commercial address in the United States. You may list a post office address (PO Box) if that is how the subject receives their mail.”

<https://www.uscis.gov/sites/default/files/document/forms/g-639.pdf> . On p. 7 of the G-639 for address the form states “Third-Party Requestor Mailing Address and Contact Information, In Care of Name (if any).” thus it specifically states that a c/o address should suffice.

<sup>3</sup> *Id.*

### III. Introduction to FOIA administrative appeals

A requester who receives an adverse determination may appeal the determination within the agency.<sup>4</sup> Filing an administrative appeal is not complicated and there is no fee. The appeal can be in a letter format or a brief to the designated appeal authority of the agency.<sup>5</sup> No particular form is required. Information on where to file a FOIA appeal is specified on the agency's website. Upon receiving an administrative appeal, an agency has twenty business days to make a determination, although, as in the context of initial determinations, it may extend this timeline by ten days for unusual circumstances.

One of the reasons that any type of address should be acceptable is that the statute itself favors release of information where it is not specifically prohibited. Basic principles of FOIA are that it confers on the public a right to access federal agency information.<sup>6</sup> There is a presumption of openness with the FOIA statute. If an agency fails to adequately respond to a valid FOIA request, an appeal is possible.<sup>7</sup>

Representatives should include a G-28 *Entry of Appearance* and consent from the subject of record. If sent as a letter, the correspondence needs to state that it is an appeal of an initial decision on a FOIA and recite specific legal reasons for the appeal. Remind the government that the purpose of FOIA is to inform the public of the operations of the federal government and that FOIA confers on the public the right to access federal agency information.<sup>8</sup>

If a requester submits a valid request, that is, one that reasonably describes the records sought, an agency must execute an "adequate" or "reasonable" search.<sup>9</sup> Failure to respond with an adequate or reasonable search where the requester has made a valid FOIA request is grounds for appeal.

FOIA provides that when processing requests, agencies should withhold information only if they reasonably foresee that disclosure would harm an interest protected by an exemption, or if disclosure is prohibited by law. The exemptions are very specific and have been interpreted by case law.<sup>10</sup> In responding to a FOIA request, an agency must consider whether partial disclosure of information is possible whenever they determine that full disclosure is not

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<sup>4</sup> 5 U.S.C. § 552(a)(6)(A).

<sup>5</sup> See the address for appeals to USCIS at their FOIA webpage, <https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act> .

<sup>6</sup> See *Pratt v. Webster*, 673 F.2d 408, 413 (D.C. Cir. 1982) ("[FOIA] was enacted by Congress ... in order to provide a statutory right of public access to documents and records held by agencies of the federal government.").

<sup>7</sup> 5 U.S.C. § 552(a)(6)(A). Within twenty (or, in the event of unusual circumstances, thirty) days of receiving a proper request, an agency must inform the requester of his or her ability to appeal an adverse determination "within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination," *id.* § 552(a)(6)(A)(i), (B)(i), (a)(6)(A)(i)(III)(aa).

<sup>8</sup> *DOD v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (explaining that "the 'core purpose of FOIA' ... is 'contributing significantly to public understanding of the operations or activities of the government'" (emphasis omitted) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 777 (1989))).

<sup>9</sup> See *Hamdan v. DOJ*, 797 F.3d 759, 770 (9th Cir. 2015); *Willbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004); see also *Edelman v. SEC*, 172 F. Supp. 3d 133, 144 (D.D.C. 2016) ("An agency has an obligation under FOIA to conduct an adequate search for responsive records.").

<sup>10</sup> 5 U.S.C. § 552(b)(1)-(9)

possible and they should take reasonable steps to segregate and release nonexempt information.<sup>11</sup>

Because FOIA favors release of information over very specific allowable exceptions to disclosure, individuals can argue on appeal that any type of current address supplied by subject of record should be sufficient. As stated, the regulation does not specify that residential/physical address of the noncitizen is needed, and a current address that is c/o or a P.O. Box suffices according to the government's own G-639. Cite to the G-639 language noted above in your appeal and argue that the regulation does not define "current address" as anything more specific, but the G-639 does, and the intent of the statute favors release of information unless specifically prohibited, thus a c/o address for the representative should be sufficient.

## IV. Conclusion

Executive agencies of the Federal government have an obligation to release information to the public unless a specific exemption is provided by the FOIA statute. Individuals seeking an A-file for a client should push back on USCIS FOIA rejections due to an overly narrow interpretation of the regulation's identity requirement of "current address" because type of address is not stated in the regulation, and the G-639 specifies an array of contact addresses as permissible examples.



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<sup>11</sup> For an exhaustive treatment of FOIA law see, Library of Congress, Congressional Research Service, *FOIA: A Legal Overview* (June 27, 2024) <https://www.congress.gov/crs-product/R46238> .

