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Comment from Immigrant Legal Resource Center (ILRC) on Freedom of Information Act (FOIA) Final Rule

Submitted to: Roman Jankowski, Chief Privacy Officer

January 30, 2026

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RE: Public comment on Final Rule, DHS, Office of the Secretary, 6 CFR Part 5, RIN 1601-AB21, Privacy Act of 1974 (Dec. 23, 2025)

Dear Chief Jankowski,

We write to express our deep concern and objection to the publication of final rule published December 23, 2025 that makes significant changes to the processing of Freedom of Information Act (FOIA) requests submitted to the Department of Homeland Security (DHS). This rule was published without notice to the public and DHS deprived the public of the opportunity to comment on the substantive changes implemented in the final rule. This is a violation of the Administrative Procedures Act (APA), and the rule should be rescinded immediately.

**Background on Immigrant Legal Resource Center**

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates, and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity.

The ILRC publishes advisories and manuals for legal practitioners in many areas of family and humanitarian immigration law which also involve filing FOIA requests to research background and procedural history before filing a benefits request. ILRC also publishes manuals and advisories regarding FOIA with government agencies and regularly conducts webinars and trainings on FOIA. Through our extensive network with service providers, immigration practitioners, and immigration benefits applicants, we have developed a profound understanding of the barriers faced by low-income immigrants of color seeking immigration benefits, including access to information about their case through FOIA. The comments that follow are gleaned from the experiences of many low-income immigrants who we and our partners serve.

These low-income non-citizens applying for benefits depend on FOIA to provide information on their procedural history with DHS so that they are properly situated to file for a benefit. Many persons have long and complicated histories with prior applications to DHS, and until that procedural history is unraveled through information revealed in a FOIA request for their file, it is completely unclear how to proceed with future applications that they may be eligible for. Such immigrants are seeking family or humanitarian benefit applications that they are eligible for to support their families and employers and ensure their stable future in the United States.

## **Introduction**

DHS issued the final rule on December 23, 2025, with an effective date of January 22, 2026. There was no opportunity to comment as a proposed rule was never published. DHS also declined to issue the rule as an interim final rule which would have allowed the public a chance to comment. As such, DHS has illegally published this rule without public input. Despite the lack of public avenue for comment, ILRC is submitting this comment to the author of the rule to protest the rule's broad impact on the public and DHS's blatant violations of the Administrative Procedures Act<sup>1</sup> and the Freedom of Information Act.<sup>2</sup>

The rule makes two major changes to all DHS components and their processing of FOIA requests.

First, it eliminates paper-filed FOIAs, which have always been an option until now. Members of the public who are not computer literate and do not have online access are prejudiced by this change, and all members of the public are prejudiced by the lack of due process and comment that went into this change in government handling of FOIA requests. Under the rule, all FOIAs must go through the electronic portal controlled at DHS, which has been plagued with

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<sup>1</sup> 5 U.S.C. § 551 et seq.

<sup>2</sup> 5 U.S.C. § 552 et seq.

submission challenges since its inception. The electronic portal also lacks transparency for the public.

Second, the rule allows DHS to “administratively close” FOIA requests that they deem to have inadequately described the records sought. No notice of decision in such cases is described in the rule, thus rejections at receipt are an internal process which is controlled only by administrative discretion with no transparency to the public.

## **I. DHS violated the APA by issuing this as a final rule without prior notice and comment because it lacks good cause and is not in the public interest**

The APA requires public notice and comment before a substantive rule changes public options. DHS violated the APA notice and comment requirements by publishing this as a final rule with no period of public input. The pretext that DHS claims justifies this is that the rule has an exception under 8 USC § 553(b)(A) because it only involves rules of agency organization, procedure, and practice. This is false. Members of the public who file FOIA requests will be impacted by these changes, so the rule does not only involve internal procedure and practice, but public-facing procedures as well.

DHS also claims that notice and comment is unnecessary because the rule will not impact the public as electronic submission of FOIA “is a routine and accepted method of seeking information in today’s society, and the vast majority of requesters already submit their requests this way.”<sup>3</sup> No statistics are provided of how current FOIAs are submitted, and no survey of the public was carried out to arrive at this conclusion. U.S. Census data confirms that many sectors of the U.S. population lack full access and ability utilizing the internet, including households that rely solely on smartphones for access, the elderly, those without a high school education, the unemployed, persons of color and persons living in poverty.<sup>4</sup> Immigrants are also on the negative side of the digital divide that will impact their access to online FOIA filing.<sup>5</sup> DHS also claims that the rule will not impact the substance of FOIA requests, thus notice and comment is unnecessary. DHS is attempting to turn the “good cause” exception to the notice and comment requirement into the default position when instead it should be narrowly construed.<sup>6</sup>

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<sup>3</sup> DHS, Privacy Act of 1974, Final Rule (Dec. 23, 2025), 90 FR 59945.

<sup>4</sup> Dr. Brian Whitacre, Oklahoma State University, *Large Screen Computer Ownership: A Call to Action. Insights from the American Community Survey Census Data* (October 10, 2025), <https://digitunity.org/data-highlights-persistent-u-s-computer-ownership-gap-in-detail/>.

<sup>5</sup> See, for example, Migration Policy Institute, *The Digital Divide Hits U.S. Immigrant Households Disproportionately During the Covid-19 Pandemic*, (Sept. 3, 2020), explaining that the proportion of U.S. adults with no computer experience is much higher (21 percent) for immigrants who speak a language other than English at home, whereas only 5 percent of U.S. adults who speak English in the home have no computer experience.

<sup>6</sup> For instance, courts have widely held that the good cause exception should be narrowly construed, that rulemaking procedures are “unnecessary” only when agencies take non-discretionary actions or issue rules that are of little or no interest to the public, and that rulemaking procedures are most often “impracticable” or “contrary to the public

There is substantial litigation and scholarship regarding “good cause” and other notice and comment exemptions, and the standards are sometimes improperly claimed by agencies who want to speed up the process without public input, which is the case here with DHS and this final rule.<sup>7</sup> The overarching principle of the APA is that the statute strongly favors inclusion of notice and comment and that exemptions are narrowly construed to favor the strong interest in public participation in rulemaking.<sup>8</sup>

This rule will impact the public and should have been subject to APA notice and comment because it restricts FOIA access to members of the public who have full internet access and are computer literate. The only exception to the paper filing requirement specifically named in the rule is for incarcerated individuals who are requested to contact, via an electronic address, a DHS FOIA public liaison “who may facilitate, in limited circumstances (e.g. incarceration), an alternative method to submit requests...” 6 CFR § 5.21. Since incarcerated persons lack internet access, even this allowance for alternative FOIAs is meaningless.

## **II. The final rule unlawfully permits DHS to administratively close FOIA requests**

The rule will have broad impact on all members of the public who submit FOIA requests because the new discretionary administrative closure provision will result in DHS rejecting FOIAs at receipt without notice or decision to requesters. 6 CFR § 5.3(c).<sup>9</sup> The lack of decision will leave requesters without any means of responding to a decision or appealing it, despite the provisions for written decision and appeal in the FOIA statute. While the FOIA statute requires the public to make requests that adequately describe the records sought, it also has detailed requirements for the agency to respond to a requester with a determination and rights to appeal adverse determinations.<sup>10</sup> This final rule apparently places all responsibility on the public, and allows the government to decide in its discretion when it will make a determination or simply reject or administratively close a FOIA request.

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interest" if regulatory delay would threaten public health or welfare—but only if those threats are documented in an administrative record. *See, e.g., Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754–55 (D.C. Cir. 2001); *Hawai'i Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995).

<sup>7</sup> Kyle Schneider, Stanford Law Review, *Judicial Review of Good Cause Determinations Under the Administrative Procedures Act* (Jan. 2021).

<sup>8</sup> Congress rejected proposals that included the phrase “impracticable because of unavoidable lack of time or other emergency,” for example. *See* APA: Legislative History, 79th Cong. 1944-46 at 157, 168. *See also*, Juan L. Kavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317 (1946).

<sup>9</sup> The ILRC has received reports from the field that indicates that the agency was administratively closing requests before the effective date of the final rule.

<sup>10</sup> 5 U.S.C. §552(a)(6)(A)(i)(I),(III)(aa).

This final rule is another example of the Trump administration unlawfully asserting the good cause and procedural exceptions to APA notice and comment to avoid procedural hurdles designed to bring transparency and accountability to federal rulemaking. Rather than follow the law, federal agencies under this administration have taken these shortcuts because it is convenient for their political agenda, not what is best for the public. These actions, left unchecked, weaken our federal regulatory system and erode public trust.

**III. The final rule fails to provide supporting data or a credible rationale for an abrupt change in policy that will negatively impact millions of people who are seeking information from their own files at DHS**

The APA requires courts to “hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious and an abuse of discretion, or otherwise not in accordance with law; [or] without observance of procedure required by law.”<sup>11</sup> Under the APA, a rule should also explain why a rule is needed, what it would accomplish, and what data, research, analyses, and assumptions were used to develop the rule.<sup>12</sup> DHS did not provide adequate data, rationale or evidence to support a change of this magnitude and simply brushes off the very real effect that the change will have on the public. This final rule’s rationale is a thinly disguised political agenda intended to harm immigrants and avoid the accountability and transparency that FOIA provides and fails to submit supporting data or reasoned analysis. The final rule is arbitrary and capricious and should be withdrawn.

The final rule should be vacated in its entirety. If changes such as these are proposed, a proposed rule must be published in accordance with the law with an opportunity for public notice and comment.

Sincerely,

/s/

Peggy Gleason

Senior Staff Attorney

Immigrant Legal Resource Center

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<sup>11</sup> 5 U.S.C. § 706(2)(A)(D).

<sup>12</sup> 5 U.S.C. § 553(c).