

## CHAPTER 1

### INTRODUCTION TO RECORDS REQUESTS

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#### § 1.1 Why Submit a Records Request?

To provide accurate legal advice to clients, we not only need to stay abreast of immigration law and policy—we also need to know about our clients’ immigration and criminal histories. Immigration law is incredibly complex, and the details surrounding someone’s entry to the United States, family situation, and prior interactions with the criminal and immigration systems can have an enormous impact on eligibility for immigration relief.

The first, and most natural, way to find out information about our clients is simply by asking them. Immigration practitioners routinely use intake questionnaires to elicit important facts from clients that could affect their immigration case. See **Appendix X** for a sample intake questionnaire.<sup>1</sup> However, it is often critical to conduct background checks or other records requests to obtain corroborating evidence or to find out additional information that clients may not remember or may not have understood. Furthermore, there are many reasons a person may want to see the documents that the government has about them. When the person is applying for an immigration benefit or fighting removal, it is not only helpful, but also often essential to the success of the person’s case to have a copy of certain documents.

The information you want to request will vary depending on the client and the immigration relief in question. But in general, practitioners often file records requests for their clients to:

- find out about prior immigration or criminal violations;

**Example:** Estelle wants to apply for a green card through her U.S. citizen husband. She told you that she was arrested for shoplifting but that she thinks the criminal case was dismissed. You will want to conduct a records request to see how the case was resolved, and whether she has a conviction that will affect her eligibility.

- find out about prior applications filed for your client or interactions at the border;

**Example:** Nour entered the country unlawfully in 1995 and now wants to apply for a green card through her U.S. citizen daughter. She mentioned that her father

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<sup>1</sup> Immigrant Legal Resource Center, *Screening for Immigration Relief: Client Intake Form and Notes*, (Sept. 19, 2019), <https://www.ilrc.org/screening-immigration-relief-client-intake-form-and-notes>.

filed a family-based petition for her shortly after she arrived, but she does not know what happened to the petition. You will want to file a records request to see if the petition was approved, and whether it will affect her current case, such as allowing her to adjust status under INA § 245(i) rather than needing to consular process.

- know what documents the government has that could affect eligibility for relief;

**Example:** Kofi, a lawful permanent resident (LPR), was placed in removal proceedings for his recent drug conviction. You would like to argue that this is not a deportable controlled substance conviction, but you will want to file a records request to see what is in the record of conviction, and what documents the government has related to the conviction.

- assess potential risk of referral to ICE or other enforcement; and

**Example:** Yeung wants to apply for a green card, but he was apprehended at the border eight years ago. He does not know if he received an expedited removal order at that time. You will want to file a records request to find out if he was removed (if so, he could be subject to reinstatement of that order of removal).

- see a paper trail of previous immigration history to help piece together what happened.

**Example:** Lawrence went to a *notario* and received bad immigration advice to file a fraudulent asylum application. You will want to do a records request to find out what application(s) were filed.

## § 1.2 What Records Can I Get?

Records requests can be made for all types of personal information held by the government, such as:

- Immigration file (“A-File”);
- Border encounters;
- Criminal records;
- Tax returns;
- Federal employment records;
- Military service records; and
- Many more.

There are many different ways to file a records request. This is because each agency has its own method of maintaining records, and also because there are a series of different state and federal laws that guarantee individuals access to government information, each with its own regulations and procedures. The following sections will discuss the most common types of records requests: (A) Freedom of Information Act requests, (B) Privacy Act requests, (C) state public records requests, and (D) criminal background checks.

## A. Freedom of Information Act requests

The Freedom of Information Act (“FOIA”) is a federal statute that entitles every person access to certain information from the federal government.<sup>2</sup> A person can file a request under this act, called a “FOIA request,” to any federal agency to request documents about themselves or others. The statute mandates that a federal agency “shall make the records promptly available” to anyone who “reasonably describes those records” and makes the request “in accordance with published rules.”<sup>3</sup> FOIA requests are available to “any person,” regardless of immigration status. Throughout this manual, the “requester” is the individual who is requesting the records while the “subject” is the individual who is the subject of the FOIA request. In some cases, this may be the same person.

FOIA requests can be made to any federal agency within the U.S. federal executive branch. This means that FOIA cannot be used to request records from outside of the executive branch, such as records from Congress or from the federal courts. However, FOIA can be used to request information from federal cabinets, the military, government corporations, government controlled corporations, independent regulatory agencies, and other agencies within the executive branch.<sup>4</sup> FOIA does not apply to elected officials currently in office, such as the president or vice president, and generally does not apply to private companies (one big exception is Amtrak)<sup>5</sup> or entities that receive federal contracts or grants.<sup>6</sup>

The FOIA statute is one of the most important legal tools we have for learning about the federal government’s operations. FOIA created a presumption that the public has a “right to know” federal information.<sup>7</sup> Importantly, the burden is not on the requester to show why they need the information, but rather on the government to disclose the information or show why it falls within an exemption to disclosure. Congress passed the first FOIA bill in 1966. Despite his earlier opposition to the bill, as President Lyndon Johnson signed FOIA into law, he wrote:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation will permit’.... I signed this measure with a deep sense of pride that the United States is an open society.<sup>8</sup>

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<sup>2</sup> Freedom of Information Act, 5 U.S.C. § 552.

<sup>3</sup> 5 U.S.C. § 552(a)(3)(A).

<sup>4</sup> UH.R. Rep. No. 112-689 (2012), available at <https://www.congress.gov/112/crpt/hrpt689/CRPT-112hrpt689.pdf>.

<sup>5</sup> S. Rep. No. 92-756, at 9 (1972).

<sup>6</sup> See H.R. Rep. No. 112-689, at 5. But the Office of Management and Budget director must “ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act.” Pub. L. No. 105-277 (1998).

<sup>7</sup> H.R. Rep. No. 112-689, at 2.

<sup>8</sup> Nat’l Security Archive, Statement by the President Upon Signing S.1160 (July 4, 1966), available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB194/Document%2031.pdf>.

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At that time, FOIA was only the third such law in the world, and by far the strongest.<sup>9</sup> Nevertheless, the original bill met with resistance<sup>10</sup> from the federal agencies and did not have the enforcement mechanisms necessary to make government agencies comply. FOIA was later amended significantly in 1974 to add, among other provisions, timeframes and sanctions for noncompliance.<sup>11</sup> The FOIA statute has been amended several times since then.<sup>12</sup> The most recent set of amendments were passed in 2016 with the FOIA Improvement Act to improve public digital access to records, among other changes.<sup>13</sup>

The majority of this manual is dedicated to requests under the federal FOIA statute because these requests are such invaluable tools in immigration law.

## **B. Privacy Act requests**

The Privacy Act of 1974 was created to allow individuals to (1) find out how personal records are collected and maintained by the federal government; (2) access personal records; and (3) amend any personal records that are inaccurate or incomplete. The Computer Matching and Privacy Protection Act of 1988 amended the Privacy Act to add specific protections for certain digital records.<sup>14</sup>

The Privacy Act is meant to govern how and what personal information is stored and protected by the government. Like FOIA, the Privacy Act applies only to records maintained by the executive branch of the federal government, and not to Congress or the federal courts. Similar to FOIA, the Privacy Act generally does not apply to private companies.<sup>15</sup>

The Privacy Act covers all personal records contained in federal “systems of records.”<sup>16</sup> A system of records is defined as any database where you can search by personally identifiable information, such as a name, social security number, or other unique identifiers.<sup>17</sup> If information is not contained within a system of records, it is not covered by the Privacy Act, although it might still be accessible through a FOIA request.

One of the biggest differences between FOIA and the Privacy Act is that Privacy Act requests are only available for U.S. citizens and lawful permanent residents (LPRs). In practice, “mixed

<sup>9</sup> H.R. Rep. 112-689, at 2.

<sup>10</sup> National Security Archive, *Veto Battle 30 Years Ago Set Freedom of Information Norms* (Nov. 3, 2004), available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB142/index.htm>.

<sup>11</sup> National Security Archive, *FOIA Legislative History*, <https://nsarchive.gwu.edu/foia/foia-legislative-history/> (last visited Sept. 26, 2019).

<sup>12</sup> *Id.*

<sup>13</sup> *See id.*

<sup>14</sup> Computer Matching and Privacy Protection Act of 1988, Pub. L. No. 100-503 (S 496) (1988). This amendment applies when individuals’ records are used in computer matching. Computer matching is when digital records are compared to determine eligibility for certain federal benefits programs. If the records used in computer matching involve a system of records about individuals, this amendment requires that the individuals be notified of the results of the matching prior to any adverse action being taken as a result, and with the opportunity to contest the result.

<sup>15</sup> *See* The Privacy Act of 1974, as amended by 5 U.S.C. § 552(a), available at <https://www.justice.gov/opcl/privstat.htm>.

<sup>16</sup> Privacy Act Implementation, 40 Fed. Reg. 28948 (July 9, 1975).

<sup>17</sup> *Id.*

databases” (e.g., databases that contain information from U.S. citizens, LPRs, and people with other or no immigration status) have been treated as covered by the Privacy Act. Indeed, in 1975, the Office of Management and Budget instructed that “[w]here a system of records covers both citizens and nonresident aliens, only that portion which relates to citizens or resident aliens is subject to the Act [however] agencies [should] treat such systems as if they were, in their entirety, subject to the Act.”<sup>18</sup> In other words, the U.S. government has had a longstanding policy of limiting the government’s sharing of personal information without permission to citizens and non-citizens alike. Those protections include limits on sharing personal information without consent; the right to access one’s own records; and the right to request corrections to records, subject to certain exceptions.

In 2003, the Office of Management and Budget further clarified that agencies could “choose to extend the protections of the Privacy Act” to all noncitizens.<sup>19</sup> In 2007, the Department of Homeland Security (DHS), explicitly stated that it would treat all personally identifiable information as protected under the Privacy Act, regardless of citizenship or immigration status of the person involved.<sup>20</sup>

However, on January 25, 2017, President Donald Trump issued an Executive Order with a new Privacy Act mandate: “Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.”<sup>21</sup> This means that DHS’s mixed system policy is revoked. Individuals who are not U.S. citizens or LPRs can no longer seek to access or amend records from DHS under the Privacy Act, and do not benefit from the same data privacy protections.<sup>22</sup>

It remains unclear the effect of this Executive Order on the handling of records covered under the Privacy Act. As of the date of publication, there have been no reports of widespread issues in the way that data is stored and shared, as there are other, still applicable, privacy laws that may apply.<sup>23</sup> Nonetheless, practitioners should still be vigilant for any irregularities in their clients’ ability to access records under the Privacy Act.

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<sup>18</sup> *Id.*

<sup>19</sup> Off. of Mgmt. and Budget, *OMB Guidance for Implementing the Privacy Provisions of the E-Government Act of 2002* (Sept. 26, 2003) available at <https://www.whitehouse.gov/wp-content/uploads/2017/11/203-M-03-22-OMB-Guidance-for-Implementing-the-Privacy-Provisions-of-the-E-Government-Act-of-2002-1.pdf>.

<sup>20</sup> Memorandum from Chief Privacy Officer, Dep’t of Homeland Sec., *Privacy Policy Guidance Memorandum No. 2007-01/Privacy Policy Directive 262-12, DHS Privacy Policy Regarding Collection, Use, Retention, and Dissemination of Information on Non-U.S. Persons*, as amended from Jan. 19, 2007, available at <https://www.dhs.gov/sites/default/files/publications/privacy-policy-guidance-memorandum-2007-01.pdf>.

<sup>21</sup> Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

<sup>22</sup> See Letter from Am. Civ. Liberties Union to Donald F. McGahn, Assistant to the President and White House Counsel (Feb. 28, 2017) available at <https://www.aclu.org/letter/aclu-letter-white-house-counsel-regarding-privacy-implications-executive-order-13768>.

<sup>23</sup> See, e.g., 26 U.S.C. § 1603 (keeping taxpayer information confidential); *Social Security Administration, GN 03313.095, Program Operations Manual System (POMS), (2016)* (keeping social security information

The Privacy Act allows U.S. Citizens and LPRs to access documents from the executive branch in much the same way as FOIA. Thus, U.S. citizens and LPRs who file FOIA requests may also want to make a records request under the Privacy Act.<sup>24</sup> FOIA and the Privacy Act have slightly different exemptions, and a request made under both may result in more information. Many federal agencies automatically treat records requests, where applicable, as being made under both FOIA and the Privacy Act. This approach is beneficial, where applicable, because it provides requesters with the maximum amount of information available under the law.

USCIS has created a specific form for FOIA and Privacy Act requests, discussed in detail in **Chapter 3**. This same form can be used to make a request under the Privacy Act to amend a record. See **Chapter 3**.

The Privacy Act is discussed as it relates to FOIA and other background checks throughout this manual, but an in-depth analysis of the Privacy Act is beyond the scope of this manual. For information about how to make a request under the Privacy Act, see U.S. House of Representatives, *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, available at <https://www.congress.gov/112/crpt/hrpt689/CRPT-112hrpt689.pdf>.

### C. State public records laws

Every state in the United States has public records laws.<sup>25</sup> These state laws vary in terms of when they were passed and what disclosure they require, but each state has some mechanism for providing individuals and the public with government records.<sup>26</sup> Each state allows individuals to request records, regardless of whether the individual is a resident of the state in question.<sup>27</sup> Many of these state laws are similar to the federal FOIA statute, but not all. Because the laws vary, it is critical to review the particular laws, regulations, and procedures of the state whose records you are seeking before requesting any records. For a complete list of state laws, see <https://www.FOIAadvocates.com>.

This manual discusses state and local criminal background checks in **Chapter 2**, some of which fall under state public records laws. However, a thorough discussion of state public records laws is beyond the scope of this manual.

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confidential); U.S. Census Bureau Privacy Pledge, 81 Fed. Reg. 94321 (Dec. 23, 2016) (keeping census information confidential); see also Dep't of Homeland Sec., *Privacy Policy Guidance Memorandum* (Apr. 25, 2017), available at [https://www.dhs.gov/sites/default/files/publications/PPGM%202017-01%20Signed\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/PPGM%202017-01%20Signed_0.pdf) (applying certain Fair Information Practice Principles to all individuals, regardless of citizenship).

<sup>24</sup> Indeed, Congress advises that “[t]o take maximum advantage of the laws, an individual seeking information about himself or herself should ordinarily cite both laws,” as information exempt under one law may be subject to disclosure under the other. H.R. Rep. 112-689, at 2.

<sup>25</sup> Ballotpedia, *Years State FOIA Laws Were Enacted*, [https://www.ballotpedia.org/Years\\_that\\_state\\_FOIA\\_laws\\_were\\_enacted](https://www.ballotpedia.org/Years_that_state_FOIA_laws_were_enacted) (last visited Aug. 19, 2019).

<sup>26</sup> *Id.*

<sup>27</sup> FOIAAdvocates, *State Public Records Laws*, available at <http://www.foiadvocates.com/records.html> (last visited Aug. 19, 2019).

## D. Criminal background checks

A criminal background check can include a broad category of records requests used to search for details about a person's criminal record. The main types of criminal background checks include a Federal Bureau of Investigation (FBI) background check; a state background check from the State Attorney General's office, State Police, or a similar department; and a court-specific records request. Background checks pull information about a person's encounters with the criminal justice system from different law enforcement and criminal databases. A response may disclose documents such as incident reports, arrest reports, criminal charges, and court records.

See **Chapter 2** for an in-depth discussion of criminal background checks.

### § 1.3 Are There Any Risks in Filing a Records Request?

Filing a records request can be an invaluable, and necessary, step in many immigration cases. However, each records request should be carefully planned—not only to maximize the usefulness of the agency response, but also to minimize any risks of filing a request. In most cases, the benefits of filing a request for necessary information will outweigh the risks of filing a records request. But it is important to be aware of possible risks.

There are three main risks associated with filing a records request: (1) the requester might rely on a response that is wrong or incomplete; (2) the government could use the information in the records request against the requester; (3) the information requested might not be necessary and could harm the case. Each risk will be discussed below.

#### A. The requester might rely on a records response that is wrong or incomplete

As this manual describes throughout, different agencies maintain records in different ways; any given agency will have its own method of retention, correction, and destruction of records. While records requests are critical to find out what documents an agency might have, the responses may not be correct or complete. For example, nearly half of all FBI background checks are flawed.<sup>28</sup> The biggest risk of filing a records request is that you or your client will give the response too much weight and make decisions based on an incomplete or erroneous record. This means you need to look at the documents you receive from a records request very carefully and weigh them against what you already know. Do not necessarily take FOIA, criminal background checks, or any other records as definitive, but simply as more evidence in your case. Sometimes records might be missing that will change the analysis completely.

**Example:** Leni's FBI background check revealed that he had been arrested for a felony burglary charge in 2012. The background check did not include the fact that the charge

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<sup>28</sup> See Nat'l Emp. L. Project, *Faulty FBI Background Checks for Employment: Correcting FBI Records is Key to Criminal Justice Reform* (Dec. 2015), available at <https://s27147.pcdn.co/wp-content/uploads/NELP-Policy-Brief-Faulty-FBI-Background-Checks-for-Employment.pdf>; see also U.S. Gov't Accountability Off., *Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used for Employment-Related Background Checks* (Feb. 2015), available at <https://www.gao.gov/assets/670/668505.pdf>. A Government Accountability Office analysis in 2015 found that a majority of states maintain incomplete criminal history records, which are used for FBI background checks.

had later been dismissed due to mistaken identity. Leni and his representative will need to find additional evidence to show the final disposition of the arrest.

**B. The government could use the information in the records request against the requester**

Remember that every records request you or your client submit is being sent to a government agency. This means that you need to be very careful about the information that you include in the request. Although we have not heard of anyone being picked up by immigration enforcement because of filing a records request, there is no guarantee that this will not happen. To protect your client, we recommend NOT listing the client's physical address in the request, or any other information you do not want the government to know. See **Chapters 2, 3, and 4** for specific guidance on how to fill out records requests strategically.

**Example:** Wei is contesting alienage in immigration court. He filed a FOIA with DHS to obtain his previous immigration records. Where the paper FOIA request form asks for his country of birth, he should not list his country of birth, as DHS could use this information as evidence against him in court.<sup>29</sup> Instead, he should state, "DHS alleges [insert country name]."

See **Chapter 3** for step-by-step instructions on filling out FOIA requests for DHS.

**C. The information requested might not be necessary and could harm your client's case**

It is important to think through carefully what information you need in a case before requesting records. Some information may be essential to a client's immigration case, such as when the client entered the country, or what their criminal sentence was. Other information, such as juvenile records, may not be necessary. Moreover, submitting juvenile records in an immigration case could actively harm your client's case. Just because you receive a document in a records response does not mean that you should submit it in an immigration application. Depending on the state, it may also be illegal for you or your clients to disclose juvenile records without prior juvenile court permission under state confidentiality laws. See **Chapter 5** for more information on juvenile records.

Similarly, a records response, especially to a court-specific records request, may reveal documents that exceed the record of conviction. The "record of conviction" is the minimal group of documents that an immigration adjudicator can review in certain circumstances to determine whether the person's conviction falls within a ground of removability. There is extensive case law on which documents have been deemed sufficiently reliable to constitute the record of conviction. It is thus imperative to make sure that you check the law in your circuit and think strategically

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<sup>29</sup> See USCIS, *G-639, Freedom of Information Act/Privacy Act Request*, <https://www.uscis.gov/g-639> (last visited: Sept. 26, 2019). Note, however, that this option is not available when using USCIS's new online FOIA request system—"Freedom of Information Act Records System (FIRST)"—to submit a FOIA request. See USCIS, <https://first.uscis.gov> (last visited: Oct. 3, 2019). The online form requires one to identify their country of birth and will not allow the applicant to proceed without picking a country from a pre-set dropdown menu. For this reason, we suggest that you avoid using the online system if the individual is contesting alienage.

about which criminal documents to submit with an immigration application; those that are not in the record of conviction may not only be unnecessary, but could also harm your client's case.

**Example:** Hugo was arrested and convicted for driving while intoxicated eight years ago. He filed a records request with the state court where he was convicted in preparation for his naturalization application. He received many documents in response, including his pre-sentence report, and his probation report. He is not required to submit the pre-sentence or probation report.<sup>30</sup> Submitting extraneous, unfavorable documents that are not required could not only be unnecessary but could also damage his application.

### § 1.4 How Do I Use This Manual?

This manual is designed as a toolbox to assist legal workers in (1) determining the options for requesting records in their clients' cases; (2) providing guidance and step-by-step instructions on where and how to file records requests in immigration cases; and (3) thinking creatively and strategically about how records requests can be used to represent immigrant youth, to defend clients in removal proceedings, and to advocate for clients more generally.

**Chapter 1** discusses the importance of filing records requests, reviews the main types of records requests, and outlines what the rest of the book will entail.

**Chapter 2** explains the various criminal background checks available to practitioners and their clients, including FBI background checks, state background checks, and court-specific records requests. Chapter 2 also discusses all of the overlapping criminal and law enforcement databases, what documents they contain, and who can access them. Using samples, Chapter 2 then discusses how to read common background check responses, with practice pointers.

**Chapter 3** describes how to file a FOIA request with DHS, including with U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, Customs and Border Protection, and the Office of Biometric Identity Management. It provides specific information and instructions for each of these components of DHS and includes a step-by-step guide, with practice tips, on how to fill out the G-639, the new online USCIS request system Freedom of Information Act Records System (FIRST), and various component-specific request forms.

**Chapter 4** covers how to file a FOIA request with the Department of State, the Department of Justice, and the U.S. Armed Forces. It provides specific information and instructions for filing a FOIA request in immigration cases for each of these agencies and includes practice tips.

**Chapter 5** addresses special considerations when filing records requests for immigrant youth. It provides guidance on certain circumstances in which additional requests for information outside of the general FOIA and criminal background check processes are appropriate. These include requesting the Office of Refugee Resettlement file when youth have been classified as "unaccompanied;" requesting juvenile delinquency records, keeping in mind any state confidentiality provisions that apply; and requesting information about whether a client's name has been added to a gang database.

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<sup>30</sup> USCIS, *N-400, Application for Naturalization*, available at <https://www.uscis.gov/n-400> (last updated: Mar. 22, 2019).

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**Chapter 6** discusses FOIA considerations for immigrants in removal proceedings. It provides information and guidance on how to accelerate USCIS FOIA requests, how to request personal review of immigration court files, how to make records requests pursuant to *Dent v. Holder* in the Ninth Circuit, and other due process arguments and subpoena options that might be available to help immigrants in removal proceedings access records.<sup>31</sup>

**Chapter 7** explains the FOIA appeal process, including how to challenge an agency's response to a FOIA request and what types of adverse actions can be appealed. It also provides detailed information on common FOIA exemptions, and some practice tips on challenging those exemptions. Chapter 7 then describes what administrative and federal court remedies are available, explaining the procedural steps of pursuing an appeal and how to use a Vaughn index.

**Chapter 8** introduces how to strategize and plan a FOIA for broader advocacy purposes, as opposed to submitting a FOIA for an individual case. It provides information about the kinds of immigration policies, data, and operational records the government keeps, and details when advocates may consider submitting a FOIA for greater transparency on immigration issues.

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<sup>31</sup> *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010).