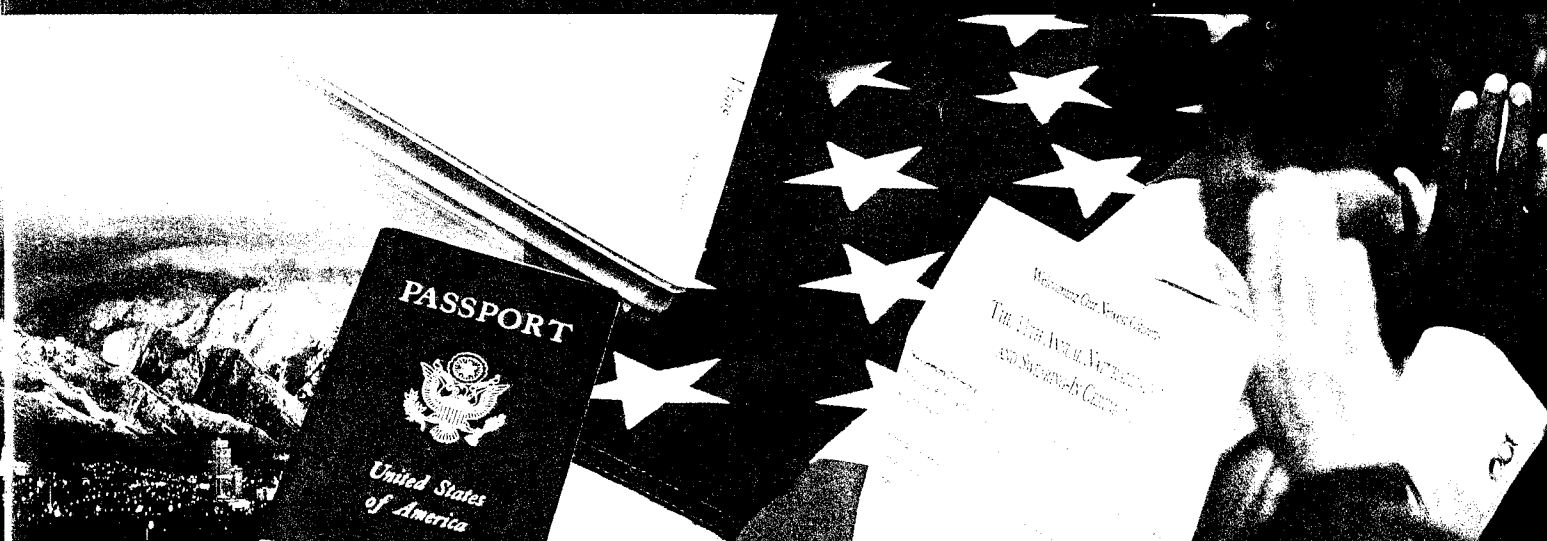


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GETTING THE FACTS ON YOUR CLIENT: FOIA AND CRIMINAL RECORDS SEARCHES

by John Patrick Pratt and Scott D. Pollock*

INTRODUCTION

In every immigration case, the Department of Homeland Security will refer to numerous databases and files to verify your client's identity and other information. Getting the facts on your client as early as possible will help chart an appropriate immigration strategy to obtain the client's objectives, and avoid an unexpected or unwanted result. Due to frequent substantive and procedural changes to the immigrations laws, familiarity with the Freedom of Information Act¹ (FOIA) and pertinent case law is increasingly critical to properly represent foreign nationals. A foreign national who is denied a visa may file a FOIA request to attempt to obtain information or documentation that could help overcome the visa denial. An alien who was in removal proceedings, was previously refused admission to the United States, or previously filed a petition or application with U.S. Citizenship and Immigration Services (USCIS) or legacy INS may need to review the file that is in the possession of the particular agency. Effective use of FOIA, therefore, can empower a practitioner to obtain the necessary documentation and information to properly represent the foreign national to avoid misrepresentations or mistakes.

Further, clients may report previous contacts with local, state, or federal law enforcement officers. The

proper analysis of these contacts is part of an attorney's effective representation. A client's admissibility or removability can of course turn on whether the client has been convicted of a crime involving moral turpitude, or an aggravated felony—or perhaps admitted to certain offenses that do not require a conviction. In-depth analysis of the immigration consequences of crimes goes beyond the scope of this article, but obtaining the client's criminal records is a first necessary step to making the analysis.

OVERVIEW AND PROCEDURAL REQUIREMENTS OF FOIA

FOIA Overview

FOIA generally provides that any person has a right, enforceable in federal court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement exclusions.

Enacted in 1966, and taking effect on July 4, 1967, FOIA firmly established an effective statutory right of public access to executive branch information in the federal government. The principles of government openness and accountability underlying FOIA, however, are inherent in the democratic ideal: "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."²

The thrust and structure of FOIA provides that virtually every record possessed by a federal executive branch agency must be made available to the public in one form or another, unless specifically exempted from disclosure or specially excluded from the Act's coverage in the first place.³ The nine exemptions of FOIA ordinarily provide the only

* This article was substantially written using the DOJ Office of Information and Privacy FOIA Guide & Privacy Act Overview, May 2004 Edition. The authors also recommend the Electronic Privacy Information Center (www.epic.org), publisher of the invaluable resource, "Litigation Under the Federal Open Government Laws."

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¹ 5 USC §552.

² *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

³ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975).

bases for nondisclosure,⁴ and generally they are discretionary, not mandatory, in nature.⁵

FOIA requesters who are dissatisfied with the government's disclosures are given a relative speedy remedy in the United States district courts, where judges determine the propriety of agency withholdings *de novo* and agencies bear the burden of proof in defending their nondisclosure actions.⁶

FOIA contains seven subsections, the first two of which establish certain categories of information that must be "automatically" be disclosed by federal agencies.

Subsection (a)(1) of FOIA requires disclosure (through publication in the *Federal Register*) of information such as descriptions of agency organizations, functions, and procedures; substantive agency rules; and statements of general agency policy.⁷ This requirement, therefore, provides the public with automatic access to very basic information regarding the transaction of agency business.⁸

Subsection (a)(2) requires that certain types of records—final agency opinions and orders rendered in the adjudication of cases, specific policy statements, certain administrative manuals, and some records previously processed for disclosure under the Act⁹—be routinely made "available for public inspection and copying." The courts have held that providing official notice and guidance to the general public is the fundamental purpose of the publication requirement of subsection (a)(1) and the "reading room" availability requirements of subsection (a)(2).¹⁰ Failure to comply with the requirements of either subsection can result in invalidation of related agency action,¹¹ unless the complaining party had actual and timely notice of the unpublished agency

policy,¹² is unable to show that he or she was adversely affected by the lack of publication,¹³ or fails to show that he or she would have been able to pursue "an alternative course of conduct" had the information been published.¹⁴

FOIA subsection (a)(3) mandates that all records not made available to the public under subsection (a)(1) or (a)(2), or exempted from mandatory disclosure under subsection (b), or excluded under subsection (c), are subject to disclosure upon an agency's receipt of a proper FOIA request from any person.¹⁵

Subsection (c) of FOIA, which was added as part of the Freedom of Information Act of 1986, establishes three special categories of law enforcement-related records that are entirely excluded from the coverage of FOIA in order to safeguard against unique types of disclosures.¹⁶ The extraordinary protection embodied in subsection (c) permits an agency to respond to a request for such records as if the records in fact did not exist.¹⁷

FOIA subsection (d) makes clear that the Act was not intended to authorize any new withholding of information, including from Congress, and subsection (e), which was modified as part of the Electronic Freedom of Information Act Amendments of 1986,¹⁸ requires an annual report from each federal agency regarding its FOIA operations and an annual report from the Department of Justice (DOJ) to Congress regarding both FOIA litigation and the DOJ's efforts to encourage agency compliance with FOIA.¹⁹

Subsection (f) defines the term "agency" so as to subject the records of nearly all executive branch entities to the Act and defines the term "record" to

⁴ See 5 USC §552(d).

⁵ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

⁶ See 5 USC §552(a)(4)(B)-(C).

⁷ See, e.g., *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 168 (D.C. Cir. 1997).

⁸ 5 USC §552(a)(1).

⁹ 5 USC §552(a)(2)(A)-(D).

¹⁰ See, e.g., *Welch v. United States*, 750 F.2d 1101, 1111 (1st Cir. 1985).

¹¹ See, e.g., *D & W Food Ctrs. v. Block*, 786 F.2d 751, 757-58 (6th Cir. 1986) (ruling that agency's interpretation of statute requiring certain businesses to be continuously inspected could not be enforced against noncomplying parties because it was not published).

¹² See, e.g., *United States v. F/V Alice Amanda*, 987 F.2d 1078, 1084-85 (4th Cir. 1993) (denying statutory defense of subparagraph (a)(1) when defendant had copy of unpublished regulations).

¹³ See, e.g., *Sheppard v. Sullivan*, 906 F.2d 756, 762 (D.C. Cir. 1994).

¹⁴ *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1136 (D.C. Cir. 1994).

¹⁵ See 5 USC §552(a)(3)(A) (stating that FOIA requests under subsection (a)(3) cannot be made for any records "made available" under subsections (a)(1) (or (a)(2)).

¹⁶ See generally *Attorney General's 1986 Amendments Memorandum* 18-30.

¹⁷ See *id.* 18, 27.

¹⁸ Pub. L. No. 104-231, 110 Stat. 3048.

¹⁹ 5 USC §552(e)(5).

include information maintained in electronic format. Lastly, FOIA subsection (g) requires agencies to prepare FOIA reference guides describing their information systems and their processes of FOIA administration, as an aid to potential FOIA requesters.

In response to several weaknesses contained in FOIA, federal courts established certain procedural devices, such as the requirement of producing a "Vaughn Index"—a detailed index of withheld documents and the justification for their exemption, established in *Vaughn v. Rosen*²⁰—and the requirement that agencies release segregable nonexempt portions of a partially exempt record, which was first articulated in *EPA v. Mink*.²¹ Furthermore, in 1976 Congress limited what could be withheld as exempt from disclosure under FOIA by narrowing the Act's incorporation of the nondisclosure provisions of other statutes.²²

Finally, FOIA was recently amended by the Intelligence Authorization Act of 2003, effective as of November 27, 2002.²³ FOIA now contains language that precludes agencies from disclosing records in response to any FOIA request that is made by any foreign government or international governmental organization, either directly or through a representative.²⁴ This amendment to FOIA is significant because this was the first time that Congress departed from the general rule that "any person" may submit a FOIA request.²⁵

FOIA Procedural Requirements

FOIA requires federal agencies to make their records promptly available to any person who makes a proper request for such records.²⁶ To provide a general overview of FOIA's procedural requirements, this section will follow a brief chronology of how a

typical FOIA request is processed from the point of determining whether an entity in receipt of a request is subject to FOIA in the first place, to the review of an agency's initial decision regarding a FOIA request on administrative appeal.

Entities Subject to FOIA. Agencies within the executive branch of the federal government, including the Executive Office of the President and independent regulatory agencies, are subject to the provisions of FOIA.²⁷ However, FOIA does not apply to entities that "are neither chartered by the federal government [n]or controlled by it."²⁸ Therefore, it is well settled that state governments,²⁹ municipal corporations,³⁰ the courts,³¹ Congress,³² and private citizens³³ are not subject to FOIA.

Agency Records. The U.S. Supreme Court has articulated a basic, two-part test for determining what constitutes "agency records" under FOIA: "Agency records" are records that are (a) either created or obtained by an agency, and (b) under agency control at the time of the FOIA request.³⁴ Since the "agency record" analysis usually hinges upon whether an agency has sufficient "control" over a record, courts have identified four relevant factors for an agency to consider when making such a determination: (a) the intent of the record's creator to retain or relinquish control over the record; (b) the ability of the agency to use and dispose of the record as it sees fit; (c) the extent to which agency personnel have read or relied upon the record; and (d) the

²⁷ 5 USC §552(f)(1).

²⁸ H.R. Rep. No. 93-1380, at 14 (1974), reprinted in House Comm. on Gov't Operations and Senate Comm. On the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents at 231-32 (1975).

²⁹ See, e.g., *Davidson v. Georgia*, 622 F.2d 895, 987 (5th Cir. 1980).

³⁰ See, e.g., *Jones v. City of Indianapolis*, 216 F.R.D. 440, 443 (S.D. Ind. 2003).

³¹ See, e.g., *United States v. Alarcon*, 6 Fed. Appx. 315, 317 (6th Cir. 2001) (holding that "the federal courts are specifically excluded from FOIA's definition of 'agency'").

³² See, e.g., *United We Stand Am. v. IRS*, 359 F.3d 595, 597 (D.C. Cir. 2004) ("The Freedom of Information Act does not cover congressional documents").

³³ See, e.g., *Allnutt v. U.S. Dep't of Justice*, 99 F. Supp.2d 673, 678 (D. Md. 2000).

³⁴ *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (holding that court opinions in agency files are agency records).

²⁰ 484 F.2d 820, 827 (D.C. Cir. 1973).

²¹ 410 U.S. 73, 91 (1973); See 5 USC 552(b) (sentence immediately following exemptions) (requiring disclosure of any "reasonably segregable" nonexempt information)

²² See Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976).

²³ Pub. L. No. 107-306, 116 Stat. 2383 (2002).

²⁴ Pub. L. No. 107-306, 116 Stat. 2383, §312 (codified at 5 USC §552(a)(3)(A), (e)).

²⁵ 5 USC §552(a)(3)(A); see also *NARA v. Favish*, 124 S.Ct. 1570, 1579 (2004) (observing that FOIA has a "general rule" that "the identity of the requester" is not taken into consideration).

²⁶ 5 USC §552(a)(3)(A). A list of FOIA officers and contact information for all federal government departments and agencies is available at www.usdoj.gov/04foia/foiacontacts.htm.

degree to which the records was integrated into the agency's recordkeeping system or files.³⁵ Agency "control" is also the predominant consideration in determining the "agency record" status of records that are either generated³⁶ or maintained³⁷ by a government contractor.

FOIA applies only to "records," not to tangible, evidentiary objects.³⁸ The courts initially defined "record" by relying on the traditional dictionary meaning of the term.³⁹ However, the Supreme Court subsequently broadened the meaning of "record" by incorporating the more modern record media referenced in the Records Disposal Act⁴⁰ into its definition of the term.⁴¹ With the passage of the Electronic Freedom of Information Act Amendments of 1996,⁴² FOIA now defines the term "record" as simply "includ[ing] any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format."⁴³

FOIA Requester. A FOIA requester can be made by "any person," a broad term that encompasses individuals (including foreign citizens), partnerships, corporations, associations, and foreign or domestic governments.⁴⁴ A request may also be made through an attorney or other representative on behalf of "any person."⁴⁵

There are two narrow exceptions to this broad "any person" standard. The first exception is the "Fugitive Disentitlement Doctrine" where courts have denied relief under FOIA to fugitives from justice if the requested records relate to the requester's

fugitive status.⁴⁶ The Fugitive Disentitlement Doctrine also applies when the FOIA plaintiff is an agent acting on behalf of a fugitive.⁴⁷ The second exception is the FOIA amendment enacted by the Intelligence Authorization Act of 2003,⁴⁸ which precludes agencies of the intelligence community⁴⁹ from disclosing records in response to any FOIA request that is made by any foreign government or international governmental organization, either directly or through a representative.⁵⁰

A FOIA request can be made for any reason whatsoever; FOIA requesters generally do not have to justify or explain their reasons for making FOIA requests.⁵¹ The Supreme Court has specifically stated that a FOIA requester's basic access rights are neither increased nor decreased because the requester claims to have a particular interest in the records sought.⁵² Nevertheless, there are two types of circumstances in which a requester's reason for making a FOIA request can properly affect the man-

³⁵ See *Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996).

³⁶ See *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1029 (4th Cir. 1988).

³⁷ See *Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996).

³⁸ See *Nichols v. United States*, 325 F. Supp. 130, 135-36 (D. Kan. 1971) (holding that archival exhibits consisting of guns, bullets, and clothing pertaining to the assassination of President Kennedy are not "records"), *aff'd on other grounds*, 460 F.2d 671 (10th Cir. 1972).

³⁹ See *DiViao v. Kelley*, 571 F.2d 538, 542 (10th Cir. 1978).

⁴⁰ 44 USC §3301 (2000).

⁴¹ See *Forham v. Harris*, 445 U.S. 169, 183 (1980).

⁴² Pub. L. No. 104-231, §3, 110 Stat. 3048, 3049 (codified as amended at 5 USC §552(f)(2) (2000)).

⁴³ 5 USC §552(f)(2).

⁴⁴ 5 USC §551(2) (2000).

⁴⁵ See *Constangy, Brooks, & Smith v. NLRB*, 851 F.2d 839, 840 n.2 (6th Cir. 1988).

⁴⁶ See *Maydak v. United States*, No. 02-5168, slip. op. at 1 (D.C. Cir. Dec. 11, 2003) (refusing to dismiss case because "[t]here is no substantial connection between [the requester's] alleged fugitive status and his current [FOIA] action," which was filed four years before the requester became a fugitive) (citing *Daccarett-Ghia v. IRS*, 70 F.3d 621, 626 (D.C. Cir. 1995); *Doyle v. U.S. Dep't of Justice*, 668 F.2d 1365, 1365-66 (D.C. Cir. 1981)). *But cf.*, *O'Rourke v. U.S. Dep't of Justice*, 684 F. Supp. 716, 718 (D.D.C. 1988) (holding that convicted criminal, fugitive from his home country and undergoing U.S. deportation proceeding, qualified as "any person" for purpose of making FOIA request); *Doherty v. U.S. Dep't of Justice*, 596 F. Supp. 423, 424-29 (S.D.N.Y. 1984) (same), *aff'd on other grounds*, 775 F.2d 49 (2d Cir. 1985).

⁴⁷ See *Javelin Int'l, Ltd. v. U.S. Dep't of Justice*, 2 Gov't Disclosure Serv. (P-H) ¶ 82,141 at 82,479 (D.D.C. Dec. 9, 1981).

⁴⁸ Pub. L. No. 107-306, 116 Stat. 2383 (2002).

⁴⁹ See 50 USC §401a(4) (2000) (provision of the National Security Act of 1947, as amended, that specifies the federal agencies and agency subparts that are deemed "elements of the intelligence community").

⁵⁰ Pub. L. No. 107-306, 116 Stat. 2383, §312 (codified at 5 USC §552(a)(3)(A), (E) (West Supp. 2004).

⁵¹ See *NARA v. Favish*, 125 S.Ct. 1570, 1580 (2004) ("[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information.").

⁵² *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975); *EPA v. Mink*, 410 U.S. 73, 86 (1973); *North v. Walsh*, 881 F.2d 1088, 1096 (D.C. Cir. 1989) ("In sum, [the FOIA requester's] need or intended use for the documents is irrelevant.").

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ner in which it is processed, either procedurally or substantively. First, the resolution of certain procedural issues—e.g., expedited access, assessment of waiver of fees, and the award of attorneys' fees and costs to a successful FOIA plaintiff—can depend on the reason for which the request was made.⁵³ Second, specifying that the FOIA request is in the "public interest" can substantively affect the agency's decision to disclose or withhold information that is potentially subject to the FOIA privacy exemptions.⁵⁴

Finally, the Court of Appeals for the District of Columbia Circuit has held that under some circumstances a FOIA claim in litigation may survive even if the FOIA requester dies before the case is finished.⁵⁵

Proper FOIA Request. FOIA specifies only two requirements for an access request: (1) it must "reasonably describe" the records sought;⁵⁶ and (2) it must be made in accordance with the agency's published FOIA regulations.⁵⁷

The legislative history of the 1974 FOIA amendments indicates that a description of a requested record that enables a professional agency employee familiar with the subject area to locate the record with a "reasonable amount of effort" is sufficient.⁵⁸ Courts have explained that "[t]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters,"⁵⁹ or to allow requesters to conduct "fishing expeditions" through agency files.⁶⁰

⁵³ See *Forsham v. Califano*, 587 F.2d 1128, 1134 (D.C. Cir. 1978), *aff'd on other grounds sub nom. Forsham v. Harris*, 445 U.S. 169 (1980).

⁵⁴ See *NARA v. Favish*, 124 S.Ct. at 1580–81.

⁵⁵ See *Sinito v. U.S. Dep't of Justice*, 176 F.3d 512, 513 (D.C. Cir. 1999).

⁵⁶ 5 USC §552(a)(3)(A).

⁵⁷ *Id.*; 5 USC §552(a)(3)(A)(ii).

⁵⁸ H.R. Rep. No. 93-876, at 6 (1974), *reprinted in*, 1974 USCCAN 6267, 6271; See, e.g., *Brunley v. U.S. Dep't of Labor*, 767 F.2d 444, 445 (8th Cir. 1985).

⁵⁹ See *Assassination Archives & Research Ctr. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989), *aff'd in pertinent part*, No. 89-5414 (D.C. Cir. Aug. 13, 1990).

⁶⁰ See *Dale v. IRS*, 238 F. Supp. 2d 99, 104–05 (D.D.C. 2002) (concluding that a requester that sought "any and all documents . . . that refer or relate in any way" to the requester failed to reasonably describe the records sought and "amounted to an all-encompassing fishing expedition of files at [the agency's] offices across the country, at taxpayer expense").

Although the scope of a FOIA request is most commonly thought of as being defined by the subject matter of the records that it seeks, a requester's scope also depends on the timeframe in which the requested records were created.⁶¹ When an agency adopts and ordinarily uses a "cut-off" date, it is obliged to inform FOIA requesters of that date.⁶² The most efficient method in which an agency provides such notice is through "constructive notice" in its published FOIA regulations⁶³ and/or through its FOIA Reference Guide on its FOIA website.⁶⁴ Alternatively, an agency can provide "actual notice" of its "cut-off" date policy in its correspondence with each FOIA requester individually.⁶⁵ A FOIA requester, therefore, must know what "cut-off" date is being applied to his request, if any, to minimize the chance of any inefficient misunderstanding about the scope of the FOIA request.⁶⁶

A FOIA requester must follow an agency's regulations in making requests.⁶⁷ Each federal agency must publish in the Federal Register its procedural regulations governing access to its records under FOIA.⁶⁸ These regulations must inform the public of where and how to address requests; its schedule of fees for search, review, and duplication; its fee waiver criteria; and its administrative appeal process.⁶⁹ Accordingly, an agency may not impose any

⁶¹ See *Church of Scientology v. IRS*, 816 F. Supp. 1138, 1148 (W.D. Tex. 1993), *appeal dismissed by stipulation*, No. 93-8431 (5th Cir. Oct. 21, 1993).

⁶² See, e.g., *Judicial Watch, Inc. v. U.S. Dep't of Energy*, No. 01-0981, 2004 WL 635180, at *21 (D.D.C. Mar. 31, 2004).

⁶³ See, e.g., 28 CFR §16.4(a) (2004) (DOJ FOIA regulation notifying requesters of its "cut-off" date).

⁶⁴ See 5 USC §552(g) (2000) (requiring each agency to prepare and make publicly available (including electronically) its own guide for ready use by FOIA requesters in making requests to it).

⁶⁵ See *Public Citizen v. U.S. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002) (noting that DOS provided notice of its "cut-off" date policy in letters sent to all requesters acknowledging receipt of their requests).

⁶⁶ See, e.g., 28 CFR §16.4(a).

⁶⁷ 5 USC §552(a)(3)(A); See, e.g., *Wicks v. Coffrey*, No. 01-3664, 2002 WL 1000975, at *2 (E.D. La. May 14, 2002) ("The first step in exhausting administrative remedies under the FOIA is filing a proper FOIA request.")

⁶⁸ See 5 USC §§552(a)(4)(A), (a)(6)(A), (a)(6)(D), (a)(6)(E); see also 5 USC §552(g) (requiring agencies to make available "reference material or a guide for requesting records or information from the agency).

⁶⁹ See, e.g., DOJ FOIA regulations, 28 CFR pt. 16 (2004).

additional requirements on a requester beyond those prescribed in its regulations.⁷⁰ Finally, a requester's failure to comply with an agency's procedural FOIA regulations that govern access to records—such as those concerning properly addressed request,⁷¹ fees and fee waivers,⁷² proof of identity,⁷³ and administrative appeals⁷⁴—may be held to constitute a failure to properly exhaust administrative remedies.

The following regulations apply to specific agencies:

- Department of Homeland Security (DHS), 6 CFR §5.3(a);⁷⁵
- Customs and Border Protection (CBP), 19 CFR §103.5 (specific request for records);⁷⁶
- Department of State (DOS), 22 CFR §171.5;⁷⁷
- Executive Office for Immigration Review (EOIR), 28 CFR §16.1 *et seq.*⁷⁸

⁷⁰ See *Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985).

⁷¹ See *Maydak v. U.S. Dep't of Justice*, No. 02-5168, slip. op. at 1 (D.C. Cir. Dec. 11, 2003).

⁷² See *Pollack v. U.S. Dep't of Justice*, 49 F.3d 115, 119 (4th Cir. 1995).

⁷³ See *Schwarz v. FBI*, 31 F. Supp. 2d 540, 542 (N.D. W. Va. 1998).

⁷⁴ See *RNR Enters. v. SEC*, 122 F.3d 93, 98 (2d Cir. 1997).

⁷⁵ Note that in Appendix A to Part 5, the addresses for the different components or agencies within DHS are listed. The regulations, however, provide that if the FOIA requester cannot determine which DHS component is applicable, that the FOIA request may be mailed to Departmental Disclosure Officer, Department of Homeland Security, Washington D.C. 20528.

⁷⁶ This regulation provides that a FOIA request addressed to CBP can either be made to: (a) Headquarters, for records maintained therein, and addressed to Freedom of Information Act Request, U.S. Customs Service (*sic*—the regulations have not been updated to reflect the new name of the agency), 1300 Pennsylvania Avenue, N.W., Washington, DC 20229; or (b) to “field offices” (*i.e.*, must be mailed to Director of the Service Port or Special Agent in charge if request concerns Office of Investigations).

⁷⁷ This regulation provides that FOIA requests, if mailed, are addresses to the Information and Privacy Coordinator, U.S. Department of State, SA-2, 515 22nd Street, N.W., Washington, D.C. 20522-6001, or, if faxed, can be faxed at (202) 261-8679. Moreover, the DOS FOIA website establishes that FOIA requests should be mailed to Margaret P. Grafeld, Information & Privacy Coordinator, Office of Information Resources Management Programs & Services, A/RPS/IPS, SA-2, Department of State, Washington, DC. 20522-6001.

⁷⁸ The Board of Immigration Appeals (BIA) Practice Manual, Chapter 13, Section 13.2(b)(i), indicates that FOIA requests may be sent to the BIA as follows: Executive Office for Immigration Review, Office of General Counsel,

continued

- Federal Bureau of Investigation (FBI), “rap sheet,” 28 CFR §16.32;⁷⁹
- U.S. Citizenship and Immigration Services (USCIS), 8 CFR §103.10;⁸⁰ and
- Immigration and Customs Enforcement (ICE).⁸¹

Time Limits. Until an agency (or the proper component of that agency) receives a FOIA request, it is not obligated to search for responsive records, meet time deadlines, or release any records.⁸² Requests not filed in accordance with published regulations are not deemed to have been received until they are identified as proper FOIA requests by agency personnel. Moreover, if a requester agrees to pay properly assessed fees but later fails to pay those fees, an agency may refuse to process that requester's subsequent requests until the amount owed is paid.⁸³

FOIA/Privacy Act Requests, 5107 Leesburg Pike, Suite 2400, Falls Church, Virginia 22041.

Practice Pointer: To file FOIA requests with immigration courts, contact the local court and it will instruct how to file a FOIA request. The local court may provide for informal in-person review of court files and thereby avoid a cumbersome FOIA procedure.

⁷⁹ The mailing address to send a FBI “rap sheet” request is: FBI, Criminal Justice Information Services (CJIS) Division, ATTN: SCU, Mod. D-2, 1000 Custer Hollow Road, Clarksburg, WV 26306. See discussion at page 64, below..

⁸⁰ Pursuant to the regulations CIS records should be requested from the office that maintains the records sought, if known, or from the “Headquarters of [Citizenship and Immigration Services], 425 I Street, N.W., Washington, D.C. 20536.” The regulations further specify that records are also maintained in the Headquarters, regional offices, service centers, district offices, and certain suboffices. See 8 CFR §103.10(a)(1).

⁸¹ A FOIA request addressed to ICE must be mailed to Director, Freedom of Information Act/Privacy Act Program, 425 Eye Street, N.W., 2nd Floor, ULLICO Building, Washington, D.C. 20536. Additionally, ICE's website instructs that FOIA requests “should be directed to the Immigration Office that maintains the records sought, if known, or to the Immigration Field Office nearest your place of residence (See www.ice.gov/graphics/legal.htm). However, based on some reports from a local USCIS FOIA officer, it appears that anything relating to documents and/or information regarding litigation must be filed with ICE at the following address: Immigration and Customs Enforcement, Marshall Fields, Office of Investigations, 425 I Street NW, Room 4038, Washington, DC 20536.

⁸² See *Brumley v. U.S. Dep't of Labor*, 767 F.2d 444, 445 (8th Cir. 1985).

⁸³ See 5 USC §552(a)(4)(A)(v); see also *Crooker v. United States Secret Serv.*, 577 F. Supp. 1218, 1219-20 (D.D.C. 1983).

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Once an agency properly receives a FOIA request, it has 20 working days in which to make a determination on the request.⁸⁴ In "unusual circumstances," an agency can extend the 20-day time limit for processing a FOIA request if it tells the requester in writing why it needs the extension and when it will make a determination on the request.⁸⁵

FOIA defines "unusual circumstances" as follows: (i) the need to search for and collect records from separate offices; (ii) the need to examine a voluminous amount of records required by the request; and (iii) the need to consult with another agency or agency component.⁸⁶ If the required extension exceeds 20 days, the agency must allow the requester an opportunity to modify his request, or arrange for an alternative time frame for completion of the agency's processing.⁸⁷ In many instances, however, agencies cannot meet the time frames specified in FOIA. Agencies, therefore, have adopted the court-sanctioned practice of generally handling backlogged FOIA requests on a "first-in, first-out" basis.⁸⁸ Moreover, the Electronic FOIA amendments expressly authorized agencies to promulgate regulations providing "multitrack processing" of their FOIA requests—which allows agencies to process requests on a first-in, first-out basis within each track, but also allows the agencies to respond to relatively simple requests more quickly than requests involving complex and/or voluminous records.⁸⁹

Constructive Denial as an Exhaustion of Administrative Remedies. An agency's failure to comply with the time limits for either an initial request or an administrative appeal may be treated as a denial and "constructive exhaustion" of administrative remedies.⁹⁰ A FOIA requester, therefore, may immediately thereafter seek judicial review, in district court, if the FOIA time limits were not complied with.⁹¹

⁸⁴ See 5 USC §552(a)(6)(A)(i).

⁸⁵ 5 USC §552(a)(6)(B)(i).

⁸⁶ 5 USC §552(a)(6)(B)(iii).

⁸⁷ 5 USC §552(a)(6)(B)(ii).

⁸⁸ See *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 614-16 (D.C. Cir. 1976) (citing 5 USC §552(a)(6)(C)).

⁸⁹ Pub. L. No. 104-231, §7(a), 110 Stat. 3048, 3050 (codified as amended at 5 USC §552(a)(6)(D) (2000)).

⁹⁰ See 5 USC §552(a)(6)(C).

⁹¹ See, e.g., *Spannus v. U.S. Dep't of Justice*, 824 F.2d 52, 58 (D.C. Cir. 1987).

LITIGATION CONSIDERATIONS

Jurisdiction, Venue, and Other Preliminary Considerations

The U.S. district courts are vested with exclusive jurisdiction over FOIA cases by 5 USC §552(a)(4)(B), which provides in pertinent part:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records improperly withheld from the complainant.

The jurisdictional FOIA provision has been interpreted to govern review under all three of FOIA's access provisions.⁹² Because of its specific reference to the "complainant," however, the Court of Appeals for the D.C. Circuit has held that this language limits relief under the FOIA disclosure of records to a particular requester.⁹³

In fact, FOIA's statutory language, as interpreted by the Supreme Court, makes federal jurisdiction dependent upon a showing that an agency has (a) "improperly"; (b) "withheld"; (c) "agency records."⁹⁴ The Supreme Court held that judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdiction grant conferred by Section 552, if the agency has contravened all three components of this obligation.⁹⁵ Therefore, a plaintiff who does not allege any improper withholding of agency records fails to state a claim over which a court has subject matter jurisdiction within the meaning of Rule 12(b)(1) of the Federal Rules of Civil Procedure⁹⁶ (FRCP) or, alternatively, fails to state a claim upon

⁹² See *Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior*, 88 F.3d 1191, 1202 (D.C. Cir. 1996) ("The judicial review provisions apply to requests for information under subsections (a)(1) and (a)(2) of section 552 as well as under subsection (a)(3)." (quoting *AM. Mail Line v. Gulick*, 411 F.2d 696, 701 (D.C. Cir. 1969)).

⁹³ See *Kennecott Utah Copper Corp.*, 88 F.3d at 1203 (holding that remedial provision of FOIA limits relief to ordering disclosure of documents).

⁹⁴ See *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980).

⁹⁵ *Id.*

⁹⁶ See *Goldgar v. Office of Admin.*, 26 F.3d 32, 34 (5th Cir. 1994).

which relief could be granted under Rule 12(b)(6).⁹⁷ Regardless of the exact basis used, if an agency has not improperly withheld records, a FOIA lawsuit should be dismissed.⁹⁸ Furthermore, for the jurisdictional requirements for a FOIA case to be satisfied, "an agency must have either created or obtained a record as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA."⁹⁹

Whether an agency has "improperly" withheld records usually turns on whether one or more exemptions applies to the documents at issue.¹⁰⁰ If the agency can establish that no responsive record exist,¹⁰¹ or that all responsive records have been released to the requester, then the agency's refusal to the produce them should not be deemed an "improper" withholding and summary judgment should be granted in favor of the agency.¹⁰²

If the district court determines that records have been properly withheld pursuant to a FOIA exemption, the court has no inherent, equitable power to order disclosure absent some other statute mandating disclosure.¹⁰³

As previously stated, the venue provisions of FOIA provide requesters with a broad choice of forums in which to bring the lawsuit.¹⁰⁴ When a requester files the suit in a jurisdiction other than the District of Columbia, however, he is obligated to allege the nexus giving rise to proper venue in that jurisdiction by alleging either residence or principal place of business.¹⁰⁵ Furthermore, aliens are treated the same as U.S. citizens for FOIA venue purposes.¹⁰⁶

⁹⁷ See *Mace v. EEOC*, 37 F. Supp. 2d 1144, 1146 (E.D. Mo. 1999).

⁹⁸ See *Kissinger*, 445 U.S. at 139.

⁹⁹ See *Forsham v. Harris*, 445 U.S. 169, 182 (1980).

¹⁰⁰ See *Abraham & Rose, P.L.C. v. United States*, 138 F.2d 1075, 1078 (6th Cir. 1998).

¹⁰¹ See *Perales v. DEA*, 21 Fed. Appx. 473, 474 (7th Cir. Oct. 17, 2001).

¹⁰² See *Reg'l Mgmt. Corp. v. Legal Servs. Corp.*, 10 F. Supp. 2d 565, 573-74 (D.S.C. 1998).

¹⁰³ See *Spurlock v. FBI*, 69 F.3d 1010, 1016-18 (9th Cir. 1995).

¹⁰⁴ See 5 USC §552(a)(4)(B) (providing for venue in any four locations).

¹⁰⁵ See *Schwarz v. IRS*, 998 F. Supp. 201, 203 (N.D.N.Y. 1998).

¹⁰⁶ See *Arevalo-Franco v. United States*, 889 F.2d 589, 590-91 (5th Cir. 1989) (ruling that resident alien may bring FOIA suit in district where he in fact resides).

Pleadings. An agency has 30 days from the date of service of process to answer a FOIA complaint,¹⁰⁷ not the usual 60 days that are otherwise permitted by FRCP Rule 12(a). Additionally, the usual "substantial evidence" standard of review of agency action is replaced in FOIA by a *de novo* review standard.¹⁰⁸ Furthermore, the burden of proof is on the defendant agency, which must justify its decision to withhold any information.¹⁰⁹

Only federal agencies are proper party defendants in FOIA litigation.¹¹⁰ Consequently, neither the agency head nor other agency officials are proper parties to a FOIA lawsuit,¹¹¹ nor is the "United States" as such.¹¹²

Only the person or entity who has actually submitted a FOIA request at the administrative level can be the proper party plaintiff in any subsequent court action based on that request.¹¹³

OBTAINING A CLIENT'S CRIMINAL RECORDS

Introduction

This section addresses when and how to obtain a client's arrest and criminal court records. Obtaining the appropriate records is a necessary part of the immigration attorney's due diligence in learning about the client. It is critical to a proper assessment of whether the client is eligible for a particular immigration benefit or admission to the United States.

While obtaining and reviewing the records should be a routine part of the investigation or discovery phase of the representation, the issue of how and when to disclose or use these records in the course of the representation is a strategic matter that goes beyond the scope of this article. Rather, the

¹⁰⁷ See 5 USC §552(a)(4)(C).

¹⁰⁸ See 5 USC §552(a)(4)(B); see also *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999).

¹⁰⁹ See 5 USC §552(a)(4)(B); see also *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1037 (7th Cir. 1998).

¹¹⁰ See 5 USC §§552(a)(4)(B) (granting district courts "jurisdiction" to enjoin the agency from withholding agency records improperly withheld from complainant"), 552(f)(1) (defining the term "agency").

¹¹¹ See *Petrus v. Bowen*, 833 F.2d 581, 582 (8th Cir. 1993).

¹¹² See *Sanders v. United States*, No. 96-5372 WL 529073, at *1 (D.C. Cir. July 3, 1997).

¹¹³ See *Unigard Ins. Co. v. Dep't of the Treasury*, 997 F. Supp. 1339, 1342 (S.D. Cal. 1997).

authors merely propose an office procedure for investigating facts where a client has had prior contact with law enforcement officials.

When and Why to Get a Client's Criminal Records

There are two main reasons why you should routinely obtain records relating to any arrests and/or criminal charges filed against a client. First, the failure to have the appropriate records available at the time of filing, interview, or hearing can delay the government's issuance of an immigration benefit or even lead to deportation. Second, failing to determine and review a client's criminal record and properly analyze it may result in a claim of malpractice.

Imagine: You are with your happily married clients at an adjustment of status interview. Months ago you learned how they met, discussed their plans for the future, and provided them with the I-485 adjustment application and other necessary forms to complete, sign, and return. During the consultation, the foreign national tells you that he was stopped by the police one time long ago, but wasn't arrested—he was released without having to pay bond. He didn't go to court or get convicted. The client signs the I-485, understanding that he must tell the truth. Through your efforts, the client received his employment authorization and advance parole. He traveled abroad and returned to the United States without incident.

At first, the interview appears routine. Then the officer asks your client, the foreign national, if he was ever arrested by the police. He answers "no." Brief pause. Question: "Are you *sure* you have never been arrested?" Your client continues to deny having been arrested until the officer shows him an FBI rap sheet indicating a "hit." The officer says he cannot complete the adjustment of status that day. He needs all arrest records and any court dispositions that will satisfy him there is no conviction or outstanding warrant that could result in a finding of inadmissibility. The officer also says he must check with his supervisor about the effect of your client's "misrepresentations" in the interview.

After the interview, the client explains: (1) He forgot the details of the incident and honestly believed he was not arrested; or (2) He was ashamed to reveal an arrest and figured that it would never be found since it happened so long ago; or (3) He was told by the lawyer in the criminal case that the charges were dismissed, and the incident need not be declared in the future since, under state law, it is not

considered an arrest or a conviction. Now, there is a delay in obtaining the adjustment of status. The client's employment authorization is about to lapse and he may lose his job. Worse, he may be placed in removal proceedings and could be deported, depending on the information that must now be disclosed.

Could an attorney have done anything to foresee and avoid this event? Yes. At the first mention of a prior contact with law enforcement, the attorney should have fingerprinted the client and obtained an FBI rap sheet even before filing the case. With the rap sheet in hand, the attorney could have helped the client obtain the necessary criminal records before filing the application or before the interview. This would have eliminated the surprise and avoided the unfortunate delays or worse.

Effective immigration attorneys must do more than merely explain the consequences of misrepresenting facts on an immigration form to their clients. To interpret the legal process to our clients, particularly the criminal grounds of inadmissibility and deportability, the attorney cannot simply parrot the language on a particular form and expect the client to give the "correct" answer. Immigration forms provide a tangle of compound questions in multiple parts, often requiring the person signing the form to provide sophisticated legal conclusions. For example the current version of the I-485 "Application to Register Permanent Residence or Adjust Status" asks:

Have you ever, in or outside the United States:

- a. knowingly committed any crime involving moral turpitude or a drug related offense for which you have not been arrested?
- b. been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?
- c. been the beneficiary of a pardon, amnesty, rehabilitation decree, other act of clemency or similar action?
- d. exercised diplomatic immunity to avoid prosecution for a criminal offense in the United States?

As the above, common example suggests, how to give the proper answer to these questions is not always self-evident. As with any legal analysis, there needs to be a reasoned matching of the facts with the often complex legal principles that the form seeks to elicit. An unexplained "no" answer to one of these questions could, in an appropriate case, be inter-

puted as a material misrepresentation to obtain an immigration benefit.

The question of whether a police or immigration stop results in an "arrest" or other event that an immigration form asks can only be determined by reviewing the client's arrest and court records, together with the language of the laws under which they were charged or convicted. The actual legal effects of an arrest, conviction or admission by the client of criminal activity is beyond the scope of this article; suffice it to say that, unless you have the records, you will be incapable of assessing the immigration consequences. The Department of Homeland Security often uses incomplete and erroneous criminal records to charge aliens with inadmissibility or deportability. Immigration judges often accept the DHS's assertions based on these documents and will base their decisions on them. Without obtaining the documents yourself, you will be unable to counter DHS's charges against your clients.

Experience reveals that humans possess powerful coping and survival mechanisms that allow us to go on after difficult events. Many clients distort their painful pasts. Anxiety, fear, or simple desire to move on, forget the past, and get the green card cause inaccuracies in the presentation of our clients' cases. Add cultural differences and suspicion of fraud, and the chances of misunderstanding in immigration proceedings are high. The attorney must therefore have all relevant facts and records available to support the client's case. To accomplish the client's objective in any immigration case, then, the attorney must seek to obtain criminal records any time the client discloses that he or she has had prior contact with law enforcement officials. The criminal records themselves will dictate the appropriate immigration strategy: whether immigration counsel should file the case at all, whether to refer the client for an assessment of post-conviction relief, or how to advise the client of the effects of a criminal record, including how it may affect the Government's exercise of discretion if discretion is to be exercised under the particular benefit sought.

What Criminal Records Should the Attorney Get?

Most USCIS officers and many immigration judges expect, at minimum, a certified court disposition for any charge that resulted in a criminal court filing. But certified court dispositions are not synonymous with a "record of conviction" that an immigration officer or judge may refer to assess an

alien's admissibility or deportability.¹¹⁴ Also, depending on local court reporting practices, a certified disposition may not disclose all facts, charges, or case events that may bear on the immigration adjudicator's decision. It is fairly common that the DHS will have obtained an incorrect "disposition," indicating, for example, initial charges before they were dismissed, or sections of law for offenses for which the client was found not guilty. Therefore the effective immigration attorney will obtain the following items, for each incident, that will provide the most complete picture to analyze the immigration consequences:

- ***Any Ticket or Arrest Record Created by a Law Enforcement Agency.*** These may be police reports, forms or computer-generated printouts relating to the stop or arrest. They may provide the officer's or witnesses statements about the incident that could color the way immigration officials may assess your client's application for an immigration benefit.
- ***The Criminal Complaint, Ticket, Information, or Indictment.*** These are all charging documents, as named or defined by the charging entity and locale for different types of criminal proceedings. The charging document will usually contain a statement of the acts charged as criminal and the sections of law that the law enforcement agency alleges the defendant violated.

¹¹⁴ INA §240(c)(3)(b) provides that any of the following documents or records constitute proof of a criminal conviction:

- (i) An official record of judgment and conviction.
- (ii) An official record of plea, verdict, and sentence.
- (iii) A docket entry from court records that indicates existence of conviction.
- (iv) Official minutes or transcript of court hearing in which the court takes notice of the existence of the conviction.
- (v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.
- (vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
- (vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

- **The Pre-plea or Pre-sentence Investigation Report (PSI/PSR).** These are sometimes developed by a probation office in response to a criminal court judge's order to assess a defendant's criminal history, including all prior arrests or convictions, and personal history, including family ties, education, drug and alcohol consumption, mental health, and other factors that could assist the judge to impose an appropriate sentence after guilt has been determined. Information for the report is gathered from multiple sources—the defendant, family members, and police and court records. Therefore, the report is not admissible in most court proceedings and is usually sealed after the criminal court judge imposes the judgment and sentence. Even though a PSI/PSR may contain inaccurate or unreliable hearsay information, immigration counsel should request it of the client or the client's probation officer as part of the attorney's information gathering. For the same reasons, immigration counsel should resist disclosing the report to an immigration official or immigration judge, unless the information is helpful to the client.
- **The "Plea."**¹¹⁵ Many courts use a form, upon which the criminal court judge provides required advisals and takes admissions of culpability from the defendant, to ensure that a guilty plea was made knowingly, intelligently, and voluntarily. This form may indicate the precise acts or charges to which the defendant pleaded guilty, which may contradict the information contained in the arrest records or charging document. The "plea" may assist immigration counsel to determine the statute (or section of a divisible statute) to which the defendant pleaded and also the type of plea entered. An improperly completed form may be grounds for post-conviction relief.
- **The Plea Hearing Transcript.** In felony cases and many misdemeanor cases, court reporters will transcribe the hearing at which the guilty plea is entered. The transcript will contain facts admitted to in the plea and the specific section of the law to

which the defendant pleaded. The transcript may reflect the judge's observance or violation of required advisals in accepting the plea. It may also contain sympathetic factors that do not appear in other criminal records. For example, the judge may have acknowledged favorable conduct by the defendant in order to avoid imposing a harsh sentence. The plea transcript may also reflect whether there was an acknowledgment of the defendant's alienage or possible immigration consequences of pleading guilty.

- **The "Judgment" and the "Sentencing Order"** (known in some courts as the "mittimus"). Depending on the jurisdiction, these may either be combined or two separate documents. These will state the sentence that the court imposed on the defendant. This is critical information to determine whether a certain conviction will be designated as a "petty offense,"¹¹⁶ an "aggravated felony,"¹¹⁷ or other immigration-significant event.
- **The Sentencing Hearing Transcript.** As with the plea hearing transcript, a court reporter may have transcribed the hearing in which the sentence was imposed. Likewise the transcript may clarify ambiguous parts of the criminal record, provide mitigating information that immigration counsel may decide to present, or demonstrate errors by the trial court that could be attacked in a post-conviction petition.
- **The "Minute Printout" or Computer Printout.** As a criminal case proceeds from charge to judgment to dismissal or sentence, the court clerk will maintain a running record of the proceedings. Each case event should be reflected on the printout, including the fact of a single or multiple count charge, amended charges, the appearance of defense counsel, pleas, findings, judgment, and sentences imposed. It should also reflect petitions to revoke a prior sentence due to a violation (e.g., a probation violation) and the result of such petitions. If probation was revoked, you will need to obtain a copy of the judgment and new sentencing order. Often the entries will appear as abbreviations that may be difficult to decipher at first (e.g., pg/fg would signify "pleaded guilty/found guilty"). The court's clerk or

¹¹⁵ The type of plea, together with the judgment and sentencing order will determine whether a conviction exists for immigration purposes under INA §101(a)(48)(A), 8 USC 1101(a)(48). See also *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999) (adopting amended federal definition of conviction); *Gill v. Aschcroft*, 335 F.3d 574 (7th Cir. 2003) (follows *Roldan*—Illinois diversionary statute does not shield alien from consequences of a conviction); but see *Lujan-Armendariz*, 222 F.3d 728 (9th Cir. 2000) (refusing to recognize state equivalent of Federal First Offender Act as a conviction).

¹¹⁶ INA §212(a)(2)(A)(ii) (ground of inadmissibility); INA §237(a)(2)(a)(1) (ground of deportability).

¹¹⁷ INA §101(a)(43)(A)-(U) (defined); INA §237(a)(2)(A)(iii) (ground of deportability); INA §238 (expedited removal of aliens convicted of committing aggravated felonies).

an experienced criminal defense attorney can explain a particular notation.

In addition to criminal court records, immigration lawyers should be aware of the dangers of accepting two very common immigration myths—that crimes committed by a minor and heard by a juvenile court have no immigration consequences, and that traffic violations not heard as misdemeanors or felonies in criminal court have no immigration consequences. In fact, these may have adverse immigration consequences, including removal from the United States or a denial of a discretionary immigration benefit.

- **Juvenile Court Records.** Although certain juvenile court records are sealed, DHS will attempt to obtain them to support a charge of inadmissibility or removability. Not all juvenile charges are shielded from immigration consequences. Certain findings or admissions in juvenile proceedings, e.g., for drug use or abuse,¹¹⁸ drug trafficking,¹¹⁹ or engaging in prostitution,¹²⁰ can stand as grounds of removal or render an applicant inadmissible. Immigration counsel should attempt to obtain records to investigate a client's criminal history, and be prepared to object to their use by DHS.
- **Traffic Violation, Secretary of State, Department of Motor Vehicles Records.** These records may contain notations of incidents that are not available in any court records. They may include charges of driving under the influence (DUI; or driving while intoxicated, DWI) that DHS may use to deny an immigration benefit as a matter of discretion. They may also reflect DUI driving while on a suspended license that DHS could charge as a crime involving moral turpitude.¹²¹ Even if these records have been expunged by a criminal court, DHS may still attempt to introduce these records against your client.
- **The Criminal Statutes.** Analysis of the immigration consequences of specific criminal conduct is not intuitive. Whether a conviction is a crime of moral turpitude or an aggravated felony can only be

determined by reviewing specific elements that are required for a conviction under a criminal statute. In this way, immigration judges and federal courts apply a "categorical" or "elements based" approach to statutory analysis. For example, in one recent decision, the court overturned an immigration judge's finding that making violent threats over the telephone was an aggravated felony "crime of violence" for a conviction under the Illinois telephone harassment statute, because the elements for a conviction did not include the use of actual or threatened force.¹²²

Therefore, in addition to obtaining the client's criminal records, the effective attorney will scrutinize the charges and convictions against the statute or local ordinance under which the client was charged.

How to Obtain Criminal Records

The United States comprises thousands of jurisdictions at the county, parish, township, municipal, state, and federal levels. Often, the immigration client will not remember precisely when or where a traffic stop, arrest, or other incident occurred. If this is the case, the best way to begin to analyze the immigration consequences of the client's criminal history is to obtain his or her FBI identification record, often referred to as a "rap sheet."¹²³

The FBI Identification Record, or Rap Sheet

There is one "nationwide" criminal database, the FBI database, which is known as the NCIC (National Crime Information Center). Local, state and federal law enforcement agencies fingerprint arrested criminal suspects and generally provide the prints and biographic information to the NCIC. Fingerprints are considered the most reliable way to search criminal history, and it is the method that DHS uses for all immigration benefits applications in the United States. As law enforcement continues to incorporate new biometric and other technological innovations, the best current immigration practice is to obtain the FBI rap sheet in any case where the client discloses any prior contact with a law enforcement officer, including immigration officers.

¹¹⁸ INA §1227(a)(2)(B)(i)(ii) (alien convicted or is or has been a drug abuser or addict is deportable).

¹¹⁹ INA §212(a)(2)(A)(i)(II) (person convicted, or who admits having committed violations of controlled substance law, is inadmissible).

¹²⁰ INA §212(a)(2)(D) (aliens inadmissible for prostitution and "any other unlawful commercialized vice, whether or not related to prostitution" within 10 years).

¹²¹ *Matter of Lopez-Meza*, Int. Dec. 3423 (BIA 1999)

¹²² *Szucz v. Gonzalez*, 2005 U.S. App LEXIS 4107 (7th Cir. March 10, 2005); see also *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003) (rejecting government's argument that court should look to actual conduct rather than the elements of the statute).

¹²³ 28 CFR §16.31.

To request an FBI rap sheet, you should provide a letter to the FBI:

Criminal Justice Information Services (CJIS) Division
Special Correspondence Unit, Mod. D-2
1000 Custer Hollow Road
Clarksburg, WV 26306

Include

- The requester's full name, date of birth and place of birth as proof of identity.
- A set of rolled-inked fingerprint impressions placed upon a fingerprint card or form commonly utilized for applicant or law enforcement purposes by law enforcement agencies.¹²⁴
- A certified check or money order (the FBI will reject a personal or a law firm check) for \$18 payable to the Treasurer of the United States.¹²⁵
- A return address for returning the rap sheet, including the client's signed authorization to transmit the record to the attorney's office, if the attorney would like to receive the identification record directly.

Obtaining proper fingerprints can sometimes be a challenge, since not all local law enforcement agencies will provide the service, and some clients may be afraid to present themselves for fingerprinting by police. The authors recommend that the immigration lawyer have the ability to take the client's fingerprints in the office. You can purchase a fingerprinting kit and instructions from various companies that advertise on the Internet. This will save time in preparing the client's applications for immigration benefits, and provide a service that most law offices do not offer.

State Criminal Records

The FBI does not always receive arrest information from state and local law enforcement, so it may also be necessary to contact the particular state's criminal records bureau. Each state has its own procedures for obtaining police or court records. There may be different fees assessed depending on whether a record is to be certified or merely photocopied. In general, it is best to approach the clerk of the court where a case was heard, or the state police

¹²⁴ 28 CFR §16.32. Applicant fingerprint cards can be purchased from the U.S. Government Printing Office. See <http://bookstore.gpo.gov/sb/sb-036.htm>.

¹²⁵ 28 CFR §16.33. The fee is based on the clerical time beyond the first quarter hour to be spent in searching for, identifying, and reproducing the identification record. Fee waivers based on indigency may be requested.

that made an arrest, and request certified records. Many states will provide certain information on criminal offenders over the internet, particularly if they are still in custody.¹²⁶

Local Criminal Records

Local or municipal police may charge offenses under state law or local ordinances. It may be critical to a client to determine if such an offense is the equivalent of a misdemeanor or a felony, to determine whether the offense is to be considered a "conviction" for immigration purposes. Contact the local court administrator for court records, the arresting law enforcement agency for arrest records, and the local or city clerk for copies of the local law.¹²⁷

Juvenile Court Records

Most states limit access to juvenile records. Check with the local juvenile court administrator regarding procedures to disclose such records.

Secretary of State, Driving and Motor Vehicle Records

Driving records are maintained by each state. The procedures for obtaining them are available from the Secretary of State's office, and can usually be obtained at the Secretary of State's website.

US-VISIT ENTRY-EXIT PROGRAM: WHAT WILL THE GOVERNMENT KNOW?

Privacy Concerns and the Client's Rights

The Department of Homeland Security rolled out the biometric identifier US-VISIT program in January 2004.¹²⁸ DHS describes US-VISIT as "part of a continuum of security measures that begins overseas,

¹²⁶ Links to each state's Department of Corrections can be found at www.ancestorhunt.com/prison_search.

¹²⁷ *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004) (Theft offense classified as "violation" under Oregon law is not a "conviction" for immigration purposes).

¹²⁸ DHS published its initial rule for US-VISIT at 69 Fed. Reg. 482 (Jan. 5, 2004). It published an interim rule at 69 Fed. Reg. 53318 (Aug. 31, 2004) that expanded US-VISIT to include Visa Waiver Program entrants under INA §217, D visa crewmembers, and exempted certain Mexican nationals on B visas or Border Crossing Cards and Taiwan representatives of the Taiwan Economic and Cultural Representative Office (TECRO), in addition to the previously exempted holders of A-1, A-2, C-3 (except attendants, servants or personal employees of accredited officials), G-1, G-2, G-3, G-4, and NATO-1 to -6 visas. US-VISIT applies to all other nonimmigrant visa holders over the age of 14 and under the age of 79.

when a person applies for a visa to travel to the United States, and continues on through entry and exit at U.S. air and seaports and, eventually, at land border crossings.”¹²⁹ Under the program, an immigration officer scans the two index fingers and takes a digital photograph of most arriving persons traveling on nonimmigrant visas or the Visa Waiver Program.¹³⁰ Upon departure at ports that are equipped, the traveler is required to insert his or her visa into a kiosk, scan the index fingerprints, have another photo taken, and obtain a receipt for the exit registration.

DHS will keep the entry and exit information in the US-VISIT database, and will refer to it, checking it against passenger lists and other databases prior to a visitor's arrival to the United States or at the U.S. port of entry. A Privacy Impact Assessment for US-VISIT indicates that the information collected in the program may also be shared with other law enforcement

agencies at the federal, state, local, and tribal levels. DHS states that all information collected in US-VISIT will be stored in secure computer systems to ensure that confidentiality will be maintained in compliance with existing laws.¹³¹

US-VISIT is administered by CBP and, as such, should disclose records it maintains, pursuant to a request under the Freedom of Information Act.¹³² Additionally, there is a three-stage redress process for correcting errors.¹³³ Persons who seek to correct information in the system can request a review or change, or a DHS officer may determine an inaccuracy and make a change, or an aggrieved person may request assistance from the US-VISIT Privacy Officer.¹³⁴ A written response to the inquiry, including the action taken to correct the information, should be generated within 20 business days. The requester may also appeal to the Department Chief Privacy Officer.

¹³¹ The Federal Information Security Act of 2002, Title X of Pub. L. No. 107-296, 116 Stat. 2259, codified in scattered sections of U.S. Code Titles 6, 10, 15, 40 and 44; the Information Management Technology Reform Act, Pub. L. No. 104-105, codified at 40 USC §11101 *et seq.*; Computer Security Act of 1987, Pub. L. No. 100-235, codified at 40 USC §1441 *et seq.*; Government Paperwork Elimination Act, Title XVII, Pub. L. No. 105-277, 112 Stat. 2681-749, codified, as amended, at 44 USC §101; and Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231, 110 Stat. 1048, codified, as amended, at 5 USC §552.

¹³² 19 CFR §103.5 (specific request for records).

¹³³ Described in 69 Fed. Reg. 53318 (Aug. 31, 2004).

¹³⁴ The interim rule provides contact information as: Privacy Officer Steve Yonkers, US-VISIT, Border and Transportation Security, Washington, D.C. 20508. Phone: (202) 927-5200. Fax: (202) 298-5201. E-mail: usvisitprivacy@dhs.gov.

¹²⁹ See US-VISIT information at www.dhs.gov.

¹³⁰ 69 Fed. Reg. 482 (Jan. 5, 2004). INA §217.