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Freedom of Information Act And Background Checks

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Freedom of Information Act
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Based on the policies and guidelines that are being implemented by the current administration, the use of Freedom of Information Act (FOIA) requests should be an essential part of your practice. Regardless of whether your case is a family based filing, naturalization, asylum adjustment, or employment based application USCIS is under the directive to re-adjudicate prior approved applications when adjudicating renewals of visas and they are looking at all prior filings to look for fraud. More than ever creating a complete picture of your client's past dealings with USCIS, DHS, CBP, or DOS has become critical to your legal representation.

If you do not have a complete file for your client and/or you are not the client's first attorney, you may need to file a FOIA to get a complete picture of your client's immigration issue(s). Below is information on how to properly file a FOIA request with each of the different agencies that might have information on your client's case.

Keep in mind, the purpose for the creation of the FOIA is to "promote open, transparent government" and "to open agency action to the light of public scrutiny". *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976). There are certain limitations as to the information that can be disclosed.

FOIA EXEMPTIONS

All agencies are required to respond within a 20-day business period which excludes Saturdays, Sundays and legal holidays. However, this means that the agency begins to count the 20-day period as of the day they received the request and they are NOT required to provide the actual documents within that timeframe. They are required to provide the requester with their determination to comply with the request and the right to appeal their determination and any possible associated fees. Once the agency has determined that they will comply with the request, then they are required to "promptly" make the records available to the requestor. 5 U.S.C. Sec. 552(a)(6)(C)(i). Note, the exemptions are discretionary which means that the agencies are not required to withhold the information. *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979). A requester can appeal an agency determination to claim an exemption. The exemption may apply to an entire document or parts of a document. The redacted materials are generally "blacked out" on a page with notations regarding the exemption being applied. If there is an entire page exempted then it will appear covered with notations regarding the exemption being applied.

The most common exemptions applied to documents regarding immigration related matters have been highlighted below:

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

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