



May 5, 2022

Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, D.C. 20529-2140

Submitted online to <http://www.regulations.gov>

RE: Docket ID number USCIS-2008-0028.
19698 Federal Register / Vol. 87, No. 65 / Tuesday, April 5, 2022 /
OMB Control Number 1615-0102
USCIS-2008-0021; Agency Information Collection Activities; Revision of a Currently Approved
Collection: Form G-639; Online FOIA Request

Dear Ms. Deshommes:

The undersigned organizations respectfully submit the following comments in connection with Docket ID USCIS-2008-0028; OMB Control Number 1615-0102; Agency Information Collection Activities; Revision of a Currently Approved Collection: Form G-639; Online FOIA Request published in the Federal Register on April 5, 2022.

I. Introduction of Stakeholders and Expertise

The Immigrant Legal Resource Center (ILRC) is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity. The ILRC has produced legal trainings, practice advisories, manuals and other materials pertaining to the Freedom of Information Act (FOIA) as it pertains to the practice of immigration law. We also advocate for expansion of government transparency in all sectors.

ILRC operates a national technical assistance line to assist immigration attorneys as they navigate through records requests for their clients and write some of the only national resources on FOIA requests for individual immigration cases. Because of our focus on this complex area of

the law, we have a distinct interest in ensuring that Form G-639 and accompanying instructions are clear and understandable to applicants.

The American Immigration Council is a not-for-profit educational and charitable organization. The Council was established to increase public understanding of immigration law and policy, advocate for the fair and just administration of U.S. immigration laws, protect the legal rights of noncitizens and citizens, and educate the public about the enduring contributions of immigrants. Through research, analysis, litigation and transparency work, the Council seeks to hold the government accountable for unlawful conduct and restrictive interpretations of the law and for failing to ensure that the immigration laws are implemented and executed in a manner that comports with due process. The Council publishes practice materials and conducts numerous trainings each year explaining the process for requesting information under FOIA from immigration agencies. Clarity regarding the process for requesting information from U.S. Citizenship and Immigration Services (USCIS)—an agency with one of the largest FOIA caseloads of any agency within the federal government—is critical to the Council’s ability to provide sound advice to immigration practitioners.

The American Immigration Lawyers Association (AILA), established in 1946, is a voluntary bar association of more than 16,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. Our members’ collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

II. Comments on the Proposed Form/Instructions

We note that USCIS has added language to the Form G-639 Instructions that advises applicants that there is an alternative method for filing FOIA requests through an online system—Freedom of Information Records System (FIRST). Some of the new instructions are repeated on the USCIS web page. *See* USCIS website, *Request Records through the Freedom of Information Act or Privacy Act*, <https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act>.

To ensure the instructions accurately reflect the requirements under the FOIA statute and are clear to FOIA requesters, we suggest changes to the proposed revisions to the Form G-639 Instructions.

1. The Instructions should lessen language advocating the use of FIRST.

USCIS’ suggested changes to the Instructions include language that heavily promotes the use of FIRST. While there are advantages to a more efficient and streamlined process for submitting FOIA requests, FIRST is still a relatively new program and there is no publicly available assessment or data explaining FIRST’s efficiencies in detail. While it is understandable that

USCIS would like to inform FOIA requesters and their representatives that FIRST is an available alternative to the Form G-639, we suggest that language lauding FIRST not be the focus of Instructions for the Form G-639—a Form intended for FOIA requests when an individual chooses *not* to use FIRST. It is also important to note that statutory timeframes for making a determination on a FOIA request are the same for FOIA requests submitted 1) with a G-639, 2) in writing without use of the Form, and 3) through FIRST. Language in the Instructions that states the FIRST system processes FOIA requests more quickly and efficiently is problematic to the extent it implies a person may not receive a response to a FOIA request in the relatively short statutory timeframe—twenty or thirty days—using other methods. *See Instructions*, pp. 1-2 X (“Our online FOIA and PA services are a more efficient way to request and receive records than by using Form G-639 to make a request.”). We recommend deleting the five paragraphs of additions to the instructions at p. 2 X that begin with “Our online FOIA and PA services are a more efficient way ...”.

2. The Form G-639 should not require country of birth information; FIRST should not require mandatory information verifying identity to complete an online FOIA request.

The revision to the Form G-639 should remove the field “Country of Birth.” At a minimum, the Form G-639 and Instructions should explicitly state that an individual’s country of birth is not required to process a FOIA request. An individual might not want to share their country of birth with a government agency because this admission may seriously impact their immigration case. In removal proceedings, the government has the burden of proving an individual’s alienage.¹ Practitioners report that the government sometimes uses FOIA requests as evidence of alienage when country of birth is provided in the Form G-639. Because a person’s country of birth is only one means of verifying identity and sharing country of birth information could be damaging to a person’s immigration case, the request for country of birth should be removed from the Form G-639.

Though the Form G-639 could be more explicit that country of birth information is not required, immigration practitioners report that USCIS often will process a FOIA request even when the “Country of Birth” field is not completed. In contrast, the FIRST system does not permit an individual to submit a FOIA request without providing this information.

USCIS released FIRST—a digital FOIA submission and tracking system for USCIS records—in June 2019.² USCIS claims that it allows FOIA requesters to submit their requests faster than

¹ *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) (“It is true that the burden of proving alienage rests upon the Government.”), overruled on other grounds by *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); Gordon, Mailman, & Yale-Loehr, *Immigration Law and Procedure* § 64.03 (rev. ed. 2009) (“INA § 240(a)(1) provides that IJs shall determine whether ‘an alien’ is inadmissible or deportable. It therefore remains the government’s burden to first establish the court’s jurisdiction by proving that the person in court is, in fact, ‘an alien.’”).

² Press Release, U.S. Citizenship and Immigration Services, USCIS Expands FIRST: A Fully Digital FOIA System (June 25, 2019), <https://www.uscis.gov/news/news-releases/uscis-expands-first-a-fully-digital-foia-system>.

physical mail submissions.³ This online system requires the user to set up an online MyUSCIS account to track requests and receive requested documents digitally. It also requires the following information: purpose of request, name, aliases, mailing address, country of birth, and information about family members.⁴ The system does not allow an individual to complete an online FOIA submission without providing this information.

Many individuals may not want to provide all of this information because they do not want to enter their country of birth and concede alienage or provide information about their family members.

By creating and promoting an online form that only can be submitted when all requested information is provided, the agency is compelling individuals to concede alienage. In order to submit a FOIA request to obtain information necessary to defend against removal or assess eligibility for immigration relief without conceding alienage, a person would need to ignore USCIS' strong recommendation to use the FIRST system and 1) complete a Form G-639 without providing country of birth, or 2) submit a request in writing without a Form G-639. We suggest FIRST eliminate the field requesting country of birth information or, at a minimum, not require that information to submit the form online.

3. The Instructions should clearly state FIRST is one option among others for submitting a FOIA request.

FOIA requires that requests for agency records be reasonably described and in writing and the agency has outlined acceptable methods for submission, including 1) with a G-639, 2) in writing without use of the Form G-639, and 3) through FIRST. Though FIRST may provide some efficiencies, not all individuals will want to create a MyUSCIS account and submit a FOIA request online, either because of personal preference, access to computers, or inability to deal with challenges associated with creating an online account.

The USCIS webpage already heavily discourages applicants from using a Form G-639. Under the listing for the Form G-639, the first line directs requesters to use the FIRST process.⁵ Only after scrolling through a page of information does an applicant arrive at the Form G-639 with information about where to file it by mail.⁶

The agency's failure to clearly communicate the methods for accessing and completing the Form G-639 on its website is regrettable and the extensive discussion about the FIRST process in the Form G-639 Instructions is confusing and unnecessary. Though USCIS may prefer FIRST, it is

³ *Id.*

⁴ See U.S. Citizenship and Immigration Service, *Submit a FOIA or PA Request, For Myself, Identify Verification*, <https://first.uscis.gov/#/request-self> (last visited May 5, 2022) (noting certain fields as required with a red asterisk).

⁵ U.S. Citizenship and Immigration Services, *Forms, All Forms*, <https://www.uscis.gov/forms/all-forms> (last visited May 5, 2022).

⁶ U.S. Citizenship and Immigration Services, *Records, Request Records, Request Records through the Freedom of Information Act or Privacy Act*, <https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act> (last visited May 5, 2022).

the decision of the requester and their representative how to approach the FOIA submission process. Where critical decisions regarding an immigration case will be informed by the records obtained through a FOIA, an individual should clearly understand their options and proceed with confidence that they will not jeopardize their immigration case in the process of trying to resolve it.

Sincerely,

Peggy Gleason

Senior Staff Attorney, on behalf of ILRC