

**FINAL DISCUSSION DRAFT**

To: Process Subcommittee, 2020-22 FOIA Advisory Committee  
From: First-Person FOIA (“FPF”) Working Group  
Date: April 1, 2022  
Re: Report of the FPF Working Group to the FOIA Advisory Committee

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**I. Introduction and Background**

During the 2018-20 term, the FOIA Advisory Committee recommended:

that the Office of Government Information Services and the Office of Information Policy have agencies identify common categories of records requested frequently under the FOIA and/or Privacy Act by or on behalf of individuals seeking records about themselves, for the purpose of establishing alternative processes for providing access to these records to requesters in a more efficient manner than the FOIA.

Recommendation 2020-14.<sup>1</sup>

Recommendation 2020-14 advances two important objectives. First, an efficient first-person alternative to FOIA timely provides individuals with important records concerning their life, liberty, and property interests at stake in agency proceedings and benefit programs. FOIA is often a substitute for discovery not otherwise available. This dimension of record access implicates basic procedural due process, as well as fairness and efficiency concerns. Second, a first-person alternative to FOIA would free agency FOIA resources to timely address requests touching on matters of broader public concern.

Since December 2020, the First Party Working Group (FPF) Working Group has studied the progress agencies have made on this recommendation and what actions agencies can take to advance timely access to federal government records in accordance with the Attorney General’s recently issued FOIA Guidelines.<sup>2</sup>

**II. Summary of FPF Working Group Recommendations**

**Recommendation # 1:** Records relied on by any agency that affect eligibility for benefits or adversely affects an individual in proceedings should be made automatically available and not require first-person FOIA practice.

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<sup>1</sup> <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf> (last visited July 22, 2021).

<sup>2</sup> <https://www.justice.gov/ag/page/file/1483516/download> (last visited March 16, 2022).

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**Recommendation # 2:** To the extent feasible, agencies should amend any existing regulations, directives, policies, and guidance adversely impacting access for pro se parties.

**Recommendation # 3:** Agencies that receive frequent first-person requests should identify the most commonly requested records and develop a plan for processing such records that leverages technology and promotes efficiency and good customer service.

**Recommendation # 4:** A comprehensive assessment of the Department of Homeland Security (DHS) processes, workforce, and existing technology should be initiated as it relates to A-files responsive to FOIA requests.

### **III. FPF Working Group Methodology**

The First-Person FOIA (FPF) Working Group began by studying the existing implementation of the 2018-20 term Recommendation 2020-14 and by identifying agencies that offer low-hanging fruit for its implementation. To that end, the FPF Working Group heard from former FOIA Advisory Committee member (2016-18 term) Professor Margaret Kwoka and reviewed her law journal article on the subject. Margaret B. Kwoka, *First-Person FOIA*, 127 *YALE L.J.* 2204 (2018). Based on her work and the idea of “expand access, shrink FOIA,” we focused on a handful of agencies identified as having large numbers of first-person FOIA requests, such as the Internal Revenue Service (IRS); the Social Security Administration (SSA); entities within the Department of Homeland Security (DHS), such as U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP); and an entity within the Department of Justice (DOJ), the Executive Office for Immigration Review (EOIR). We then engaged with agency representatives, as well as those who conduct business before those agencies, to identify those common categories of records frequently requested, budgetary, regulatory, technological and other challenges preventing first-party access, and to discuss strategies for securing the timely release of frequently requested records. The FPF also reviewed a collection of materials to include annual reporting metrics, operating procedures, record schedules, and court reports.

Typically, the FPF Working Group met biweekly opposite those weeks with Process Subcommittee meetings.

Simultaneous to the group’s work, the Office of Government Information Services (OGIS) reported in August 2021 that 18 agencies in their 2021 Chief FOIA Officer Reports noted some degree of alternative non-FOIA means to access first-party records. OGIS’s assessment, *Commonly Requested Categories of First-party Records* (<https://www.archives.gov/ogis/foia-compliance-program/targeted-assessments/first-party-records-30-aug-2021>, August 30, 2021), completed OGIS’s work on Recommendation 2020-14, upon which the FPF Working Group expands in its work.

### **IV. FPF Working Group Members**

1. Roger Andoh, Working Group Leader, Centers for Disease Control and Prevention
2. Alexis Graves, U.S. Department of Agriculture

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3. Tuan N. Samahon, Villanova University Charles Widger School of Law
4. Thomas M. Susman, American Bar Association

The FPF Working Group was formerly assisted by Kirsten Mitchell, OGIS, National Archives and Records Administration (NARA), the Committee's Designated Federal Officer; Hana Medlin (Centers for Disease Control and Prevention) and Jennifer Dryer (NARA), in addition to the participation of other 2020-22 FOIA Advisory Committee members noted below.

### **V. Preliminary Findings**

Some agencies have begun to offer parties before them alternatives to first-person FOIA practice, but most agencies have alternatives that are, at best, in their infancy. Some alternatives are incomplete or wholly inadequate. Key agencies with high volumes of first-person requests need to take seriously Recommendation 2020-14 and implement changes consistent with it.

We recognize that additional resources will be required to effect proactive disclosure mechanisms for first-person requesters but conclude that the long-term benefits for the agencies and other FOIA requesters, as well as the relevant first-person requesters, will be worth the investment.

This memorandum first considers two agencies, the Internal Revenue Service (IRS) and the Social Security Administration (SSA), that have already begun to implement alternatives to first-person FOIA practice. It then considers two departments' agency components, USCIS and the Executive Office for Immigration Review (EOIR), that have technological infrastructure in place to offer alternatives, but that would benefit from substantial reform in their response to first-person FOIA requests.

#### **A. Agencies that have already implemented some alternatives to FPF**

Some agencies have already taken steps to provide efficient alternatives to FOIA requests to facilitate prompt requester access to frequently requested records. Two of these constituent-oriented agencies are the IRS and the SSA.

##### **1. *IRS***

On January 13, 2021, FPF Working Group member Tuan Samahon interviewed by phone Nina E. Olson, former National Taxpayer Advocate, 2001-2019, head of Taxpayer Advocate Service, now Executive Director at the Center for Taxpayer Rights.<sup>3</sup> Olson suggested several factors moved the IRS in the direction of providing a tax transcript, a type of summary document of tax information relating to a taxpayer's tax filings and subsequent actions taken by the IRS.

*First*, many records that requesters sought were digital records housed in over 60 different major databases that its employees had to consult to see the status of a taxpayer's return. As IRS

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<sup>3</sup> The content about the IRS is the opinion of the interviewee and does not necessarily represent the position of the agency.

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records had become increasingly digital, technology facilitated information retrieval from the multiple databases to generate taxpayer transcripts.

*Second*, IRS saw the “tax transcript system,” a FOIA alternative, as an efficient, time-saving response. It saw many efficiencies in offering a single document as a way of reducing requests made to IRS, including those made under a tax-specific, FOIA-type statute located at 26 U.S.C. § 6110. IRS was motivated to implement its tax transcript system because it perceived them as a time saving response.

*Third*, politically influential external third parties helped bring about the change in IRS. Mortgage lenders and other financial institutions often sought timely production of tax information (with individual taxpayers’ consent) as part of their due diligence in lending processes. Tax transcripts provided a speedier alternative to the more laborious FOIA process. Relatedly, external agencies provided impetus to the IRS making the change too. The U.S. Department of Education’s needs for taxpayer records also helped move the change along. Taxpayers often required information from the IRS on a timely basis to complete federal financial aid forms (Free Application for Federal Student Aid (FAFSA)). Due to tax specific requirements (26 U.S.C. § 6103), special statutory authorization was required to enable this data sharing across agencies.

*Fourth and finally*, IRS extended the efficiencies it receives from offering tax transcripts by offering self-service online accounts from which taxpayers can request transcripts. That reduces receipt and processing of paper correspondence and reduces demand on customer service representatives.

### 2. SSA

On February 4, 2021, the FPF Working Group heard from 2020-22 FOIA Advisory Committee member Linda Frye, SSA, on how SSA handles simple FOIA requests. Linda reported that SSA handles approximately 13,000 FOIA requests annually (this does not include first-party Privacy Act requests (aka access requests)), which are received principally via FOIAonline. The most requested types of records are copies of decedents’ Forms SS-5 (Applications for Social Security Cards); claims files; and genealogical information.

The FOIA requests that SSA receives are placed into one of two tracks: simple or complex. The high volume of requests for copies of decedents’ original SS-5 and Numident records are simple requests that are processed by the agency’s Office of Central Operations, Division of Earnings and Business Services. However, appeals of these requests are processed by the Office of Privacy and Disclosure (OPD). To assist with OPD’s processing of simple FOIA requests, OPD utilizes the assistance of SSA’s SkillsConnect program, i.e., analysts from components outside of OPD work one day a week as FOIA analysts on the processing of these simple requests.<sup>4</sup> The SkillsConnect participants receive guidance from experienced FOIA analysts, and their responses receive clearance before being sent to requesters. As concerns the simple FOIA workload, the SkillsConnect participants primarily process SS-5/Numident appeals and requests

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<sup>4</sup> SSA sunsetted the SkillsConnect program at the end of fiscal year 2021. OPD’s current SkillsConnect project will end in March 2022.

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for genealogical information. The SkillsConnect participants have a similar pay grade to OPD’s FOIA analysts, but by processing the simple requests, they free up the more experienced FOIA analysts to work on complex cases.

### B. Agency components that would benefit from substantial reform of current practice

During March through September 2021, the FPF Working Group focused considerable amounts of time on immigration, an area where there is significant first-person FOIA activity scattered across multiple executive departments (DHS, DOJ, Labor, State) and within multiple component entities of DHS (*e.g.*, DHS-USCIS, DHS-ICE, DHS-CBP).<sup>5</sup> Our initial principal focus was on DHS-USCIS, an area where FPF Working Group Leader Roger Andoh holds considerable relevant expertise as a former Supervisory Government Information Specialist with USCIS. He identified personal “Alien Files” (or A-Files) as the principal collection of records most requested by first-person requesters. In addition, we spoke to agency representatives as well as members of the requester community before the agencies.

While the Working Group was hesitant to single out specific agencies as the focus of our recommendations, DHS accounts for approximately half of all FOIA requests to the federal government and thus it would be irresponsible for us to fail to address recommendations to this Department.

#### 1. *DHS-USCIS*

The largest category of first-person FOIA requests is A-Files. A-Files may run approximately 200 pages with an average complex track processing time of 68 days when processed through FOIA.<sup>6</sup> A-Files include critical information about past interactions between the individual and DHS; records of prior entries to the country, admissions, or removal orders; records of past statements; and records of past applications filed by the noncitizen or on the noncitizen’s behalf. These records are requested both (1) to apply for immigration benefits where delay hinders an alien’s ability to apply for benefits and (2) to support an alien in a pending immigration proceeding, such as removal proceedings, release from detention, or bond hearings. This use of FOIA for administrative discovery is a significant driver to the USCIS backlog problem. The solution USCIS has implemented is to create a separate “litigation track.” First-person requesters and their attorneys often seek these records.

Several of the records found within an A-File are also of interest to CBP, a separate DHS component. These include recordings concerning: (1) apprehension by Border Patrol between

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<sup>5</sup> The FPF Working Group discussed the possibility of a cross-department, cross-agency portal for immigrants/non-immigrants (and counsel) to access documents relating to their matters, such as those held by DHS-ICE, DHS-CBP, DOJ-EOIR, DOL, DOS, etc. That possibility would be further sweeping than, say, the online accounts that USCIS already allows aliens for its records (*see, e.g.*, <https://www.uscis.gov/file-online/how-to-create-a-uscis-online-account>). Ultimately, however, we focused on measures for incremental improvements.

<sup>6</sup> [https://www.dhs.gov/sites/default/files/publications/dhs\\_fy2020\\_foia\\_report\\_cleared.pdf](https://www.dhs.gov/sites/default/files/publications/dhs_fy2020_foia_report_cleared.pdf) (reporting for FY 2020, at page 22, the USCIS average number of days to respond in the table “Processed Requests – Response Time for All Processed Perfected Requests”).

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Official Ports of Entry; (2) CBP background investigations; (3) detention by Border Patrol or at a port of entry; (4) expedited removal by Border Patrol or at a port of entry; (5) I-94 Records documenting a traveler's arrival to, or departure from, the U.S.; (6) passenger name records (PNR) (Travel Industry Reservation Data); (7) records regarding inspection or examination upon arrival at a U.S. Port of Entry; (8) information regarding entry and exit; and (9) voluntary return records. In FY 2020, CBP took 49+ days for simple requests, 161+ for complex requests, and 179+ for those requests in the expedited track.<sup>7</sup>

On March 4 and April 15, 2021, the FPF Working Group heard from Mark Prada, American Immigration Lawyers Association (AILA), about the difficulties aliens and their counsel experience when trying to obtain records. On March 18, we also heard from 2018-20 FOIA Advisory Committee member Emily Creighton, Legal Director, Transparency, American Immigration Council (AIC), on the same topic. In addition, on March 30, we heard from three USCIS representatives: Tammy Meckley, Associate Director of the Immigration Records and Identity Services Directorate (IRIS); Terri White, and Brandi Blackburn.

Prada explained why immigration attorneys file first-person FOIA requests with USCIS. He explained these requests concern agency records specifically related to their clients' cases, not policy-related materials likely to be of broader public interest.<sup>8</sup> Practitioners want copies of DHS records “not only for the purpose of defending against removal in [EOIR], but also for preparing affirmative benefits requests with the non-adversarial immigration agencies,”<sup>9</sup> such as USCIS. In the affirmative benefits context, they often seek records that the agency might rely on to establish ineligibility for relief available from USCIS.<sup>10</sup>

Unfortunately, USCIS representatives perceived multiple obstacles to a FOIA-alternative A-File first-person request system. They noted the typical A-File averages 270 pages, including law enforcement documents from other agency records. Processing those records requires memoranda of understanding (MOU) with the other agencies, which include DOD, DOJ, and DOJ-FBI. Because any first-person process would resemble a FOIA process—intake, file scan, page-by-page review, etc.—USCIS was unsure how helpful taking requests out from the FOIA queue would be. When asked whether specific A-File records could be pulled from the file to facilitate a first-person FOIA alternative, USCIS noted it had a “fast track” (21 days) separate from the slower queue for an A-File (26 days).

USCIS noted that it completes in 11 days processing records for those persons in removal proceedings before an Immigration Court. But that rate has not always been the case. It is in response to the successful class action litigation brought in 2019 against DHS-USCIS and DHS-ICE that challenged their pre-litigation rate of processing FOIA requests. In *Nightingale v. U.S. Citizenship and Immigration Services*, Emily Creighton (with whom working group

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<sup>7</sup> *Id.* (reported at page 22).

<sup>8</sup> Mark Prada, Prada Urizar, PLLC, *Recommendations for Legislative Fixes to the Immigration-Related FOIA Backlog through the Strengthening of Existing Procedures*, at 2 (Apr. 15, 2021) (addressing DHS and DOJ FOIA backlogs in immigration-related first-person FOIA requests).

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.* at 5.

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members spoke) and others represented a plaintiff class of noncitizens and their counsel in challenging the systemic failure of DHS-USCIS and DHS-ICE to timely respond to first-person FOIA requests for A-Files.<sup>11</sup> USCIS admitted that it had failed to comply with FOIA statutory deadlines *for at least eight years*.<sup>12</sup> The Court excoriated the DHS component agencies:

This noncompliance has real life consequences. Defendants serve as custodians of A-Files, prosecutors in removal proceedings, and adjudicators of applications for immigration benefits. Their delay in processing A-File FOIA requests deprives plaintiffs of the information they need to defend against removal, to obtain benefits, and to gain citizenship. It undermines the fairness of immigration proceedings, particularly for the vast number of noncitizens who navigate our immigration system without assistance of counsel. Despite defendants' recent efforts to reduce the backlog of A-File FOIA requests, they have not come close to resolving this systemic problem. A comprehensive remedy is needed and is long overdue.<sup>13</sup>

Ultimately, the Court ordered injunctive relief against USCIS in this pattern or practice case, permanently enjoining it “from failing to adhere to FOIA statutory deadlines for adjudicating A-File FOIA requests...”<sup>14</sup> The Court also required USCIS (and ICE) to “make determinations on all A-File FOIA requests” in their backlogs within sixty days of the order.<sup>15</sup> Further, the Court ordered the defendants to “provide the court and class counsel with quarterly compliance reports, with the first report due within ninety (90) days of this order.”<sup>16</sup>

The Court's class action injunction effectively directs USCIS to prioritize first-person FOIA requests due to the definition of the class and the scope of the injunctive relief. It certified a class defined as “[a]ll individuals who filed, or will file, *A-File FOIA requests with USCIS* which have been pending, or will be pending, with USCIS for more than 30 business days without a determination.” Ironically, this injunction privileges first-person FOIA requests over those that might concern broader policy concerns classically thought to be the core missions of “ensur[ing] 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.”<sup>17</sup>

The *Nightingale* injunction was a successful prompt to address first-person FOIA backlogs at USCIS. Its most recent compliance report demonstrates significant progress toward reducing its backlog. According to Tammy Meckley, USCIS reduced its “A-File” backlog from 21,987 to 244 requests.<sup>18</sup> Similarly, with respect to new requests, USCIS “achieved substantial compliance with the injunction’s requirement that the agency timely process new FOIA requests for

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<sup>11</sup> 507 F.Supp.3d 1193, 1195-96 (N.D. Cal. 2020).

<sup>12</sup> *Id.* at 1196.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

<sup>18</sup> See Fifth Dec’l Tammy M. Meckley, *Nightingale v. DHS*, No. 3:19-cv-03512-WHO (N.D. Cal. filed Sept. 15, 2021), ¶ 5.

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A-Files.” To accomplish this reduction in backlog and prospective compliance, USCIS credited “technological, staffing, and management changes.”<sup>19</sup>

Because the Committee wants to ensure USCIS’ continued success and because noncompliance with FOIA’s statutory timeframe carries especially grave consequences in removal proceedings, we recommend that a non-government entity with research and development expertise assess and then provide recommendations to improve the current state of USCIS’ FOIA program. That recommendation is consistent with other groups that have called for DHS to modernize its access to A-Files outside of FOIA.<sup>20</sup> There are efficiencies of scale to be gained by processing first-person requests through an alternative system (*see, e.g.*, IRS and its successful use of tax transcripts). Moreover, the *Nightingale* court’s privileging of requests for matters of narrow individual concern, while helpful for the individuals with liberty interests, slows requests for matters of broader public concern. USCIS gave us no indication that it planned to offer any alternative to first-person FOIA practice. Instead, it noted that anyone else in USCIS that would process first-person requests would do so as a collateral duty, and we would be left with the same result, slow responses.

### 2. DOJ-EOIR

In addition to the information obtained from the previously mentioned requesters’ counsel, members of the FPF Working Group and Advisory Committee (Andoh, Graves, Mitchell, and Semo) met with representatives from EOIR on September 2, 2021. The meeting’s focus was EOIR’s first-person FOIA requests.

EOIR principally engages in executive branch adjudication of individual rights through three adjudicatory bodies: (1) the Office of the Chief Immigration Judge (OCIJ); (2) the Office of the Chief Administrative Hearing Officer (OCAHO); and (3) the Board of Immigrations Appeals (BIA). Each of these adjudicative units handle important matters that touch on life, liberty, and property interests protected by the Due Process Clause. Within OCIJ, immigration judges have the power, *inter alia*, to order the “removal” of aliens from the United States, potentially to countries where their lives are at risk, or grant asylum, withholding of removal, or other remedies. The OCAHO administrative law judges conduct hearings in civil penalty cases involving, for example, employers allegedly knowingly hiring unauthorized aliens, engaging in immigration-related unfair employment practices, and immigration-related document fraud. The BIA handles administrative appeals from the Immigration Judges (*e.g.*, orders of removal) as well as from DHS district directors.

In theory, Congress provides foreign nationals in removal proceedings with procedural rights, including, among others, “a reasonable opportunity to examine the evidence against the alien”<sup>21</sup> and “access to the alien’s visa or other entry document, if any, and any other records and

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<sup>19</sup> *Id.*, ¶ 12.

<sup>20</sup> *See, e.g.*, Open the Government, Accountability 2021, Recommendations for Restoring Accountability in the Federal Government 22 (2020), *available at* <https://www.openthegovernment.org/wp-content/uploads/2020/10/Accountability-2021-Agenda-1.pdf#page=22> (last visited on Dec. 3, 2021).

<sup>21</sup> 8 U.S.C. § 1229a(b)(4)(B).

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documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.”<sup>22</sup> But in practice enforcement agencies “tak[e] the position that the only way [a respondent in removal proceedings] would be entitled to get the file would be a Freedom of Information Act request.”<sup>23</sup> Attorney Prada noted that only the Ninth Circuit has precedent interpreting those statutes to require agencies to provide immigrants with access to their A-Files.<sup>24</sup> “We are unable to imagine a good reason for not producing the A-file routinely without a request....”<sup>25</sup>

Consequently, in connection with removal adjudication, EOIR receives a very high percentage of first-person FOIA requests. Approximately 50 full-time FOIA staff receive and process approximately 48,000 to 60,000 requests annually. Approximately 99% of the requests seek records of proceedings (ROP) of aliens before Immigration Judges. Generally, a ROP includes: a Notice to Appear (Form I-862); hearing notice(s); the attorney's Notice of Appearance (Form EOIR-28); Alien's Change of Address Form(s) (Form EOIR 33/IC); application(s) for relief; exhibits; motion(s); brief(s); hearing tapes (if any); and all written orders and decisions of the Immigration Judge. The EOIR FOIA Service Center centralizes record processing. It is where all requests for records must be filed from the immigration courts located across the country.

Traditionally, parties to proceedings could obtain a copy of ROPs only by filing a FOIA request. Paper records must be mailed between immigration courts, the BIA, the Federal Records Center, and the EOIR FOIA Service Center. As records are maintained all over the country, this paper record system, which is being phased out, was highly inefficient.

The roll out of the EOIR Courts and Appeal System (ECAS) promises to remedy this inefficiency by offering timely processing of first-person FOIA requests. EOIR began to roll out ECAS in stages in late 2019, but as of late 2021 it is still not completely implemented.<sup>26</sup> ECAS will eventually permit BIA to “access, manage, store and transfer” records of proceedings electronically.<sup>27</sup> It will also permit self-service access to DHS and representatives of aliens in proceedings before EOIR.<sup>28</sup>

ECAS provides a good start in furnishing access but remains insufficient for two reasons.

First, and very significantly, ECAS is unavailable to pro se immigrants. Solely DHS and “opted-in representatives” can access ECAS.<sup>29</sup> Without that access to ECAS, pro se parties will have to rely on paper ROPs, which remain accessible only through first-person FOIA requests.

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<sup>22</sup> 8 U.S.C. § 1229a(c)(2)(B); *see also* 8 U.S.C. § 1361 (similar).

<sup>23</sup> *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010) (footnote omitted).

<sup>24</sup> *Prada*, *supra* note 3, at 4.

<sup>25</sup> *Dent*, 627 F.3d at 375.

<sup>26</sup> EOIR's rollout of ECAS represents an attempt to adhere to the OMB/NARA mandate (M-19-21) that requires agencies to become completely digital by December 2022.

<sup>27</sup> U.S. Dep't of Justice, Executive Office for Immigration Review, “Understanding ECAS” (Aug. 2021) (DOJ\_Understanding\_ECAS.BIA\_Aug2021Updates.pdf) [hereinafter “Understanding ECAS”].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

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On appeal to the BIA, pro se appellants will continue to file in hard copy and be served in hard copy. When asked, the agency representative at EOIR said pro se appellants “don’t have access, for now,” but also stated that he wasn’t sure of the number of pro se appeals currently in the queue.<sup>30</sup> He offered no further explanation for this failure to provide access.

This unavailability of ROPs to pro se aliens is a very significant problem because almost half of the parties before EOIR are pro se. “Removal” proceedings are formally “civil” administrative matters.<sup>31</sup> Accordingly, barring any statutory right to paid counsel, there is generally no constitutional right to government paid counsel for indigents in civil matters.<sup>32</sup> Unsurprisingly, then, many people, unable to afford counsel, must proceed pro se. According to data assembled by Professor Susan Long and Syracuse University’s Transactional Records Access Clearinghouse (TRAC), as of the end of FY 2021, 663,029 immigrants (“aliens”) are unrepresented out of 1,443,500 pending deportation (“removal”) cases, or approximately 46% of people in proceedings.<sup>33</sup> Because ECAS is currently unavailable to them, almost half of pro se respondents must file first-person FOIA requests for their ROPs for any appeal to the BIA.

Second, ECAS fails to address the problem of accessing *paper* ROPs, whether for pro se or represented parties. Pre-ECAS, records of proceedings were generated in paper.<sup>34</sup> They will not be made available via ECAS.<sup>35</sup> Instead, EOIR will continue to require FOIA requests to secure release of records begun in paper.<sup>36</sup>

Of course, the perfect should not be made the enemy of the good, but there are easy alternatives that can and should be provided where paper ROPs are at issue. During our September 2nd meeting, EOIR informed us that Immigration Court hearings are recorded digitally. Limited effort would be required to automatically furnish these raw digitally recorded audio files for download as a matter of course. Given the seriousness of removal proceedings and the individual liberty interests at stake, timely furnishing audio recordings of a removal proceeding is a modest step in the direction of disclosure and might obviate the need for first-person FOIA requests.

## **VI. Our Recommendations for Next Steps**

Congress may need to intervene to spur change where agencies are unwilling to adopt the change as a matter of their existing administrative discretion, but the below recommendations may all be accomplished by executive action.

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<sup>30</sup> Email correspondence between Roger Andoh and Joseph Schaaf (EOIR) Oct. 29, 2021.

<sup>31</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

<sup>32</sup> *See, e.g., Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003) (noting “alien does not have a right to appointed counsel”).

<sup>33</sup> <https://trac.syr.edu/phptools/immigration/nta/> (select “outcome” for left-hand table and click “pending”; then select “represented” in middle table) (last visited Nov. 3, 2021).

<sup>34</sup> Understanding ECAS, at 1.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

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- A. Recommendation # 1:** Records relied on by any agency that affect eligibility for benefits or adversely affects an individual in proceedings should be made automatically available and not require first-person FOIA practice.

The Fifth Amendment guarantees that no person shall “be deprived of life, liberty, or property, without due process of law.” In addition to the Courts, the Executive Branch can provide persons with the due process of law guaranteed by the Fifth Amendment.<sup>37</sup> Moreover, Congress and executive agencies may furnish additional processes above and beyond what the U.S. Constitution requires. But when notice and a meaningful opportunity to be heard are “a person’s due, process which is a mere gesture is not due process.”<sup>38</sup> Very often the meaningful exercise of the opportunity to be heard requires *timely* access to information in records about the party to the agency’s action. This evidence is found in records that only the agency holds. The inadequacy of other paths to disclosure often motivates parties to engage in first-person FOIA practice.

We recommend, across all agencies, that records relied on by any agency that affects eligibility for benefits or adversely affects an individual in proceedings ***should be made automatically available and not require first-person FOIA practice***. In the judicial context, automatic disclosures are common and supplement other tools. In the criminal context, *Jencks v. United States*<sup>39</sup> and *Brady v Maryland*<sup>40</sup> require disclosure of certain materials to the criminally accused. In the civil context, the Federal Rules of Civil Procedure categorically mandate some initial disclosures from the parties.<sup>41</sup>

- B. Recommendation # 2:** To the extent feasible, agencies should amend any existing regulations, directives, policies, and guidance adversely impacting access for pro se parties.

EOIR’s ECAS system is a large step in the right direction of providing timely access to electronic ROPs. But differential treatment between represented parties and DHS on the one hand and pro se immigrants on the other is a substantial problem. As previously noted, the number of pro se parties before EOIR is very large. ECAS provides a simple mechanism for efficiently and inexpensively distributing records of proceedings. Given that the technology is already in place to enable this disclosure, we specifically recommend that EOIR should change its policy to permit pro se immigrants access to the ECAS system. But our recommendation is still more general. Record access should not disfavor or discriminate against pro se parties. In fact, requiring pro se parties to engage in satellite FOIA processes exacerbates their inability to secure counsel.

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<sup>37</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>38</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<sup>39</sup> 353 U.S. 657 (1957).

<sup>40</sup> 373 U.S. 83 (1963).

<sup>41</sup> Fed. R. Civ. P. 26(a)(1)(A).

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- C. Recommendation # 3:** Agencies that receive frequent first-person requests should identify the most commonly requested records and develop a plan for processing such records that leverages technology and promotes efficiency and good customer service.

Both IRS and EOIR successfully use technology to distribute first-person FOIA records more efficiently and conveniently than would be the case if parties before agencies had to file FOIA requests. Tax transcripts draw upon information from multiple databases to conveniently release first-party information to taxpayers. Similarly, ECAS makes ROPs more promptly and efficiently available to counsel of represented parties.

SSA has also successfully developed a method of handling a high volume of first-party requests by flagging and sorting first-person FOIA requests from other types of FOIA requests. The agency is aware of its most commonly requested records and can leverage that knowledge to more efficiently staff their processing. IRS too is aware of its most commonly requested records. Tax transcripts respond to that agency's first-person request reality. Similarly, EOIR is aware that ROPs are the chief target of first-person FOIA requests. Consequently, it was able to include the release of these records through ECAS, at least to represented parties. Even USCIS is aware that A-Files are its agency's most commonly requested collection of first-person records. Agencies should leverage their knowledge of commonly requested records to provide good customer service.

- D. Recommendation # 4:** A comprehensive assessment of DHS' processes, workforce, and existing technology should be initiated as it relates to the disposition of A-Files responsive to FOIA requests.

The assessment would be performed by a non-governmental entity with expertise in research and development, and directed to USCIS, the creator of the approximately 70 million A-Files and the system manager for the Alien File/Central Index System. Other DHS components like ICE and CBP that maintain equities in those same files and systems will also be assessed. Recommendations will focus on three dimensions – process, workforce, and technology – to reduce delays.