

Fact Sheet: Federal Regulations Protecting the Confidentiality of Asylum Applicants

Synopsis

The federal regulations at 8 CFR 208.6 generally prohibit the disclosure to third parties of information contained in or pertaining to asylum applications, credible fear determinations, and reasonable fear determinations—including information contained in RAPS or APSS¹—except under certain limited circumstances. These regulations safeguard information that, if disclosed publicly, could subject the claimant to retaliatory measures by government authorities or non-state actors in the event that the claimant is repatriated, or endanger the security of the claimant's family members who may still be residing in the country of origin. Moreover, public disclosure might, albeit in rare circumstances², give rise to a plausible protection claim where one would not otherwise exist by bringing an otherwise ineligible claimant to the attention of the government authority or non-state actor against which the claimant has made allegations of mistreatment.

According to established guidance, confidentiality is breached when information contained in or pertaining to an asylum application (including information contained in RAPS or APSS) is disclosed to a third party in violation of the regulations, and the unauthorized disclosure is of a nature that allows the third party to link the identity of the applicant to: (1) the fact that the applicant has applied for asylum; (2) specific facts or allegations pertaining to the individual asylum claim contained in an asylum application; or (3) facts or allegations that are sufficient to give rise to a reasonable inference that the applicant has applied for asylum. The same principles generally govern the disclosure of information related to credible fear and reasonable fear determinations, as well as to applications for withholding or deferral of removal under Article 3 of the Convention Against Torture, which are encompassed within the asylum application.

In the absence of the asylum applicant's written consent or the Secretary of Homeland Security's³ specific authorization, disclosure may be made only to United States government officials or contractors and United States federal or state courts on a need to know basis related to certain administrative, law enforcement, and civil actions. In some instances, interagency arrangements have been established – such as the arrangement between the former INS and the FBI -- to facilitate the proper disclosure of asylum-related information to United States agencies pursuant to the regulations. The release of information relating to an asylum application,

¹RAPS is the system for maintenance of records concerning aliens who affirmatively seek asylum by applying for the benefit with USCIS. APSS is the system for maintenance of records concerning aliens referred to a USCIS asylum officer for a credible fear or reasonable fear screening determination after having expressed a fear of return to the intended country of removal because of fear of persecution or torture during the expedited removal process under INA sec. 235(b) or administrative removal processes under INA sec. 238(b) or INA sec. 241(a)(5).

²Public disclosure alone will rarely be sufficient to establish *sur place* protection claims under U.S. asylum laws. The applicant would have to establish, in light of this disclosure, that he or she has a well-founded fear of persecution on account of one of the protected grounds.

³By operation of section 1512(d) of the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, 2310, the Attorney General's authority under 8 C.F.R. § 208.6(a) to authorize disclosure of confidential asylum information held by the former Immigration and Naturalization Service (INS)—and now held by the Department of Homeland Security (DHS)—was transferred to the Secretary of DHS.

credible fear determination, or reasonable fear determination (including information contained in RAPS or APSS) to an official of another government or to any entity for purposes not specifically authorized by the regulations without the written consent of the claimant requires the express permission of the Secretary of Homeland Security.

Code of Federal Regulations, Title 8

Sec. 208.6 Disclosure to third parties.

(a) Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General [now the Secretary of DHS].

(b) The confidentiality of other records kept by the [Immigration and Naturalization] Service [now DHS] and the Executive Office for Immigration Review that indicate that a specific alien has applied for asylum, received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure. The Service [now DHS] will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.

(c) This section shall not apply to any disclosure to:

(1) Any United States Government official or contractor having a need to examine information in connection with:

(i) The adjudication of asylum applications;

(ii) The consideration of a request for a credible fear or reasonable fear interview, or a credible fear or reasonable fear review;

(iii) The defense of any legal action arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear determination or reasonable fear determination under § 208.30 or § 208.31;

(iv) The defense of any legal action of which the asylum application, credible fear determination, or reasonable fear determination is a part; or

(v) Any United States Government investigation concerning any criminal or civil matter; or

(2) Any Federal, State, or local court in the United States considering any legal action:

(i) Arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear or reasonable fear determination under § 208.30 or § 208.31; or (ii) Arising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part.

Frequently Asked Questions

1. Q: Why do the regulations protect asylum-related information from disclosure?

A: Public disclosure of asylum-related information may subject the claimant to retaliatory measures by government authorities or non-state actors in the event that the claimant is repatriated, or endanger the security of the claimant's family members who may still be residing in the country of origin. Moreover, public disclosure might, albeit in rare circumstances (see footnote #2), give rise to a plausible protection claim where one would not otherwise exist by bringing an otherwise ineligible claimant to the attention of the government authority or non-state actor against which the claimant has made allegations of mistreatment.

2. Q: Under what specific circumstances can asylum-related information be disclosed to third parties?

A: In general, asylum-related information must not be shared with third parties without the asylum applicant's written consent or the Secretary of Homeland Security's specific authorization. However, this general prohibition does not apply to the following limited circumstances as established by the regulations at 8 CFR 208.6:

“(1) Any United States Government official or contractor having a need to examine information in connection with:

- (i) The adjudication of asylum applications;
 - (ii) The consideration of a request for a credible fear or reasonable fear interview, or a credible fear or reasonable fear review;
 - (iii) The defense of any legal action arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear determination or reasonable fear determination under § 208.30 or § 208.31;
 - (iv) The defense of any legal action of which the asylum application, credible fear determination, or reasonable fear determination is a part; or
 - (v) Any United States Government investigation concerning any criminal or civil matter; or
- (2) Any Federal, State, or local court in the United States considering any legal action:
- (i) Arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear or reasonable fear determination under § 208.30 or § 208.31; or
 - (ii) Arising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part.”

3. Q: To what extent may asylum-related information be disclosed to personnel within the Department of Homeland Security (DHS), such as the Immigration and Customs Enforcement (ICE) or Customs or Border Protection (CBP) personnel?

A: Protected asylum-related information may be disclosed to CBP and ICE, as they are not considered “third parties” for purposes of 208.6 and, therefore, requesters from those former INS components need not demonstrate a “need to examine” protected asylum information. Information may also be disclosed to offices within the direct policy and legal chains of command of DHS, such as DHS Office of General Counsel, the Office of the Undersecretary for Border and Transportation Security (BTS), Office of the Deputy Secretary, and the Office of the Secretary.

4. Q: If none of the regulatory exceptions applies, what information about an asylum applicant, if any, may be shared with third parties without breaching confidentiality?

A: According to established guidance, confidentiality is breached when information contained in or pertaining to an asylum application is disclosed to a third party in violation of the regulations, and the unauthorized disclosure is of a nature that allows the third party to link the identity of the applicant to: (1) the fact that the applicant has applied for asylum; (2) specific facts or allegations pertaining to the individual asylum claim contained in an asylum application; or (3) facts or allegations that are sufficient to give rise to a reasonable inference that the applicant has applied for asylum. The same principles govern the disclosure of information related to credible fear and reasonable fear determinations. They also generally apply to

applications for withholding or deferral of removal under Article 3 of the Convention Against Torture, which are encompassed within the asylum application.

5. Q: Under the regulation's exceptions, can asylum-related information be disclosed to state law enforcement agencies or other state agencies?

A: No. The confidentiality regulations do not allow disclosure of asylum-related information to state agencies, including state law enforcement agencies, except with the asylum applicant's written consent or the Secretary of Homeland Security's specific authorization. The regulations at 208.6(c)(2) do, however, allow for disclosure to state or local courts in certain circumstances.

6. Q: How can a United States Government official or contractor, who is seeking asylum-related information and to whom asylum-related information may be disclosed under the regulations, obtain asylum-related information from USCIS?

A: Unless there is a pre-existing interagency arrangement or protocol (such as the arrangement between the former INS and the FBI), federal agency officials or contractors should request asylum-related information about specific aliens directly from the appropriate United States Citizenship and Immigration Services (USCIS) Asylum Office Director with jurisdiction over the alien's application. Requests for asylum-related information concerning groups of aliens that match certain identified criteria must be made to the Director of the Asylum Division of USCIS by the appropriate official in the requesting agency.

7. Q: If asylum-related information is properly disclosed to a third party pursuant to the regulations, what is the third party's obligation with respect to confidentiality?

A: As the new custodian of the asylum-related information, the third-party recipient is bound by the confidentiality regulations under 8 CFR 208.6. The recipient must not disclose the asylum-related information to other parties, except pursuant to the regulations. When making an authorized disclosure of asylum-related information to a third party, USCIS officials should alert the third party to the confidentiality requirements of 8 CFR 208.6.

8. Q: What are the obligations of U.S. government officials or contractors who work with or are responsible for maintaining asylum-related data in U.S. government systems?

A: U.S. government officials or contractors who encounter asylum-related data in their work are bound by the confidentiality regulations under 8 CFR 208.6. These handlers of asylum-related data must not disclose the asylum-related information to third parties, except in keeping with the regulations.

9. Q: Are non-USCIS custodians of asylum-related information required to obtain authorization from USCIS before disclosing the asylum-related information to another party pursuant to the regulations?

A: No. However, the transmitter of information should take reasonable steps to ensure that the new recipient of information is aware of the confidentiality rules described in this document to prevent unauthorized disclosure by the new recipient. In fact, it might be prudent to provide the new recipient this document for that purpose.

10. Q: What is the special arrangement between the FBI and USCIS concerning the disclosure of asylum-related information?

A: As established in an October 8, 2001 memorandum, the Attorney General has used his discretionary authority under 8 CFR 208.6 (now belonging to the Secretary of Homeland Security) to provide the FBI access to asylum applications filed with USCIS for the purpose of gathering foreign counterintelligence or international terrorism information unrelated to pending criminal or civil litigation. Where the request relates to a specific alien, the request should be made to the Director of the appropriate USCIS Asylum Office and be approved by the FBI Field Office Special Agent in Charge or an appropriate Assistant Special Agent in Charge. Where the request relates to an explicitly identified group of aliens, the request will be made to the Director of the Asylum Division of USCIS and be approved by the FBI Field Office Special Agent in Charge or an appropriate Assistant Special Agent in Charge.

11. Q: Can asylum-related information be shared with foreign governments or international organizations (such as INTERPOL)?

A: Asylum-related information cannot be shared with foreign governments or international organizations without the written consent of the asylum applicant, except at the discretion of the Secretary of Homeland Security. To date, the Secretary has exercised his discretion to permit regular sharing of asylum-related information with a foreign government only with respect to Canada. The arrangement is in the form of a *Statement of Mutual Understanding on Information Sharing* (SMU) and an Annex to the SMU, which together permit Canada's Department of Citizenship and Immigration Canada (CIC) and USCIS to exchange asylum-related records on both a case-by-case and systematic basis.

12. Q: Why is there a special information-sharing agreement with Canada?

A: Sharing information on asylum seekers was included as an initiative in the agreement signed by Attorney General Ashcroft and former Minister of Citizenship and Immigration Caplan on December 2, 2001. It is also one of the thirty initiatives included in the Ridge-Manley Smart Border Action Plan. In furtherance of this initiative, the United States and Canadian governments entered into a formal arrangement in 2003 that permits USCIS and CIC to systematically share information on individuals seeking asylum in Canada and the United States. By gaining access to this key information, USCIS and CIC will enhance their abilities to prevent abuse of the asylum process in their respective countries and to make accurate asylum eligibility determinations, thereby strengthening the integrity of both countries' asylum systems.

13. Q: What is the status of the implementation of the information-sharing arrangement with Canada?

A: USCIS and CIC have already begun to share information on asylum seekers on a case-by-case basis. With regard to the systematic sharing of information, USCIS and CIC and their technical specialists are working together to develop protocols for the process of comparing and matching biometrically shared data sets.

14. Q: Has the Secretary of Homeland Security exercised his discretion to authorize disclosure of information to third parties in other instances (besides disclosure to the FBI and to Canada)?

A: Yes. In 2002, the Attorney General authorized the Asylum Division to disclose to the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS) biographical information on individuals granted asylum to enable ORR to meet congressional

reporting requirements and generate statistical reports used to allocate funding for asylee social benefits. In addition, in 2001 the Attorney General authorized the Asylum Division to disclose to HHS certain biographical information on asylees to enable ORR and the Center for Disease Control (CDC) to provide emergency relief to qualified asylees. The Attorney General and the Secretary have, in rare circumstances, also authorized disclosure on specific asylum seekers on a case-by-case basis for state law enforcement agencies, foreign governments, and members of Congress.

15. Q: May protected asylum-related information be shared with congressional offices?

A: If the Chairman of a congressional committee with competent jurisdiction submits a written request for protected asylum-related information, then the requested information will generally be provided without regard to the regulation. Written requests for asylum-related by individual Members of Congress or their respective staff members will be considered on a case-by-case basis.

16. Q: What information can be shared with the press when the applicant has gone public with the asylum claim?

A: Because the regulation currently requires the applicant's "written consent," we generally do not recognize implicit waivers of confidentiality, even when the asylum-related material is a matter of public record.

If you have any questions regarding these policies, please contact Ted Kim at 202.272.1615.