

# Holland+Knight

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May 14, 2007

Leon Fresco  
305 789 7443  
leon.fresco@hklaw.com

## VIA HAND-DELIVERY

United States Citizenship and Immigration Service  
FOIA/PA Appeals  
111 Massachusetts Ave. NW, Second Floor  
Washington, DC 20529

**RE: Notice of Freedom of Information Act Appeal**  
**Mr. Samir Hussain**  
**NRC2005094322**

Dear Sir/Madam:

Holland & Knight LLP ("Holland & Knight"), pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552 ("FOIA"), hereby submits this appeal of the decision dated March 6, 2007 of the Department of Homeland Security ("DHS") in response to the FOIA request submitted by undersigned counsel on September 15, 2005 seeking all information possessed by the Department regarding the arrest of my *pro bono* client Mr. Samir Hussain, A75-523-244 on July 24, 2003 including but not limited to his "apprehension record", any border patrol disposition, I-213 record of deportable alien; and any other information possessed by DHS regarding Mr. Hussain's detention on July 24, 2003. *See* Form G-329 FOIA Request dated September 15, 2005 attached hereto as **Exhibit A**. This appeal is filed within sixty days of receiving DHS' response. *See* Affidavit of Leon Fresco dated May 7, 2007 attached hereto as **Exhibit B**, attesting to counsel's receipt of the FOIA production on March 15, 2007.

After review of the released documents, we respectfully appeal DHS' decision and release of documents including but not limited to the withholding (via redaction) a total of 56 pages of our client Mr. Hussain's records in their entirety. *See* chart indicating the relevant page numbers, numbers of pages withheld in full and exemptions cited attached hereto for your convenience as **Exhibit C**.

As you are certainly aware, the Freedom of Information Act (FOIA) requires full disclosure as a necessary ingredient for public participation. *See Stone v F.B.I.*, 727 F.Supp.662,666 (D.D.C.1990). It has been stated that the purpose of FOIA is to "pierce the veil of administrative secrecy and open agency action to the light of public scrutiny...FOIA reflects a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *See National Association of Home Builders v. Norton*, 309 F.3d 26 (D.C.Cir.2002).

As our first ground for appeal, we respectfully contend that by withholding 56 pages of records in their entirety, DHS has failed to provide full disclosure contrary to both the spirit and letter of FOIA. Specifically, DHS failed to provide any of the reasonably segregable portions of the 56 pages of records in question as required by 5 U.S.C. § 552(b), *providing* that "Any reasonably segregable portion of a record shall be provided to any requesting such record after deletion of the portions which are exempt under this subsection." It defies logic that none of the 56 pages of records in question contained any segregable, releasable information even accounting for the need for redactions.

As our second and related ground for appeal, we challenge DHS' improper use of exemptions to withhold the 56 pages of records in their entirety. DHS invokes a wide variety of exemptions under 5 U.S.C. 552 § (b)(2), (b)(5), (b)(6), (b)(7)(c) and (b)(7)(e) to justify withholding the records in their entirety. However, DHS has failed to provide a sufficient basis to assert any of these exemptions. Indeed, DHS has failed to provide any explanation as to how the withholding of a particular document in its entirety correlates specifically and unambiguously to a corresponding exemption. Absent an index under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) or a suitable equivalent, let alone DHS' release of reasonably segregable portions of the 56 pages of records in question with corresponding redactions, we are left to guess as to the specific basis for the redaction of the document *in toto* and therefore cannot fully address whether the redaction was in fact justified by the corresponding exemption(s). Thus, by withholding 56 pages of records in their entirety, in a veritable sleight of hand, DHS has effectively vitiated our ability to contest the exemptions invoked in this administrative appeal in contravention of our statutory and regulatory rights under FOIA and our due process rights under the Fifth Amendment to the United States Constitution.

However, notwithstanding this undue burden, we contend that DHS' reliance on the specific exemptions in the 56 pages was arbitrary and capricious and devoid of valid legal basis. For example, consider DHS' repeated invocation of Exemption 5, 5 U.S.C. §552(b)(5), in the majority of the 56 pages of the records withheld in their entirety. This Exemption concerns intra-agency or inter-agency documents that would not be discoverable except in an action by one agency against another agency. This Exemption generally applies to "those documents, and only those documents that are normally privileged in the civil discovery context." *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The three most frequently invoked privileges incorporated into Exemption 5 are the deliberative process privilege (or the executive privilege), the attorney work-product privilege, and the attorney-client privilege. *Id.* However, DHS' response fails to identify even which privilege(s) are at issue for any particular record warrant the use of Exemption 5 let alone identify the nature of the communications, attorneys, clients and agencies involved.

Assuming that the privilege at issue in one of the records in question was the deliberative process privilege, the information is properly exempted under this privilege only if the communication is pre-decisional and deliberative. *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987). We, however, do not know if the records are currently pre-decisional because, as explained above, DHS failed to release any reasonably segregable portions of the records. Without knowing what decisions were affected by the records we can only speculate as to whether the information would in fact be considered deliberative by a federal district court. However, the burden of proof is on DHS to show that

the information requested satisfies both requirements of being pre-decisional and deliberative. *Coastal States Gas Corp v. Depar't of Energy*, 617 F.2d at 866 (D.C. Cir. 1980).

Moreover, DHS failed to perform an adequate search reasonably calculated to produce *all* relevant documents within the scope of the instant FOIA request consisting of Mr. Hussain's "apprehension record", any border patrol disposition or *other* information possessed by DHS regarding Mr. Hussain's detention (*emphasis ours*). While we acknowledge DHS' generous release of Mr. Hussain's Record of Deportable Alien (*see* pp. 437-438 of the March 6, 2007 FOIA release), DHS failed to release any sworn statements taken by my client Mr. Hussain, any written notes or electronic communications pertaining to interviews with Mr. Hussain by DHS, the Joint Terrorism Task Force (JTTF) or other federal agency.

We have significant reason to believe that such records exist considering for example the fact that DHS notified JTTF of our client Mr. Hussain's arrest and his reported experience of having been interviewed by the JTTF. *See e.g.* pp 437-438. As DHS has already released Mr. Hussain's Record of Deportable Alien as one of his arrest records, DHS cannot legitimately fail to search for and/or withhold *in toto* Mr. Hussain's related arrest records including but not limited to own sworn statements or notes from interviews with our client Mr. Hussain inextricably linked to this arrest including Mr. Hussain's statements to the JTTF particularly if and when they are included in or referenced in records in his DHS A file. *See, e.g., Senate of P.R. v. Dep't of Justice*, No. 84-1829, 1993 U.S. Dist. LEXIS 12162 (D.D.C. Aug. 24, 1993), mandating the release of a plethora of documents contained in an FBI investigative file.

We therefore contest the adequacy of DHS' search to be reasonably calculated to discover the requested documents. *See Judicial Watch, Inc. v. DOD*, No. 05-390, 2006 US U.S. Dist. LEXIS 44003. When the sufficiency of the search is challenged, the Government must demonstrate beyond material doubt that the search was reasonable and calculated to uncover all relevant documents. *See Kronberg v. DOJ*, 875 F.Supp. 861, 869 (D. D.C. 1995); *see also Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1998).

Based on the foregoing, Holland & Knight accordingly requests DHS' reconsideration of *all* redactions to the FOIA release pertaining to our client Mr. Hussain including the release of all reasonably segregable portions of the 56 pages withheld in their entirety and a production of a *Vaughn* index or its suitable equivalent which clearly describes the basis for the exemption corresponding to the specific redactions. We additionally request that DHS conduct a subsequent search pursuant to the initial FOIA request reasonably calculated to produce documents missing from the initial release such as sworn statements, interviewer notes and electronic communications by and between DHS, JTTF and other federal agencies.

Finally, we request expedited consideration of this appeal cognizant of both DHS' significant delay of 18 months in responding to the initial FOIA request and our rights to pursue federal judicial review within 20 days of filing this administrative appeal pursuant to 5 U.S.C. § 552(a)(6)(A)(ii). We reserve the right to amend and/or supplement any and of all arguments in this administrative appeal if this case is considered by a federal district court *de novo*.

If you have any questions or need further information, please do not hesitate contacting me at (305) 789-7443 or emailing at [leon.fresco@hklaw.com](mailto:leon.fresco@hklaw.com). We anticipate and thank you for your kind cooperation and look forward to hearing from you at your earliest convenience.

Sincerely,

**HOLLAND & KNIGHT**



Leon Fresco

BY  
CHRISTOPHER WUGG  
HOLLAND AND KNIGHT  
LLP

Enclosures

# 4542559\_v1

**Exhibit A**

OMB No. 1653-0030; Expires 08/31/05

Department of Homeland Security  
U.S. Citizenship and Immigration Services

**G-639, Freedom of Information/  
Privacy Act Request**

**NOTE:** The completion of this form is optional. Any written format for Freedom of Information or Privacy Act requests is acceptable.

**START HERE - Please type or print in black ink. Read instructions before completing this form.**

**1. Type of Request:** (Check appropriate box.)

- Freedom of Information Act (FOIA). (Complete all items except Number 6.)
- Privacy Act (PA). (Number 6 must be completed in addition to all other applicable items.)
- Amendment. (PA only. Number 5 must be completed in addition to all other applicable items.)

**2. Requester Information.**

Name of Requester: (Last, First and Middle Names) Fresco, Leon <sup>?</sup>	Date (mm/dd/yyyy) 09/15/2005	Daytime Telephone: (305) 789-7443
Address (Street Number and Name): 701 Brickell Avenue, (Holland & Knight LLP)		Apt. Number: Suite 3000
City: Miami	State: FL	Zip Code: 33131


By my signature, I consent to the following:

Pay all costs incurred for search, duplication and review of materials up to \$25.00, when applicable. (See Instructions.)

Signature of requester: \_\_\_\_\_

- Deceased Subject - Proof of death must be attached. (Obituary, Death Certificate or other proof of death required.)

**3. Consent to Release Information.** (Complete if name is different from Requester). (Numbers 7 and 8 must be completed.)

Print Name of Person Giving Consent: Samir Hussain	Signature of Person Giving Consent: (Original signature required.) 
---	--

By my signature, I consent to the following: (Check applicable boxes.)

- Allow the Requester named in Number 2 above:  All of my records, or  A portion of my records. (If a portion, specify what part, i.e. copy of application.)

(Consent is required for records of U. S. citizens (USC) and Lawful Permanent Residents (LPR).)

**4. Information needed to search for record(s).**

Specific information, document(s) or record(s) desired: (Identify by name, date, subject matter and location of information.)

Mr. Hussain's "Apprehension Record"; Any Border Patrol Disposition; I-213 record of deportable alien; and any other information possessed by DHS regarding Mr. Hussain's detention on July 24, 2003.

**Purpose:** (Optional: You are not required to state the purpose of your request. However, doing so may assist USCIS to locate the records needed to respond to your request.)

**5. Data Needed on Subject of Record.** (If data marked with an asterisk (\*) is not provided, records may not be located.)

* Family Name: Hussain	Given Name: Samir	Middle Name:
* Other names used, if any:	* Name at time of entry into the U.S.: Samir Hussain	I-94 Admissions #:
* Alien Registration Number: <del>7525244</del> 75253244	* Petition or Claim Receipt #:	* Country of Birth: Iraq
Names of other family members that may appear on requested record(s) (i.e., Spouse, Daughter, Son):		* Date of Birth (mm/dd/yyyy) 08/31/1969
Father's Name	First	Middle
		Last
Mother's Name	First	Middle
		Last (Include Maiden Name)

Country of Origin: <i>(Place of Departure)</i> Iraq	Port-of-Entry Into the U.S.: New York, NY	Date of Entry: October 12, 1996
Manner of Entry: <i>(Air, Sea, Land)</i>	Mode of Travel: <i>(Name of Carrier)</i>	U.S. Social Security Number:
Name on Naturalization Certificate:	Certificate #:	Naturalization Date:
Address on Date of Naturalization:	Court and Location:	

**6. Verification of Subject's Identity:** *(See Instructions for explanation. Check one box.)*

In-Person With ID       Notarized Affidavit of Identity       Other *(Specify)* \_\_\_\_\_

**7. Signature of Subject of Record:**

*(Original signature required)*

*[Handwritten Signature]*

Date: 9/27/05

Telephone No.: (305) 215 03

**8. Notary:** *(Normally needed from persons who are the subject of the record sought or for a sworn declaration under penalty of perjury. See below.)*

Subscribed and sworn to before me this September Day of 19 in the Year 2005  
 Signature of Notary *[Handwritten Signature]* My Commission Expires on 01/20/2009

OR

**NOTE:** *If a declaration is provided in lieu of a notarized signature, it must state at a minimum the following: (Include Notary Seal or Stamp in the appropriate space below.)*

**Executed outside U.S.**

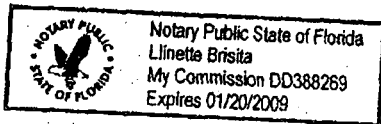
If executed outside the United States: "I declare (certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signature: \_\_\_\_\_

**Executed in U.S.**

If executed within the United States, its territories, possessions or commonwealths: "I declare (certify, verify or state) under penalty of perjury that the foregoing is true and correct.

Signature: *[Handwritten Signature]*



(Seal/Stamp)

(Seal/Stamp)

U.S. Department of Justice  
Immigration and Naturalization Service

**Notice of Entry of Appearance  
as Attorney or Representative**

**Appearances** - An appearance shall be filed on this form by the attorney or representative appearing in each case. Thereafter, substitution may be permitted upon the written withdrawal of the attorney or representative of record or upon notification of the new attorney or representative. When an appearance is made by a person acting in a representative capacity, his personal appearance or signature shall constitute a representation that under the provisions of this chapter he is authorized and qualified to represent. Further proof of authority to act in a representative capacity may be required. **Availability of Records** - During the time a case is pending, and except as otherwise provided in 8 CFR 103.2(b), a party to a proceeding or his attorney or representative shall be permitted to examine the record of proceeding in a Service office. He may, in conformity with 8 CFR 103.10, obtain copies of Service records or information therefrom and copies of documents or transcripts of evidence furnished by him. Upon request, he/she may, in addition, be loaned a copy of the testimony and exhibits contained in the record of proceeding upon giving his/her receipt for such copies and pledging that it will be surrendered upon final disposition of the case or upon demand. If extra copies of exhibits do not exist, they shall not be furnished free on loan; however, they shall be made available for copying or purchase of copies as provided in 8 CFR 103.10.

In re:	Date: 9/15/05
	File No.

I hereby enter my appearance as attorney for (or representative of), and at the request of the following named person(s):

Name: <b>Samir Hussain</b>	<input type="checkbox"/> Petitioner	<input checked="" type="checkbox"/> Applicant
	<input type="checkbox"/> Beneficiary	
Address: (Apt. No.) (Number & Street)	(City)	(State) (Zip Code)
67 East 41st Street	Hialeah	FL 33013
Name:	<input type="checkbox"/> Petitioner	<input type="checkbox"/> Applicant
	<input type="checkbox"/> Beneficiary	
Address: (Apt. No.) (Number & Street)	(City)	(State) (Zip Code)

Check Applicable Item(s) below:

1. I am an attorney and a member in good standing of the bar of the Supreme Court of the United States or of the highest court of the following State, territory, insular possession, or District of Columbia  
Florida Florida Supreme Court and am not under a court or administrative agency order suspending, enjoining, restraining, disbaring, or otherwise restricting me in practicing law.

2. I am an accredited representative of the following named religious, charitable, social service, or similar organization established in the United States and which is so recognized by the Board:

3. I am associated with \_\_\_\_\_ the attorney of record previously filed a notice of appearance in this case and my appearance is at his request. (If you check this item, also check item 1 or 2 whichever is appropriate.)

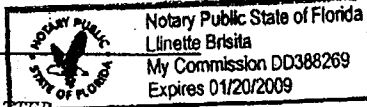
4. Others (Explain Fully.)

SIGNATURE <i>Leon Fresco</i>	COMPLETE ADDRESS Holland & Knight LLP 701 Brickell Avenue, Ste. 3000 Miami, FL 33131
NAME (Type or Print) Leon Fresco	TELEPHONE NUMBER (305) 789-7443

PURSUANT TO THE PRIVACY ACT OF 1974, I HEREBY CONSENT TO THE DISCLOSURE TO THE FOLLOWING NAMED ATTORNEY OR REPRESENTATIVE OF ANY RECORD PERTAINING TO ME WHICH APPEARS IN ANY IMMIGRATION AND NATURALIZATION SERVICE SYSTEM OF RECORDS:

Leon Fresco

(Name of Attorney or Representative)



THE ABOVE CONSENT TO DISCLOSURE IS IN CONNECTION WITH THE FOLLOWING MATTER:

FOIA Request to the Department of Homeland Security

Name of Person Consenting <u>Samir J. Hussain</u>	Signature of Person Consenting <i>[Signature]</i>	Date <u>9/19/05</u>
--	--	------------------------

(NOTE: Execution of this box is required under the Privacy Act of 1974 where the person being represented is a citizen of the United States or an alien lawfully admitted for permanent residence.)

This form may not be used to request records under the Freedom of Information Act or the Privacy Act. The manner of requesting such records is contained in 8CFR 103.10 and 103.20 Et. SEQ.



**Exhibit B**

USCIS FOIA/PA APPEALS OFFICE  
111 MASSACHUSETTS AVENUE, NW  
WASHINGTON, DC 20529

\_\_\_\_\_  
In the Matter of:  
HUSSAIN, Samir

FOIA APPEAL  
A75-523-244  
NRC2005094322

\_\_\_\_\_  
**AFFIDAVIT OF LEON FRESCO, ESQ, PRO BONO COUNSEL FOR SAMIR HUSSAIN  
IN SUPPORT OF FREEDOM OF INFORMATION ACT APPEAL**

STATE OF FLORIDA                    }  
COUNTY OF MIAMI-DADE         }

I, Leon Fresco, a United States citizen, hereby declare that the following is true and correct to the best of my knowledge and belief:

1. I am an attorney employed by the Miami office of Holland & Knight LLP. I am a member of Holland & Knight's Community Services Team. In this capacity, I primarily represent clients on a *pro bono* basis in immigration, civil rights, death penalty, and other matters.

2. I have been a member in good standing of the Florida Bar since October 2003. I am a graduate of the Yale Law School and received my undergraduate degree from the University of Pennsylvania.

3. On September 15, 2005, I sent a Freedom of Information Act request, pursuant to 5 U.S.C. § 552, to the Department of Homeland Security (DHS) seeking all information possessed by the Department regarding the apprehension of Samir Hussain, A75-523-244 on July 24, 2003. Specifically, I asked for Mr. Hussain's "apprehension record," any border patrol disposition, and any other information possessed by DHS regarding Mr. Hussain's detention.

4. This request was received by the Department of Homeland Security on September 27, 2005 and was assigned Case Number NRC2005094322.

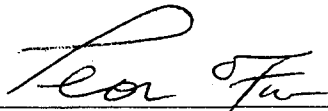
5. On March 6, 2007, it appears as if the Department of Homeland Security mailed its response to my FOIA request. This response withheld 56 pages of critical information pertaining to Mr. Hussain's apprehension, including Mr. Hussain's apprehension records and border patrol dispositions.

6. Even though the Department of Homeland Security's cover letter is dated March 6, 2007, I only received the FOIA production from the Department of Homeland Security on Thursday, March 15, 2007. Accordingly, pursuant to the FOIA Act, the time period for appeal runs 60 days from March 15, 2007. Therefore, an appeal of the information withheld as part of this request is due on Monday, May 14, 2007.

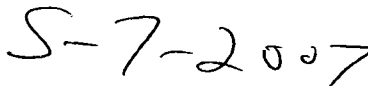
7. I understand and recognize, for purposes of this affidavit, the laws of perjury and the consequences of their violation.

**FURTHER AFFIANT SAYETH NAUGHT**

I, Leon Fresco, swear and affirm, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

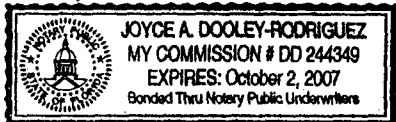


Leon Fresco



Date

The foregoing instrument was acknowledged before me this 7<sup>th</sup> day of May, 2007 by Leon Fresco, who is personally known to me or has produced \_\_\_\_ (n/a) \_\_\_\_\_ as Identification.



*Joyce A. Dooley Rodriguez*  
Joyce A. Dooley-Rodriguez  
Notary Public-State of Florida

Commission Number: \_\_\_\_\_

# 4527873\_v1

**Exhibit C**

**DEPARTMENT OF HOMELAND SECURITY  
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICE  
FOIA/PA APPEALS  
WASHINGTON, D.C.**

**IN THE FOIA APPEAL OF SAMIR HUSSAIN, A75 254 244  
NRC2005094322**

**TABLE OF PAGE NUMBERS, NUMBERS OF PAGES AND EXEMPTIONS CITED BY DHS  
FOR THE WITHHOLDING OF 56 PAGES IN THEIR ENTIRETY IN DHS FOIA RESPONSE**

<b>Page Numbers of Documents Withheld in Entirety in DHS FOIA Response</b>	<b>Number of Pages of Documents Withheld in Entirety in DHS FOIA</b>	<b>Exemption(s) Cited for Withholding Documents in Entirety in DHS FOIA</b>
231-239	9	(b)(5), (b)(7)(c)
261	1	(b)(5)
266	1	(b)(5)
272	1	(b)(5), (b)(7)(c)
273-274	2	(b)(5)
292	1	(b)2, (b)(5), (b)(7)(c)
384	1	(b)5
391-392	2	(b)5, (b)(7)(c)
395-396	2	(b)5, (b)(7)(c)
397-400	4	(b)(5)
401	1	(B)5, (b)(7)(c)
402	1	(b)2, (b)(5), (b)(7)(c)
407	1	(b)2, (b)(7)(c)
409	1	(b)5, (b)(7)(c)
413-414	2	(b)2, (b)(7)(c)
415-417	3	(b)2, (b)(5), (b)(7)(c)
430	1	(b)2, (b)(6)
432	1	(b)2, (b)(6), (b)(7)(c)
439	1	(b)5, (b)(7)(c)), (b)(7)(c)
442-443	2	(b)2, (b)(5), (b)(7)(c)
527-528	2	(b)(5)
531	1	(b)2, (b)(5), (b)(7)(c)
537	1	(B)5, (b)(7)(c)
552	1	(b)2, (b)(7)(c)
555	1	(b)2, (b)(5), (b)(7)(c)
556	1	(b)5, (b)(7)(c)
560	1	(b)2, (b)(5), (b)(7)(c)
563	1	(b)2, (b)(5), (b)(7)(c), (b)(7)(e)
584-585	2	(b)(5)
590-594	5	(b)5, (b)(7)(c)
595	1	(b)(5)
<b>Total</b>	<b>56</b>	