

1 Crisostomo G. Ibarra (SBN 103480)  
2 Gener D. Benitez (SBN 206765)  
3 Ibarra Professional Law Corporation  
4 459 Fulton Street, Suite 109  
5 San Francisco, CA 94102  
6 (415) 398-5329

7 Attorneys for Plaintiff  
8 PHALKUN BUN HEANG

9 UNITED STATES DISTRICT COURT  
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 PHALKUN BUN HEANG  
12 1531 S Wright Road  
13 Santa Rosa, CA 95407,

14 Plaintiff,

15 vs.

16 US IMMIGRATION AND CUSTOMS  
17 ENFORCEMENT  
18 500 12<sup>th</sup> Street, S.W.  
19 Washington, DC 20356,

20 Defendant.

Case No.: CV-14-04077JSC

**COMPLAINT FOR INJUNCTIVE  
RELIEF**

21 Plaintiff PHALKUN BUN HEANG (“Plaintiff”) alleges as follows:

- 22 1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, for  
23 injunctive and other appropriate relief seeking the release of agency records, particularly, an  
24 audio/video recording of Plaintiff’s and her then husband’s June 6, 2006 interview with the US  
25 Citizenship and Immigration Service (“USCIS”) in conjunction with an application for  
26 permanent residence, improperly withheld from Plaintiff by Defendant US IMMIGRATION  
27 AND CUSTOMS ENFORCEMENT (“ICE” or “Defendant”).

28

1 **JURISDICTION AND VENUE**

2 2. This Court has both subject matter jurisdiction over this action and personal  
3 jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(5). This Court also has jurisdiction  
4 over this action pursuant to 28 U.S.C. § 1331. Venue is proper in this district under 5 U.S.C. §  
5 552(a)(4)(5) as Plaintiff resides in this district.

6 **PARTIES**

7 3. Plaintiff is a resident of this district.

8 4. Defendant ICE is a federal law enforcement agency under the US Department of  
9 Homeland Security (DHS). ICE is an agency within the meaning of 5 U.S.C. § 552(f)(1).

10 **FACTS**

11 5. Plaintiff is a citizen and national of Cambodia. She last entered the United States  
12 on July 15, 2003 as a nonimmigrant K-1 beneficiary of a petition filed by her fiancé, Howard  
13 Morey.

14 6. Plaintiff married Mr. Morey on September 22, 2003, and applied for adjustment  
15 of status. Plaintiff and Mr. Morey appeared for the adjustment interview on June 6, 2005 with  
16 USCIS.

17 7. During that interview, Plaintiff alleges that she was harassed and intimidated by  
18 USCIS and/or ICE officers,<sup>1</sup> and coerced to sign a "Record of Sworn Statement" she did not  
19 agree with. Mr. Morey made similar complaints as well. The interview was videotaped. That  
20 videotape of the June 6, 2005 interview is the subject of this Complaint.

21 8. At the beginning of the interview, the USCIS and/or ICE officers introduced  
22 themselves to Plaintiff. The officers also signed the Record of Sworn Statement identifying  
23 themselves.

24 9. Plaintiff was placed in removal proceedings before the Immigration Court on or  
25 about August 3, 2005.

26 10. On September 11, 2006, DHS submitted the Record of Sworn Statement and the  
27 DVD recording of the June 6, 2005 interview with the Immigration Court. The Record of Sworn  
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<sup>1</sup> USCIS is also an agency under DHS.

1 Statement and the DVD recording of the June 6, 2005 interview was admitted into evidence by  
2 the Immigration Court during a hearing held on December 12, 2006.

3 11. On May 11, 2007, the Immigration Court denied Plaintiff's applications for relief  
4 and ordered Plaintiff removed. Plaintiff then appealed that decision with the Board of  
5 Immigration Appeals (BIA), and when denied, filed a Petition for Review with the US Ninth  
6 Circuit Court of Appeals, Case No. 08-74058.

7 12. Plaintiff also unsuccessfully tried to reopen her proceedings with the BIA,  
8 claiming ineffective assistance of counsel, but the motion to reopen was denied by the BIA.  
9 Plaintiff also sought review of the denial of her motion to reopen with the US Ninth Circuit  
10 Court of Appeals, Case No. 15-70380.

11 13. Accordingly, the Record of Sworn Statement and the DVD recording of the June  
12 6, 2005 interview, are also part of the administrative record of both Ninth Circuit appeals. Both  
13 appeals, Case Nos. 08-74058 and 15-70380, which were consolidated, are still pending with the  
14 Ninth Circuit.

15 14. On October 20, 2014, Plaintiff made a FOIA request with USCIS requesting  
16 specifically the recording of the June 6, 2005 interview. Attached hereto as Exhibit A and  
17 incorporated herein by this reference is a true and correct copy of the FOIA request to USCIS.<sup>2</sup>

18 15. On March 4, 2016, USCIS responded that the responsive media originated from  
19 ICE, and forwarded the FOIA request to ICE. Attached hereto as Exhibit B and incorporated  
20 herein by this reference is a true and correct copy of the March 4, 2016 letter from USCIS.

21 16. On April 12, 2016, ICE gave its final response to the FOIA request, denying  
22 release of the videotape recording of the June 6, 2005 interview, claiming Exemptions 6 and  
23 7(C) of FOIA, supposedly to protect the identity and privacy of the officers. Attached hereto as  
24 Exhibit C and incorporated herein by this reference is a true and correct copy of the April 12,  
25 2016 letter by UCE.

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28  

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<sup>2</sup> Portions of Exhibit A, and Exhibit D below, are redacted pursuant to Fed. R. Civ. Proc. §5.2.



1 conducted the interview and the DVD recording of the June 6, 2005 interview itself are already  
2 part of the public domain.

3 24. Furthermore, disclosing Plaintiff's request would serve the core purpose of FOIA,  
4 which is to contribute significantly to the public understanding of the operations or activities of  
5 the government. There is a public interest here in whether the USCIS or ICE uses coercive  
6 tactics during adjustment interviews to obtain statements or withdrawals of petitions, a kind of  
7 information that sheds light in an agency's performance of its statutory duties.

8 25. Accordingly, Plaintiff is entitled to injunctive relief compelling release and  
9 disclosure of the recording of her and Mr. Morey's June 6, 2005 interview with USCIS/ICE.

10 **Requested Relief**

11 WHEREFORE, Plaintiff prays that this Court:

- 12 A. Order Defendant to produce the recording of Plaintiff's June 5, 2006 interview  
13 pursuant to her FOIA request;
- 14 B. Award Plaintiff her costs and reasonable attorney's fees incurred in this action  
15 pursuant to 5 U.S.C. § 552(a)(4)(E); and
- 16 C. Grant such other relief as the Court may deem just and proper.

17  
18 Dated: November 1, 2016

19 Ibarra Professional Law Corporation

20  
21 

22 By: Gener D. Benitez  
23 Attorneys for Plaintiff  
24 PHALKUN BUN HEANG

# **EXHIBIT A**

## TRANSMISSION VERIFICATION REPORT

TIME : 10/20/2014 14:28  
 NAME : IBARRA PLC  
 FAX : 4153986831  
 TEL : 4153985329  
 SER.# : 09N983029

DATE, TIME	10/20 14:26
FAX NO./NAME	18163505785
DURATION	00:01:50
PAGE(S)	05
RESULT	OK
MODE	STANDARD ECM

**IBARRA PROFESSIONAL LAW CORPORATION**

459 FULTON STREET SUITE 109

SAN FRANCISCO, CA 94102

Phone: (415) 398-5329 Facsimile: (415) 398-6831

<b>To: National Records Center (NRC) FOIA/PA Office</b>	<b>From: Crisostomo G. Ibarra, Esq</b>
<b>Fax: 1-(816) 350-5785</b>	<b>Pages: Including Cover Sheet: 5</b>
<b>Phone:</b>	<b>Date: October 20, 2014</b>
<b>Re: G-639 Phalkun Bun Heang A095-448-037</b>	<b>CC:</b>

Urgent  For Review  Please Comment  Please Reply  Please Recycle

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

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

**NOTE:** Use of this form is optional. Any written format for a Freedom of Information or Privacy Act request is acceptable.

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

**1. Type of Request** (Check appropriate box. **NOTE:** If you are filing this request for records on behalf of another individual, please respond to Number 1 as it would apply to that individual.)

- Freedom of Information Act (FOIA): I am not a U.S. citizen/Lawful Permanent Resident and I am requesting my own records.
- Freedom of Information Act (FOIA): I am a U.S. citizen/Lawful Permanent Resident and I am requesting documents other than my own records.
- Privacy Act (PA): I am a U.S. citizen/Lawful Permanent Resident and I am requesting my own records.
- Amendment of Record (PA only): I am a U.S. citizen/Lawful Permanent Resident and I am requesting amendment of my own records.
- Other: \_\_\_\_\_

**2. Description of Record(s) Requested:**

**NOTE:** While you are not required to respond to all items in Number 2, failure to provide complete and specific information as requested may result in a delay in processing or an inability to locate the record(s) or information requested.

- Complete Alien File (A-File)
- Other (please specify): DVD/Videotape of 06/06/05 interview of Heang and Morey with USCIS

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

Family Name (Last Name)				Given Name (First Name)		Middle Name	
HEANG				PHALKUN		BUN	
Other Names Used (if any)				Name at time of entry into the U.S.			I-94 Admission #
				HEANG, PHALKUN			
Alien Registration Number (A#)		Petition or Claim Receipt #		Country of Birth		Date of Birth (mm/dd/yyyy)	
A095-448-037				CAMBODIA		[REDACTED] 1983	

**Names of other family members that may appear on requested record(s) (i.e., spouse, daughter, son):**

Family Member's Name: Given Name (First Name)	Middle Name	Family Name (Last Name)	Relationship
HOWARD	HALL	MOREY	
Father's Name: Given Name (First Name)	Middle Name	Family Name (Last Name)	
BUN	HO	HEANG	
Mother's Name: Given Name (First Name)	Middle Name	Family Name (Last Name, including Maiden Name)	
UONG	SOK	HEANG LANG	
Country of Origin (Place of Departure)	Port of Entry into the U.S.	Date of Entry (mm/dd/yyyy)	
CAMBODIA	SAN FRANCISCO	Jul 15, 2003	
Manner of Entry (Air, Sea, Land)		Mode of Travel (Name of Carrier)	
AIR			



**3. Subject of Record Consent to Release Information** *(Must be signed by the subject of record(s) requested.)*

By my signature, I consent to allow USCIS to release to the requester named in Number 5 (Check applicable box):

- All of my records       A portion of my records *(If a portion, specify below what part, i.e., copy of application.)*  
 DVD/Videotape of the 06/06/05 interview of Heang and Morey with USCIS

Print Name of Subject of Record Phalkun Heang  
 Signature of Subject of Record ~~PHALKUN BUN HEANG~~      Date (mm/dd/yyyy) 10/16/14

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

**4. Verification of Identity** *(Required; Fill out all that apply.)*

Name of Subject of Record <i>(First, Middle, Last)</i>		Daytime Telephone	E-mail Address
Phalkun Bun Heang		(707) 696-5927	phalkunheang@yahoo.com
Address <i>(Street Number and Name)</i>			Apt. Number
1365 S Wright Road			
City	State	Zip Code	
Santa Rosa	California	95407	
Date of Birth <i>(mm/dd/yyyy)</i>	Place of Birth		
1983	CAMBODIA		

The Subject of Record must provide a signature under either a Notarized Affidavit of Identity or a Sworn Declaration Under Penalty of Perjury:

Notarized Affidavit of Identity  
 Signature of Subject of Record \_\_\_\_\_ Date (mm/dd/yyyy) \_\_\_\_\_  
 Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ Telephone No. \_\_\_\_\_  
 Signature of Notary \_\_\_\_\_ My Commission Expires on \_\_\_\_\_

OR

Sworn Declaration Under Penalty of Perjury

**Executed outside the United States**

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 of Subject of Record \_\_\_\_\_

**Executed in the United States**

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."

PHALKUN BUN HEANG  
 Signature of Subject of Record

**5. Requester Information**

By my signature, I consent to pay all costs incurred for search, duplication and review of materials up to \$25 *(See instructions)*

Signature of Requester: \_\_\_\_\_

Name of Requester <i>(Fill out if different from the Subject of Record.)</i>		Daytime Telephone	E-mail Address
Crisostomo G. Ibarra		(415) 398-5329	cgibarra@aol.com
Address <i>(Street Number and Name)</i>			Apt. Number
459 Fulton Street			Suite 109
City	State	Zip Code	
San Francisco	California	94102	



Notice of Entry of Appearance as Attorney or Accredited Representative Department of Homeland Security

DHS Form G-28 OMB No. 1615-0105 Expires 02/29/2016

Part 1 Information About Attorney or Accredited Representative

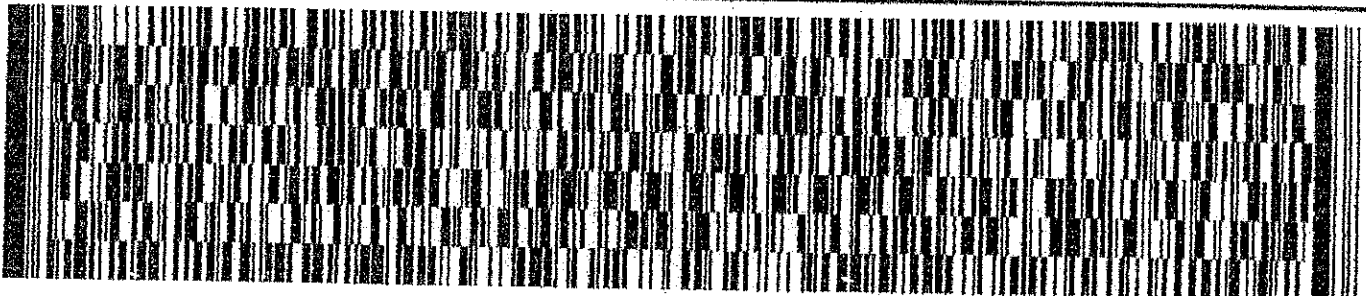
Name and Address of Attorney or Accredited Representative

1.a. Family Name (Last Name) IBARRA
1.b. Given Name (First Name) CRISOSTOMO
1.c. Middle Name GUILLERMO
2. Name of Law Firm or Recognized Organization IBARRA PROFESSIONAL LAW CORP
3. Name of Law Student or Law Graduate
4. State Bar Number 103480
5.a. Street Number 459
5.b. Street Name FULTON ST
5.c. Apt. Ste. Ftr. 109
5.d. City or Town SAN FRANCISCO
5.e. State CA 5.f. Zip Code 94102
5.g. Postal Code
5.h. Province
5.i. Country USA
6. Daytime Phone Number (415) 398 - 5329
7. E-Mail Address of Attorney or Accredited Representative CGIBARRA@AOL.COM

Part 2 Eligibility Information For Attorney or Accredited Representative

(Check applicable items(s) below)

1. [X] I am an attorney eligible to practice law in, and a member in good standing of, the bar of the highest court(s) of the following State(s), possession(s), territory(ies), commonwealth(s), or the District of Columbia.
1.a. CALIFORNIA
1.b. I (choose one) [X] am not [ ] am subject to any order of any court or administrative agency disbaring, suspending, enjoining, restraining, or otherwise restricting me in the practice of law. (If you are subject to any order(s), explain fully in the space below.)
1.b.1.
2. [ ] I am an accredited representative of the following qualified nonprofit religious, charitable, social service, or similar organization established in the United States, so recognized by the Department of Justice, Board of Immigration Appeals pursuant to 8 CFR 292.2. Provide the name of the organization and the expiration date of accreditation.
2.a. Name of Recognized Organization
2.b. Date Accreditation expires (mm/dd/yyyy)
3. [ ] I am associated with
3.a.
the attorney or accredited representative of record who previously filed Form G-28 in this case, and my appearance as an attorney or accredited representative is at his or her request. If you check this item, also complete number 1 (1.a. - 1.b.1.) or number 2 (2.a. - 2.b.) in Part 2 (whichever is appropriate).
4. [ ] I am a law student or law graduate working under the direct supervision of the attorney or accredited representative of record on this form in accordance with the requirements in 8 CFR 292.1(a)(2)(iv).



**Part 3. Notice of Appearance as Attorney or Accredited Representative**

This appearance relates to immigration matters before (select one):

- 1.  USCIS - List the form number(s)  
1.a.
- 2.  ICE - List the specific matter in which appearance is entered  
2.a.
- 3.  CBP - List the specific matter in which appearance is entered  
3.a.

I hereby enter my appearance as attorney or accredited representative at the request of:

- 4. Select only one:  Applicant  Petitioner  Respondent (ICE, CBP)

Name of Applicant, Petitioner, or Respondent

- 5.a. Family Name (Last Name)
- 5.b. Given Name (First Name)
- 5.c. Middle Name
- 5.d. Name of Company or Organization, if applicable

NOTE: Provide the mailing address of Petitioner, Applicant, or Respondent and not the address of the attorney or accredited representative, except when a safe mailing address is permitted on an application or petition filed with Form G-28.

- 6.a. Street Number and Name
- 6.b. Apt.  Ste.  Fl.
- 6.c. City or Town
- 6.d. State  6.e. Zip Code

7. Provide A-Number and/or Receipt Number

Pursuant to the Privacy Act of 1974 and DHS policy, I hereby consent to the disclosure to the named Attorney or Accredited Representative of any record pertaining to me that appears in any system of records of USCIS, ICE, or CBP.

8.a. Signature of Applicant, Petitioner, or Respondent

8.b. Date

(mm/dd/yyyy) ▶

**Part 4. Signature of Attorney or Accredited Representative**

I have read and understand the regulations and conditions contained in 8 CFR 103.2 and 292 governing appearances and representation before the Department of Homeland Security. I declare under penalty of perjury under the laws of the United States that the information I have provided on this form is true and correct.

1. Signature of Attorney or Accredited Representative

2. Signature of Law Student or Law Graduate

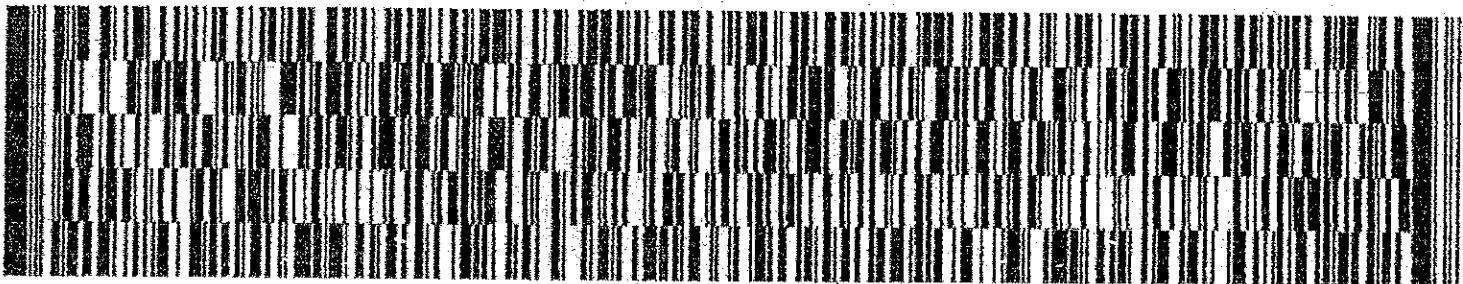
3. Date

(mm/dd/yyyy) ▶

**Part 5. Additional Information**

1.

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# **EXHIBIT B**

U.S. Department of Homeland Security  
National Records Center  
P.O. Box 648010  
Lee's Summit, MO 64064-8010



U.S. Citizenship  
and Immigration  
Services

MAR 10 2016

March 4, 2016

NRC2014119952

Crisostomo G. Ibarra  
Attorney at Law  
459 Fulton St., Ste. 109  
San Francisco, CA 94102

Dear Crisostomo G. Ibarra:

This is in response to your Freedom of Information Act/Privacy Act (FOIA/PA) request received in this office October 27, 2014 regarding Phalkun Bun Heang. You specifically requested a copy of DVD/videotape of the 06/06/05 interview of Heang and Moray with USCIS.

During our review, USCIS located a potentially responsive media that may have originated from U.S. Immigration and Customs Enforcement (ICE). USCIS has sent the media and a copy of your FOIA request to the ICE FOIA Office for consideration and direct response to you. Should you wish to contact ICE concerning the status of the processing of the media, please contact the ICE FOIA Office via phone at (866) 633-1182 or via e-mail at [ICE-FOIA@dhs.gov](mailto:ICE-FOIA@dhs.gov). The ICE FOIA Office mailing address is 500 12<sup>th</sup> Street, S.W., MS 5009, Washington, D.C. 20536-5009.

The National Records Center does not process petitions, applications or any other type of benefit under the Immigration and Nationality Act. If you have questions or wish to submit documentation relating to a matter pending with the bureau, you must address these issues with your nearest District Office.

All FOIA/PA related requests, including address changes, must be submitted in writing and be signed by the requester. Please include the control number listed above on all correspondence with this office. Requests may be mailed to the FOIA/PA Officer at the PO Box listed at the top of the letterhead, or sent by fax to (816) 350-5785. You may also submit FOIA/PA related requests to our e-mail address at [uscis.foia@uscis.dhs.gov](mailto:uscis.foia@uscis.dhs.gov).

Sincerely,

Jill A. Eggleston  
Director, FOIA Operations

# **EXHIBIT C**

*Freedom of Information Act Office*

U.S. Department of Homeland Security  
500 12<sup>th</sup> St SW, Stop 5009  
Washington, DC 20536



**U.S. Immigration  
and Customs  
Enforcement**

April 12, 2016

Crisostomo Ibarra  
Ibarra Professional Law Corp  
459 Fulton Street  
Suite 109  
San Francisco, CA 94102

**RE: ICE FOIA Case Number 2016-ICFO-25393  
USCIS FOIA Case Number NRC2014119952**

Dear Mr. Ibarra:

This is the final response to your Freedom of Information Act (FOIA) request to U.S. Citizenship and Immigration Services (USCIS) dated October 20, 2014. You are seeking records pertaining to your client, Phalkun Bun Heang.

A search of USCIS for records responsive to your request produced an audio/video recording that originated from U.S. Immigration and Customs Enforcement (ICE). USCIS referred this record to ICE for review and processing under the FOIA.

To provide you with the greatest degree of access authorized by law, we have considered your request under both the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Information about an individual that is maintained in a Privacy Act system of records may be accessed by that individual<sup>1</sup> unless the agency has exempted the system of records from the access provisions of the Privacy Act.<sup>2</sup>

After a review of the record referred by USCIS, I have determined that the record cannot be reasonably segregated and will be withheld in its entirety pursuant to Exemptions 6 and 7(C) of the FOIA as described below.

ICE has applied FOIA Exemptions 6 and 7(C) to protect from disclosure law enforcement officials' identities, names, and other third-party information contained within the documents.

**FOIA Exemption 6** exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public

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<sup>1</sup> 5 U.S.C. § 552a(d)(1).

<sup>2</sup> 5 U.S.C. §§ 552a(d)(5), (j), and (k).

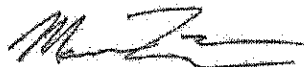
interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

**FOIA Exemption 7(C)** protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

You have the right to appeal ICE's determination. Should you wish to do so, send your appeal and a copy of this letter to: U.S. Immigration and Customs Enforcement, Office of Principal Legal Advisor, U.S. Department of Homeland Security, Freedom of Information Act Office, 500 12<sup>th</sup> Street, S.W., Stop 5900 Washington, D.C. 20536-5900, following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Your appeal must be received within 60 days of the date of this letter. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at [www.dhs.gov/foia](http://www.dhs.gov/foia).

If you have any questions, please call (866) 633-1182 and reference the ICE FOIA case number in the subject line of this letter.

Sincerely,



Catrina M. Pavlik-Keenan  
FOIA Officer

for



# **EXHIBIT D**

## **IBARRA PROFESSIONAL LAW CORPORATION**

459 Fulton Street, Suite 109

San Francisco, CA 94102

Tel: (415) 398-5329

Fax: (415) 398-6831

June 9, 2016

US Immigration and Customs Enforcement  
Office of Principal Legal Advisor  
U.S. Department of Homeland Security  
Freedom of Information Act Office  
500 12<sup>th</sup> Street, S.W., Stop 5900  
Washington, D.C. 20536-5900

**Re: FOIA APPEAL**

**ICE FOIA Case Number 2016-ICFO-25393**

**USCIS FOIA Case Number NRC2014119952**

Dear Sir/Madam:

This is to appeal the April 12, 2016 denial of Phalkun Bun Heang's Freedom of Information Act (FOIA) request for a copy of the audio/video recording of Ms. Heang's June 6, 2006 interview with USCIS. See attached.

U.S. Immigration and Customs Enforcement (ICE) denied the request claiming that the "record cannot be reasonably segregated" and ICE has applied "FOIA Exemptions 6 and 7(C) to protect from disclosure law enforcement officials' identities, names, and other third-party information contained in the documents."

First, ICE is claiming the Exemptions to protect the law enforcement officials' names; however, the identity of the law enforcement officials involved in the interview are already known. They introduced themselves to Ms. Heang at the interview. In addition, they placed their names in a document memorializing the interview (Record of Sworn Statement) identifying themselves. See Exhibit A to the attached Government's Submission of Evidence; Request for Television and DVD Player at Next Hearing. More importantly, the DVD of the interview, the same audio/video recording Ms. Heang seeks in her FOIA request, was submitted by the Department of Homeland Security in Immigration Court in Ms. Heang's removal proceeding. See attached Exhibit C to the Government's Submission of Evidence; Request for Television and DVD Player at Next Hearing. Thus, the DVD is a part of the Immigration Court's records. Furthermore, since Ms. Heang filed appeals in her case with the Ninth Circuit Court of Appeals (No. 0874058, review of the original order of removal, and No. 15-70380, review of the denial of a motion to reopen), the very same DVD is also a part of the administrative record of both appeals

Office of Principal Legal Advisor  
U.S. Immigration and Customs Enforcement  
June 9, 2016  
Page 2

(now consolidated). Accordingly, the names of the law enforcement agents who conducted the interview, and the DVD itself, are now part of the public domain.

Under the public domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record. See Cottone v. Reno, 193 F. 3d 550, 554 (D.C. Cir. 1999) (audio tapes received into evidence).

Second, ICE has not shown it is entitled to the claimed Exemptions either. The U.S. Supreme Court has repeatedly stated that the policy of FOIA requires that the disclosure requirements be construed broadly, and the exemptions narrowly. See Dep't of the Air Force v. Rose, 425 U.S. 352, 366 (1976); U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 151 (1989). The agency claiming the exemption always has the burden of proof to establish its decision to withhold documents was proper. See 5 U.S.C. § 552(a)(4)(B); Trea Citizens League v. DOS, 923 F. Supp. 2d 55, 61 (D.D.C. 2013).

Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information. See News-Press v. DHS, 489 F. 3d 1173, 1196 (11<sup>th</sup> Cir. 2007). Thus, there is a two-tier test to determine whether Exemption 6 applies: "personal information in governmental agency files is exempt from mandatory disclosure only if: (1) the information was within personnel, medical, or similar files; and (2) a balancing of the individual privacy interests against the public interest in disclosure reveals that the disclosure of the information 'would constitute a clearly unwarranted invasion of personal privacy.'" Id. at 1196-1197.

The release of names or other identifying information does not inherently and always constitute a "clearly unwarranted" invasion of personal privacy. See id. at 1199. As one court has stated: "[i]t is not the case that any mention of a federal employee's name may be withheld. Such a blanket rule would fail both the threshold test—as to the type of file or record or information in which such information is found—and the balancing test of privacy versus public interests." NDLON v. US ICE, 811 F. Supp. 2d 713, 746, 811 F. Supp. 2d 713, 748 (S.D. New York 2011). Whether disclosure of names is a significant or a de minimis threat depends upon the characteristics revealed, and the consequences likely to ensue. See id. Similarly, the D.C. Circuit has held that "FOIA does not categorically exempt individual's identities . . . because the privacy interest at stake may vary depending on the context in which it is asserted. [While] the privacy interests of the U.S. government officials might be 'somewhat diminished' due to the countervailing interest of the public to be informed about what their government is up to," federal employees nonetheless maintain "an identifiable privacy interest in avoiding disclosures of information that could lead to annoyance or harassment." See id. at 744-745. Thus, this is why federal courts had generally concluded that the agency's burden under Exemption 6 of showing that disclosure "would constitute a clearly unwarranted invasion of personal privacy" is an onerous one. See News-Press, 489 F. 3d at 1198.

Office of Principal Legal Advisor  
U.S. Immigration and Customs Enforcement  
June 9, 2016  
Page 3

Here, simply revealing the names of the interviewing officers is not a “clearly unwarranted” invasion of personal privacy. It does not lead to injury, embarrassment, annoyance, or harassment. Accordingly, Exemption 6 does not apply.

Exemption 7(C), which exempts from disclosure “records or information compiled for law enforcement purposes,” where disclosing them “could reasonably be expected to constitute an unwarranted invasion of personal privacy,” admittedly has a lower threshold for what invasion of privacy will trigger the exemption. See New York Times Co. v. US Dep’t of Homeland Security, 959 F. Supp. 2d 449, 452 (S.D. New York 2013). However, it still is examined under a two-part test: (1) whether there is any privacy interest in the information sought, and (2) whether the public interest in disclosure outweighs the privacy interest. See id. at 452-453. Where the privacy concerns are present, the exemption then requires the person requesting the information to show (1) that the public interest sought to be advanced is a significant one; and (2) that the information is likely to advance that interest. See id. at 453.

The Supreme Court has explained that, as “a general rule, when documents are within FOIA’s disclosure provisions, citizens should not be required to explain why they seek the information. A person requesting the information needs no preconceived idea of the uses the data might serve. [However] when disclosure touches upon certain areas defined in the exemptions . . . the requester must indicate how disclosing the information ‘would serve the core purpose of FOIA, which is contributing significantly to public understanding of the operations or activities of the government.’” See U.S. Dep’t of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 495 (1994).

There is a public interest here in whether the USCIS or ICE uses coercive tactics during adjustment interviews to obtain statements or withdrawals of petitions. See attached Government’s Submission of Evidence; Request for Television and DVD Player at Next Hearing. This is the kind of “information that sheds light in an agency’s performance of its statutory duties.” See U.S. Dep’t of Justice v. Reporter’s Comm. For Freedom of Press, 489 U.S. 749, 773. As one court stated, there is “only one relevant public interest, that of ‘open[ing] agency action to the light of public scrutiny.’” Associated Press v. United States Dep’t of Defense, 554 F. 3d 274, 288. Here, the release of Ms. Heang’s interview is likely to advance that interest. Accordingly, the public interest outweighs any claimed privacy interest the interviewing officers may have in the release of their names. Exemption 7(c) cannot apply.

Third, ICE has not shown how or why the record cannot be segregated either. Pursuant to 5 U.S.C. § 552(b), “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions that are exempt.” See Abdelfattah v. DHS, 488 F. 3d 178, 186 (3<sup>rd</sup> Cir. 2007); Trea Citizens League v. DOS, 923 F. Supp. 55, 69-71 (D.D.C. 2013). If ICE is concerned about revealing the identity of the interviewing officers, the portion of the record where the officers identified themselves can easily be masked/deleted, while the rest of the interview is released. Assuming the names of the officers are unknown, their identities cannot be known simply by hearing their voices. Thus, even assuming that ICE’s claimed exemptions are valid, which they are not, there is no reason why portions of the interview are withheld and the rest released.

Office of Principal Legal Advisor  
U.S. Immigration and Customs Enforcement  
June 9, 2016  
Page 4

For the foregoing reasons, Ms. Heang requests that ICE provide her with her June 6, 2006 interview under FOIA.

Let us know if you have any questions or require additional information.

Very truly yours,

A handwritten signature in black ink, appearing to read "Crisostomo G. Ibarra". The signature is stylized with a large initial "C" and a long horizontal stroke extending to the right.

Crisostomo G. Ibarra

Enclosure

*Freedom of Information Act Office*

U.S. Department of Homeland Security  
500 12<sup>th</sup> St SW, Stop 5009  
Washington, DC 20536



**U.S. Immigration  
and Customs  
Enforcement**

April 12, 2016

Crisostomo Ibarra  
Ibarra Professional Law Corp  
459 Fulton Street  
Suite 109  
San Francisco, CA 94102

**RE: ICE FOIA Case Number 2016-ICFO-25393  
USCIS FOIA Case Number NRC2014119952**

Dear Mr. Ibarra:

This is the final response to your Freedom of Information Act (FOIA) request to U.S. Citizenship and Immigration Services (USCIS) dated October 20, 2014. You are seeking records pertaining to your client, Phalkun Bun Heang.

A search of USCIS for records responsive to your request produced an audio/video recording that originated from U.S. Immigration and Customs Enforcement (ICE). USCIS referred this record to ICE for review and processing under the FOIA.

To provide you with the greatest degree of access authorized by law, we have considered your request under both the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Information about an individual that is maintained in a Privacy Act system of records may be accessed by that individual<sup>1</sup> unless the agency has exempted the system of records from the access provisions of the Privacy Act.<sup>2</sup>

After a review of the record referred by USCIS, I have determined that the record cannot be reasonably segregated and will be withheld in its entirety pursuant to Exemptions 6 and 7(C) of the FOIA as described below.

ICE has applied FOIA Exemptions 6 and 7(C) to protect from disclosure law enforcement officials' identities, names, and other third-party information contained within the documents.

**FOIA Exemption 6** exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public

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<sup>1</sup> 5 U.S.C. § 552a(d)(1).

<sup>2</sup> 5 U.S.C. §§ 552a(d)(5), (j), and (k).

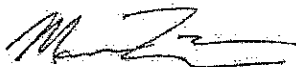
interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

**FOIA Exemption 7(C)** protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

You have the right to appeal ICE's determination. Should you wish to do so, send your appeal and a copy of this letter to: U.S. Immigration and Customs Enforcement, Office of Principal Legal Advisor, U.S. Department of Homeland Security, Freedom of Information Act Office, 500 12<sup>th</sup> Street, S.W., Stop 5900 Washington, D.C. 20536-5900, following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Your appeal must be received within 60 days of the date of this letter. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at [www.dhs.gov/foia](http://www.dhs.gov/foia).

If you have any questions, please call (866) 633-1182 and reference the ICE FOIA case number in the subject line of this letter.

Sincerely,



for

Catrina M. Pavlik-Keenan  
FOIA Officer

2300

RONALD E. LE FEVRE  
Chief Counsel  
LEONARD A. ROSENBERG  
Deputy Chief Counsel  
MICHAEL D. STEINBERG  
Assistant Chief Counsel  
U.S. Department of Homeland Security  
P.O. Box 26449  
San Francisco, California 94126-6449  
(415) 705-1379

DEPARTMENT OF JUSTICE

2006 SEP 11 PM 1:47

EXECUTIVE OFFICE FOR  
IMMIGRATION REVIEW  
OFFICE OF IMMIGRATION JUDGE  
SAN FRANCISCO, CALIFORNIA

BA

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE OF IMMIGRATION REVIEW  
OFFICE OF THE IMMIGRATION JUDGE

In the Matter of:

File: A95 448 037  
San Francisco

Phalkun Bun Heang  
Respondent,

**GOVERNMENT'S SUBMISSION OF  
EVIDENCE; REQUEST FOR  
TELEVISION AND DVD PLAYER AT  
NEXT HEARING**

In Removal Proceedings.

Date: 12/12/06  
Time: 2:30PM  
IJ: Hon. B.M. Phillips

The U.S. Department of Homeland Security ("Government") submits the attached evidence in support of the charges alleged in the Notice to Appear. The Government also requests that a television and DVD player be available at the next hearing.

- Exhibit A: Record of Sworn Statement, signed by respondent.
- Exhibit B: Record of Sworn Statement, signed by respondent's I-129 petitioner.
- Exhibit C: DVD recording of respondent's marriage fraud interview.

Date: 8/25, 2006

Respectfully submitted,

  
Michael D. Steinberg  
Assistant Chief Counsel



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CERTIFICATE OF SERVICE DEPARTMENT OF JUSTICE

I, the undersigned, declare:

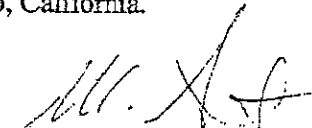
2006 SEP 11 PM 1:47

That I am a citizen of the United States over the age of 18 years and not a party to the within-entitled action. I am an employee of the U.S. Immigration and Naturalization Service and my business address is 550 Kearny Street, Suite 1000, San Francisco, California 94108;

That I served a true copy of Government's submission by placing said copy in an envelope, which was then sealed, and was on this day sent by U.S. Mail, full postage paid, addressed as follows:

E. Wong, Esq.  
930 Montgomery St., Ste. 301  
San Francisco, CA 94133

Executed on 8/28, 2006, at San Francisco, California.

  
Michael D. Steinberg  
Assistant Chief Counsel

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Q & A

U.S. Department of Homeland Security  
Bureau of Immigration and Customs Enforcement

Record of Sworn Statement  
Administrative Proceedings

Office: SFR

File No: A 95 448 037

Statement by: Phalkun HEANG

In the case of: HEANG, Phalkun

At: San Francisco, CA

Date: June 6, 2005

Before: Wes Walters Special Agent  
(Name and Title)

In the English

language.

Interpreter: \_\_\_\_\_

Interpreter employed by: \_\_\_\_\_

I am an officer of the United States Immigration and Naturalization Service, authorized by law to administer oaths and take sworn statements. I am required to obtain, under oath, certain information from you in connection with your application for legal permanent resident and your immigration status in the United States. Any incorrect or untrue information that you provide under oath can subject you to the penalties of perjury and other criminal laws of the United States of America and/or removal from the United States of America. Therefore all the information or the evidence you submit during this application process must be true and correct. I desire to take your sworn statement regarding your application for legal permanent residency and your immigration status in the United States.

Q: Do you understand what I've said to you?

A: yes

Q: Any statement you give must be given freely and voluntarily. Are you willing to answer my questions at this time?

A: yes

Q: Do you swear or affirm that all of the answers and information that you are about to give will be true and correct?

A: yes

Q: What is your family (last) name?

A: HEANG

Q: What is your first (given) name?

A: PHALKUN

Q: What is your middle name?

A: Bun

Q: Of what country are you a citizen?

A:

Q: What is your place of birth (Country and city or province)?

A: Cambodia

Q: What is your date of birth?

A: [redacted] 1983

Exhibit # 7  
12/12/06 (date) [Signature] (initials)

PHALKUN BUN HEANG

- Q: What is the name of your father?  
A: Bun Heang
- Q: What is the date and place of birth of your father?  
A: He is 61 years old. Cambodia
- Q: What is the name of your mother?  
A: Soklang Wong
- Q: What is the date and place of birth of your mother?  
A: She is 49. Cambodia
- Q: What family members do you have in the United States?  
A: I have an Aunt. Kim Hoy PHALKUN
- Q: Are you married?  
A: Yes
- Q: What is your spouse's name and citizenship?  
A: Howard Hall Morey, US citizen.
- Q: Do you have any children?  
A: no
- Q: Why did you marry Howard Morey?  
A: Because I wanted to live here. It is bad in Cambodia.
- Q: Did you marry him to come to the United States?  
A: Yes
- Q: Who told you that about marrying this person to come to the United States?  
A: My aunt told me when she visited from the United States that I could marry someone to live in the United States. She told me about Mr. Morey and set up for him to come to meet me and to marry me.
- Q: How does your Aunt know Howard Morey?  
A: Because he is the son of my Uncle, Dennison Morey. (her husband) PHALKUN
- Q: When did you first meet Mr. Morey?  
A: I met him at the airport in 2000 or 2001 in Cambodia (PHALKUN)
- Q: Where and when did you marry Mr. Morey?  
A: In Cambodia. On December 30, 2000 or 2001
- Q: How long was Mr. Morey in Cambodia when you met him?  
A: one weeks.
- Q: When did you next see Mr. Morey and how long was he in Cambodia?  
A: When I went to get the visa to come to the United States. He was in Cambodia for 1 week and then <sup>we</sup> you went to Thailand for about 1 week. PHALKUN  
1
- Q: When did you enter the United States?  
A: July 15, 2003
- Q: Where did you live after you came to the United States?  
A: I live at my Aunts house more than one year. My Aunts house is Patio Ct. I have been living with Mr. Morey for the last 4 months.

PHALKUN BUN HEANG

Q & A

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Q: Where do you sleep in Howard Morey house?

A: I sleep in the front room and Howard sleeps in his room.

Q: What is the address where you are living with Howard Morey?

A: 2964 W. Steele Lane, Santa Rosa CA 95403

Q: What did your family give Howard Morey for helping you?

A: He get money. \$10,000. He got it step by step. My parents gave cash to friends in Cambodia that visited the United States and brought cash to my Aunt and my aunt gave it to him. There were several friends that visited from Cambodia to give the money to my Aunt to pay Howard. My parents sold land to have the money. PHALKUN

Q: Did Howard Morey buy anything with the money?

A: Yes, Howard paid for his new teeth. He was hurt in the big earthquake in San Francisco, California.

Q: Did you ever have sexual relations with Howard Morey?

A: No.

Q: Do you work in the United States?

A: Yes, I work at Spring Lake Village. Retirement people, in Santa Rosa. I am a waitress. I started working there on July 17, 2004. I work 4 hours a day on Monday through Thursday and 8 hours on Sunday. I make 8 ~~hours~~ <sup>hours</sup> a ~~day~~ <sup>day</sup> hours. PHALKUN

Q: Do you have any questions or wish to make any statements?

A: I just want to come here and study and make my life better.

I have read (or have had read to me) the foregoing statement, consisting of 5 pages. I state that the answers made therein by me are true and correct to the best of my knowledge and belief, and that his statement is a full, true, and correct record of my interview by the officer of the Immigration and Naturalization Service name on Page 1 of this statement. I have initialed each page of this statement [and the corrections noted on page \_\_\_\_].

Signature: ~~PHALKUN BUN HEANG~~

Printed Name of Alien: ~~PHALKUN BUN HEANG~~

Subscribed and sworn to before me on June 6, 2005

INS officer: SA Wes Walters [Signature]  
Witnessed: SA HERMILA FLORES [Signature]

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U.S. Department of Justice

Immigration and Naturalization Service

TO: US Immigration and Naturalization Service  
630 Sansome Street  
San Francisco, CA 94111  
Atten: E-11/A# 95 448 037

DATE: JUN - 6 2005

Fiance  
WITHDRAWAL OF VISA PETITION (I-130) - I129F

My name is Howard Hall Morey

I filed a Fiance I129F visa petition (I-130) on behalf of Phalkun Bun Heany  
(NAME)

[REDACTED] 83 Phnum Penh Cambodia  
(DATE AND COUNTRY OF BIRTH)

on JUN - 6 2005, at San Francisco, CA.

I now wish this petition to be withdrawn and waive any right to any appeal I have in this matter.

Reason for withdrawing petition THIS PETITION WAS FILED  
WITHOUT THE BEST INTENTIONS BUT UNWITTINGLY  
IN DAD FAITH.

SORRY.  
I'LL NEVER DO IT AGAIN.

Howard Hall Morey  
(SIGNATURE)

(IDENTIFICATION)

HOWARD MOREY  
2964 W. STEELE LN.  
SANTA ROSA, CA 95403  
(ADDRESS)

Exhibit # 6  
12/12/06 [Signature]  
(date) (initials)

THIS WAS DONE AS A FAVOR FOR AN IN-LAW.  
THE MARRIAGE WAS NOT CONSUMMATED. [Signature]

UNITED STATES DEPARTMENT OF JUSTICE  
IMMIGRATION AND NATURALIZATION SERVICE

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RECORD OF SWORN STATEMENT IN AFFIDAVIT FORM

IN RE: Phalkun Bun Heay FILE NO: 95 448 037

EXECUTED AT: San Francisco, California Date: 6/6/05

Before the following officer of the US Immigration and Naturalization Service: K. Dulk

I, ~~Mr~~ Howard Hall Mera,  
acknowledge that the above-named officer has identified her/himself to me as an officer of the United States Immigration and Naturalization Service authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. S/he has informed me that s/he desires to take my sworn statement regarding marriage to Phalkun Bun Heay. S/he has told me that my statement must be made freely and voluntarily. I am willing to make such a statement. I swear that I will tell the truth, the whole truth, and nothing but the truth, so help me, God.

Being duly sworn, I make the following statement:

AS A FAVOR TO MY FATHER'S WIFE I AGREED TO MARRY PHALKUN BUN HEANG AND SPONSOR HER IMMIGRATION TO THE UNITED STATES.  
I RECEIVED A COUPLE OF TRIPS TO SOUTHEAST ASIA AS FOR WHAT COULD BE CONSIDERED COMPENSATION.  
I NEVER WISHED TO CAUSE ANY HARM OR DAMAGE AND WOULD LIKE TO SAY THAT PHALKUN BEHAVES MUCH MORE CONSCIENTIOUSLY AND RESPONSIBLY THAN MANY NATIVE-BORN AMERICANS.  
ONCE AGAIN, THE MARRIAGE WAS NEVER CONSUMMATED.

Howard Mera  
Signature of Applicant for naturalization

Subscribed and Sworn to before me this 6<sup>th</sup> day of JUNE 2005 at San Francisco, CA

Karen C. Dulk  
District Adjudications Officer

237

WITHDRAWAL OF ENFORCEABLE AFFIDAVIT OF SUPPORT (I-864)

File No: A 05448037

Date: JUN -6 2005

To: U. S. CITIZENSHIP AND IMMIGRATION AND SERVICES  
630 SANSOME STREET (B-11/LLB)  
SAN FRANCISCO, CA 94111-2280

My name is Howard Hall Mory I was born in  
LIVERMORE, CA on APRIL 14, 1944 I filed an enforceable affidavit of support

on behalf of PHALKUN DIN HENG on JUNE 6, 2005 at  
SAN FRANCISCO, CA He/She was born on [REDACTED] 1993  
in PHNOM PENH, CAMBODIA

I wish to withdraw my obligation of financial support (Form I-864) which was submitted in accordance with Section 213A of the Immigration and Nationality Act, as amended (the Act).

[Handwritten Signature]  
(Signature and Address)

In Re Beneficiary: Residence and Employment (if known)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

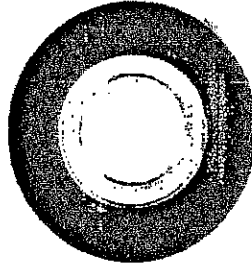
THE MARRIAGE WAS DONE AS A FAVOR TO MY FATHER'S WIFE.  
IT WAS NEVER CONSUMMATED.  
NO HARM WAS INTENDED.  
AS FAR AS I KNOW THE ONLY COMPENSATION I  
RECEIVED WERE TWO TRIPS TO CAMBODIA.

238

A95 448 037

2/2

ICE



*Low Performance Control*

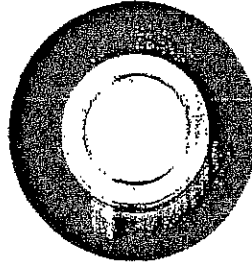


239

A95 448 037

(1/2)  
②

CE



# **EXHIBIT E**

U.S. Department of Homeland Security  
500 12<sup>th</sup> St. SW; STOP 5009  
Washington, DC 20546-5009



U.S. Immigration  
and Customs  
Enforcement

JUL 12 2016

June 29, 2016

Crisotomo G. Ibarra, Esq.  
Ibarra Professional Law Corporation  
459 Fulton Street, Suite 109  
San Francisco, CA 94102

VIA REGULAR U.S. POSTAL SERVICE

RE: 2016-ICAP-00537, 2016-ICFO-25393

Dear Mr. Ibarra,

This is in response to your letter, dated June 9, 2016, appealing the adverse determination by the U.S. Immigration and Customs Enforcement (ICE), Freedom of Information Act (FOIA) Office in response to your Freedom of Information Act/Privacy Act (FOIA/PA) request. The initial request to USCIS described a DVD/videotape of a June 6, 2005 interview of Phalkun Bun Heang, A95448037, with USCIS.

On March 4, 2016, USCIS referred the recording at issue to ICE FOIA for processing. In a letter dated April 12, 2016, the ICE FOIA Office advised you that it would withhold the recording in full pursuant to Exemptions 6 and 7(C) of the FOIA because the record could not be reasonably segregated. Your appeal of that determination was received on June 14, 2016.

Section 5.9(a)(1) of Title 6 of the Code of Federal Regulations requires that appeals from an adverse determination by the ICE FOIA Office "must be received by the Associate General Counsel (General Law) within 60 days of the date of the letter denying your request." Because your appeal letter was received on Tuesday, June 14, 2016, which is more than 60 days from the date of the April 12, 2016 final response letter, ICE is administratively closing your appeal in this case.

Crostomo Ibarra, Esq.  
2016-ICAP-00537, 2016-ICFO-25393  
Page 2 of 2

Should you have any questions regarding this appeal closure, please contact ICE at [ice-foia@dhs.gov](mailto:ice-foia@dhs.gov). In the subject line of the email please include the word "appeal", your appeal number, which is 2016-ICAP-00537 and the FOIA case number, which is 2016-ICFO-25393.

Sincerely,



Debbie Seguin  
Chief

Government Information Law Division  
Office of the Principal Legal Advisor  
U.S. Immigration and Customs Enforcement  
U.S. Department of Homeland Security

# **EXHIBIT F**

## IBARRA PROFESSIONAL LAW CORPORATION

459 Fulton Street, Suite 109  
San Francisco, CA 94102  
Tel: (415) 398-5329  
Fax: (415) 398-6831

July 12, 2016

*Via email to ice-foia@dhs.gov*

Debbie Saguin  
Chief  
Government Information Law Division  
Office of Principal Legal Advisor  
US Immigration and Customs Enforcement  
U.S. Department of Homeland Security

**Re: FOIA APPEAL Number 2016-ICAP-00537  
ICE FOIA Case Number 2016-ICFO-25393**

Dear Ms. Saguin:

This is in response to your June 29, 2016 Notice stating that you are administratively closing the appeal supposedly because the appeal is untimely. You state in your letter that the "appeal letter was received on Tuesday, June 14, 2016, which is more than 60 days from the date of the April 12, 2016 final response letter."

To the contrary, we sent the appeal via overnight delivery through Fed-Ex on June 9, 2016, and the Fed-Ex tracking shows that the appeal **was delivered and received on June 10, 2016 by an "H. Clements"** (see attached). Accordingly, the appeal was timely, and you should reopen the FOIA appeal.

Let us know if you have any questions or require additional information.

Very truly yours,



Crisostomo G. Ibarra

Enclosure

U.S. Department of Homeland Security  
500 12<sup>th</sup> St. SW; STOP 5009  
Washington, DC 20546-5009



U.S. Immigration  
and Customs  
Enforcement

JUL 05 2016

June 29, 2016

Crisotomo G. Ibarra, Esq.  
Ibarra Professional Law Corporation  
459 Fulton Street, Suite 109  
San Francisco, CA 94102

VIA REGULAR U.S. POSTAL SERVICE

**RE: 2016-ICAP-00537, 2016-ICFO-25393**

Dear Mr. Ibarra,

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Crostomo Ibarra, Esq.  
2016-ICAP-00537, 2016-ICFO-25393  
Page 2 of 2

Should you have any questions regarding this appeal closure, please contact ICE at [ice-foia@dhs.gov](mailto:ice-foia@dhs.gov). In the subject line of the email please include the word "appeal", your appeal number, which is **2016-ICAP-00537** and the FOIA case number, which is **2016-ICFO-25393**.

Sincerely,

A handwritten signature in black ink, appearing to read "Debbie Seguin". The signature is fluid and cursive, with a large initial "D" and "S".

Debbie Seguin

Chief

Government Information Law Division  
Office of the Principal Legal Advisor  
U.S. Immigration and Customs Enforcement  
U.S. Department of Homeland Security





July 5, 2016

Dear Customer:

The following is the proof-of-delivery for tracking number **783322174768**.

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**Delivery Information:**

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<b>Status:</b>	Delivered	<b>Delivered to:</b>	Shipping/Receiving
<b>Signed for by:</b>	H.CLEMENTS	<b>Delivery location:</b>	9300 HAMPTON DR Washington, DC 20536
<b>Service type:</b>	FedEx Priority Overnight	<b>Delivery date:</b>	Jun 10, 2016 09:30
<b>Special Handling:</b>	Deliver Weekday		
	Direct Signature Required		

A black and white image of a handwritten signature, which appears to be "H. Clements", written in dark ink on a light background.

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<b>Tracking number:</b>	783322174768	<b>Ship date:</b>	Jun 9, 2016
		<b>Weight:</b>	0.5 lbs/0.2 kg

**Recipient:**  
Off. of Principal Legal Advisor  
US Immigration & Customs Enforcemen  
500 12th St. SW  
Stop 5900  
Washington, DC 20536 US

**Shipper:**  
Chris Ibarra  
ibarra Professional Law Corp  
459 FULTON ST STE 109  
SAN FRANCISCO, CA 94102 US

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## **IBARRA PROFESSIONAL LAW CORPORATION**

459 Fulton Street, Suite 109

San Francisco, CA 94102

Tel: (415) 398-5329

Fax: (415) 398-6831

June 9, 2016

US Immigration and Customs Enforcement  
Office of Principal Legal Advisor  
U.S. Department of Homeland Security  
Freedom of Information Act Office  
500 12<sup>th</sup> Street, S.W., Stop 5900  
Washington, D.C. 20536-5900

**Re: FOIA APPEAL**

**ICE FOIA Case Number 2016-ICFO-25393**

**USCIS FOIA Case Number NRC2014119952**

Dear Sir/Madam:

This is to appeal the April 12, 2016 denial of Phalkun Bun Heang's Freedom of Information Act (FOIA) request for a copy of the audio/video recording of Ms. Heang's June 6, 2006 interview with USCIS. See attached.

U.S. Immigration and Customs Enforcement (ICE) denied the request claiming that the "record cannot be reasonably segregated" and ICE has applied "FOIA Exemptions 6 and 7(C) to protect from disclosure law enforcement officials' identities, names, and other third-party information contained in the documents."

First, ICE is claiming the Exemptions to protect the law enforcement officials' names; however, the identity of the law enforcement officials involved in the interview are already known. They introduced themselves to Ms. Heang at the interview. In addition, they placed their names in a document memorializing the interview (Record of Sworn Statement) identifying themselves. See Exhibit A to the attached Government's Submission of Evidence; Request for Television and DVD Player at Next Hearing. More importantly, the DVD of the interview, the same audio/video recording Ms. Heang seeks in her FOIA request, was submitted by the Department of Homeland Security in Immigration Court in Ms. Heang's removal proceeding. See attached Exhibit C to the Government's Submission of Evidence; Request for Television and DVD Player at Next Hearing. Thus, the DVD is a part of the Immigration Court's records. Furthermore, since Ms. Heang filed appeals in her case with the Ninth Circuit Court of Appeals (No. 0874058, review of the original order of removal, and No. 15-70380, review of the denial of a motion to reopen), the very same DVD is also a part of the administrative record of both appeals

# **EXHIBIT G**

U.S. Department of Homeland Security  
500 12<sup>th</sup> St. SW; STOP 5009  
Washington, DC 20546-5009



U.S. Immigration  
and Customs  
Enforcement

AUG 17 2016

August 11, 2016

Crisotomo G. Ibarra, Esq.  
Ibarra Professional Law Corporation  
459 Fulton Street, Suite 109  
San Francisco, CA 94102

VIA REGULAR U.S. POSTAL SERVICE

**RE: 2016-ICAP-00537, 2016-ICFO-25393**

Dear Mr. Ibarra,

This is the response to your letter dated July 12, 2016, requesting that U.S. Immigration and Customs Enforcement (ICE) reconsider the closure of your Freedom of Information Act (FOIA) appeal as untimely.

The administrative record indicates that ICE stated in a letter dated June 29, 2016, that “[b]ecause your appeal letter was received on Tuesday, June 14, 2016, which is more than 60 days from the date of the April 12, 2016 final response letter, ICE is administratively closing your appeal in this case.” See 6 C.F.R. § 5.9.

Upon review of the delivery receipt that you provided with your July 12, 2016 letter, ICE finds that your appeal dated June 9, 2016 was delivered timely on June 10, 2016. Accordingly, your appeal is reopened.

Your FOIA request to U.S. Citizenship and Immigration Services (USCIS), sought a DVD video recording of a June 6, 2005 interview of Phalkun Bun Heang, A95448037, and another individual by ICE personnel.

On March 4, 2016, USCIS referred the recording at issue to ICE FOIA for processing. In a letter dated April 12, 2016, the ICE FOIA Office advised you that it would withhold the recording in full pursuant to Exemptions 6 and 7(C) of the FOIA because the record could not be reasonably segregated.

It stated:

ICE applied FOIA Exemptions (b)(6) and (b)(7)(C) to protect from disclosure information pertaining to third parties who have not provided consent. Without the explicit consent of the individual(s) named in the records you seek, ICE cannot release these records to you, your client or any other member of the public. Protecting the

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2016-ICAP-00537, 2016-ICFO-25393  
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privacy interests of individuals who may be named in ICE records which are the target of FOIA requests requires this procedure; members of the public may draw adverse inferences from the mere fact that an individual is mentioned in the files of a criminal law enforcement agency. ICE has also applied FOIA Exemptions (b)(6) and (b)(7)(C) to protect from disclosure the name and initials of DHS employees to prevent an unwarranted invasion of privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in the disclosure of the information. Please understand that any private or litigation interest you or your client may have in that information cannot factor into this determination.

You are appealing the withholding of the recording in its entirety. You state that ICE cannot claim the exemptions at issue and that, even if it could, the identities of the parties appearing in the recording have already been publicized, as the recording was submitted to the Immigration Court in connection with your client's removal proceeding and is now part of the record on appeal before the U.S. Court of Appeals, Ninth Circuit.

Courts have upheld the withholding the identities of law enforcement personnel and third parties under the FOIA exemptions claimed by ICE in this case, especially where those individuals may suffer harassment if associated with law enforcement investigations. *Moore v. Bush*, 601 F. Supp. 2d 2, 14 (D.D.C. 2009); *George v. IRS*, No. 05-955, 2007 WL 1450309, at \*11 (N.D. Cal. May 14, 2007).

Nevertheless, you cite *Cottone v. Reno*, 193 F.3d 550 (D.C. Cir. 1999), in support of your assertion that the recording has been publicized such that withholding the identities of the parties in the recording is unnecessary. In *Cottone*, the plaintiff sought copies of recorded telephone conversations obtained by the government using a wiretap. *Id.* at 552. He was able to show that the government had played those recordings "in open court, before the jury and the public gallery ... and introduced them into evidence." *Id.* at 552. Noting that the public domain exception to the FOIA exemptions is narrow and requires that the requester show "that there is a permanent public record of the exact portions [of the records] he wishes," the U.S. Court of Appeals, District of Columbia Circuit, held that the plaintiff had met his burden. *Id.* at 555.

The instant case is distinguishable from *Cottone* and is more like *Ewell v. U.S. Department of Justice*, --- F. Supp. 3d ---, 2016 WL 316777 (D.D.C. Jan. 26, 2016). In *Ewell*, the plaintiff sought recordings obtained by the government through a wiretap. He claimed that the FOIA exemption at issue was inapplicable because the recordings had been "'disclosed, played, and entered into evidence' at his detention hearing." *Id.* at \*19 (citation omitted). The federal court in the District of Columbia found that "the transcript of Ewell's detention hearing does not show that any wiretapped conversations were played in open court." *Id.* Accordingly, it found that the government had not waived the exemption by publicizing the recordings.

The Immigration Court hearing transcript in the instant case does not reflect that the recording at issue was ever marked for identification, admitted as evidence or played in open court. Moreover, the record before the Ninth Circuit Court of Appeals appears to have been sealed and cannot be accessed by the public at large. Based on the information available, it cannot be concluded that the recording was publicized as contemplated in *Cottone* such that withholding it would be pointless.

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Finally, you contend that, even if the exemptions claimed by ICE are proper, the information sought is reasonably segregable from the information that must be withheld. ICE FOIA does not possess technology which would allow it to obscure the images and voices of the employees and third party individual in the recording. Therefore, it is concluded that the information sought is not reasonably segregable from the exempt information in the recording.

Upon a complete review of the information withheld by ICE, it is determined that the withholding of the recording in its entirety was proper in all respects, and the information is exempt from disclosure under the applicable provisions of 5 U.S.C. § 552 and 5 U.S.C. § 552a cited above.

This decision is the final action of U.S. Immigration and Customs Enforcement concerning your FOIA/PA request. Inasmuch as you consider this to be a denial of your appeal, you may obtain judicial review of this decision pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B) in the United States District Court in the district in which you reside, or have a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Should you have any questions regarding this appeal closure, please contact ICE at [ice-foia@dhs.gov](mailto:ice-foia@dhs.gov). In the subject line of the email please include the word "appeal", your appeal number, which is **2016-ICAP-00537** and the FOIA case number, which is **2016-ICFO-25393**.

Sincerely,



Debbie Seguin  
Chief

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