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[**INSERT COURT NAME AND JURISDICTION**]

[INSERT NAME OF PLAINTIFF]	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. [DOCKET NUMBER]
	)	
[INSERT NAME OF DEFENDANT]	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER

Pursuant to Rule of Civil Procedure ___, [plaintiff] [name] hereby moves the Court to issue a protective order prohibiting discovery related to the existence and/or substance of any petition for immigration benefits filed pursuant to 8 U.S.C. § 1154 and prepared or submitted on behalf of [plaintiff] that may or may not exist.

[**Add facts of the case and relevant discovery request.]**

Congress has enacted federal law requiring that knowledge of the substance, or even the existence, of any Violence Against Women Act ("VAWA") immigration case be kept confidential. ("VAWA confidentiality"). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), Pub. L. No. 104-208, § 384(a)(2), codified at 8 U.S.C. § 1367(a)(2) (2007). These VAWA confidentiality protections are an important component of federal immigration law protections for immigrant crime victims, including domestic violence victims. Congress created VAWA confidentiality to stop ongoing harm to victims and escalation of violence that was occurring to victims when abus

immigration status on her own, that the victim would no longer be dependent on the abuser to attain legal immigration status, and that abuser no longer had the power to have the victim deported enhanced the danger of future abuse just as separation from an abuser increases potential danger to victims.[1] When abusers lose control over victims the likelihood of retaliatory abuse rises.[2] To cut off such retaliatory actions, VAWA confidentiality also bars batterers and other crime perpetrators from interfering with a victim's VAWA, T or U visa immigration case and from triggering or securing the victim's deportation. It bars abusers and perpetrators of crime from access to information commonly used as a tool to control victims, to continue perpetrating threats of deportation and crimes against them, and effectively to secure their silence. Accordingly, this Court should issue a protective order pursuant to Rule ___ to prevent discovery related to any VAWA immigration case.

ARGUMENT

The petition for immigration benefits that [defendant] seeks in discovery is a highly confidential, federally-protected information and documentation that is filed by immigrant victims of violence against women, including domestic violence, under the federal Violence Against Women Act. In a non-abusive marriage between a U.S. citizen or permanent resident and a noncitizen, the U.S. citizen or permanent resident usually files a petition on behalf of his or her spouse to receive immigration benefits. See 8 U.S.C. § 1154(a)(1)(A)(i). In an abusive marriage, however, the power to file or withdraw such a petition – and so to control whether the

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not a citizen and the non-citizen’s legal status depends on his or

Because Congress's intent in passing VAWA's immigration and confidentiality provisions was to assist battered immigrants in gaining independence from abusive spouses – including by preventing the abusive party from finding out whether the immigrant has filed a VAWA immigration case and what information any such petition might contain – this Court should not allow the [defendant] to obtain precisely this protected information through discovery.

II. PUBLIC POLICY DICTATES THAT DISCOVERY OF THE EXISTENCE OR

nondisclosure as elucidated in FOIA case law, as a body of case law specific to the discoverability of VAWA immigration cases has not yet been developed.

A. Policy Reasons for Protecting Information Subject to a Statutory Prohibition Against Disclosure

The policy reasons for FOIA's exemption covering information prohibited from disclosure by statute apply in the context of discovery of VAWA immigration cases as well. As the U.S. Court of Appeals for the D.C. Circuit stated in Friedman

abusive spouse's discovery in litigation of the existence and substance of a VAWA immigration case.

As the legislative history of VAWA's confidentiality provision makes clear, the mere existence of a VAWA immigration case warrants "considered and cautious treatment." The Court should accord great weight to the intent of this statutory protection – to prevent interference with the [plaintiff's] immigration case, to stop abusers and perpetrators of crime from successfully encouraging pursuit of victims by DHS and initiation of a removal action against [plaintiff], and to prevent other harm to the [plaintiff]. The Congressional purpose of protecting victims is furthered by granting [plaintiff's] motion for a protective order.

B. Additional Policy Reasons Exist for Protecting Personal Privacy Information

Exemptions 6 and 7(c) to the Freedom of Information Act ("FOIA") protect information that, if disclosed by the government, would create an unwarranted invasion of personal privacy. Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," while Exemption 7(c) covers "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (c) could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b).

The policies underlying FOIA Exemptions 6 and 7(c) demonstrate why [plaintiff's] privacy interest in the existence or substance of any VAWA immigration case should be shielded from discovery as well. The purpose of Exemption 6 was to "require a balancing of the individual's right of privacy against the preservation of the basic purpose of the [FOIA] . . . The device adopted to achieve that balance was the limited exemption, where privacy was threatened, for 'clearly unwarranted' invasions of privacy." Dep't of the Air Force v. Rose, 425 U.S. 352,

372 (1976) *quoted in* Dep't of State v. Ray, 592 U.S. 164, 175 (1991). Similarly, though employing a less stringent standard than Exemption 6, the policy behind Exemption 7(c) was also to balance "privacy interests against any asserted public interest in disclosure." Deglace v. Drug Enforcement Admin., No. 05-2276, 2007 WL 521896, at *2 (D.D.C. Feb. 15, 2007) (citations omitted).

In addition to addressing the need to balance an individual's interest in privacy against the [defendant's] interest in disclosure, FOIA case law provides illustrative guidance as to when it is inappropriate to acknowledge even the existence of a private document, such as a VAWA immigration case. Specifically, where an individual's personal information is the target of a FOIA request:

> the agency to which the FOIA request is submitted may provide a Glomar response, that is, a refusal to confirm or deny the existence of . . . information responsive to the FOIA request, on the grounds that even acknowledging the existence of responsive records constitutes an unwarranted invasion of the targeted individual's personal privacy.

Id. at *1, citing Phillippi v. Cent. Intelligence Agency, 456 F.2d 1009, 1014-15 (D.C. Cir. 1976) (involving the existence of the Hughes Glomar Explorer). This standard, as with the balancing test that applies generally in Exemption 6 and 7(c) cases, is also applicable and useful in the discovery context.

In balancing the interests at issue in the case at bar, public policy clearly weighs against disclosure. The privacy interest of the [plaintiff] is very high, as revealing the existence or substance of any VAWA immigration case would put her at risk of a variety of harms – the very harms cited by Congress in protecting the confidentiality of the petitions. The interest of the [defendant] in disclosure is low, as the existence of any such petition is irrelevant to the case at

bar, and the information contained therein (e.g., name, address, marital history) would be discoverable by other means, if not already known to the [defendant]. In this family law case the existence of any history of domestic violence would be relevant a range of determinations being made by the Court in this case, including [reference relvant determinations such as custody, property division, divorce, spousal support, and/or issuance of a civil protection order]. When [plaintiff] presents evidence through testimony, [respondent] will have adequate opportunity for cross examination and discovery in this action.

The potential for abuse is so high that the information that is found in a petition, or in the fact of the existence of a petition, cannot outweigh the privacy interest of the [plaintiff]. Further, revealing the mere existence of a VAWA immigration case would put the [plaintiff] at such great risk that she should be protected from either confirming or denying whether such a petition exists. For the foregoing reasons, public policy dictates that the [plaintiff's] motion be granted.

III. THE EXISTENCE AND SUBSTANCE OF A VAWA IMMIGRATION CASE IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

[*CONSIDER HOLDING THIS ARGUMENT FOR REPLY*] In the instant action, [defendant] seeks discovery of information and/or materials that are covered by the attorney-client privilege, which protects confidential communications between a client and her attorney. Specifically,8.TCgallby ppn as:LEGE.

to DHS, any confidential communications regarding that petition – including the fact of its existence – are shielded from discovery by the attorney-client privilege. While the VAWA immigration case must be submitted to DHS, admittedly a third party, that submission does not waive the privilege: DHS must, by statutory directive, maintain the confidentiality of the case. See 8 U.S.C. § 1367(a)(2) ("in no case may . . . the Secretary of Homeland Security . . . or any other official or employee of the Department of Homeland Security . . . (including any bureau or agency of [the Department])— . . . permit use by or disclosure to anyone . . . of any information which relates to an alien who is the beneficiary of an application for relief under [VAWA].").

[Defendant] may assert that attorney-client protection for any VAWA immigration case is waived upon submission to DHS, but that argument should be rejected. First, as explained above, DHS is required to keep any VAWA-related immigration case confidential.[6] Moreover, while the doctrine of selective waiver has been rejected by most jurisdictions, it does not appear that it has been considered in a context on point with the case at bar. It may well be that "the fundamental principle that 'the public . . . has a right to every man's evidence'" underlies the attorney-client privilege, Univ. of Pennsylvania v. Equal Employment Opportunity Comm'n, 493 U.S. 182, 189 (1990) (citations omitted); however, such a doctrine should not lie where an individual's personal privacy, physical protection and personal safety are at issue, as they are here. The need for privacy protection for the safety of the victim and her family is even more critical in cases such as the one at bar where the person seeking release of privacy- and VAWA-

[6] VAWA cases include: VAWA self-petitions (domestic abuse, child abuse, elder abuse cases filed by the victim with DHS)(INA Section 101(a)(51); VAWA cancellation of removal (INA Section 240A(b)(2)) or suspension of deportation (INA Section

confidentiality-protected information is the perpetrator of abuse and/or other criminal activities against the petitioner.

Therefore, as in the arena of work product protection, the attorney-client privilege should not automatically be waived by release of an otherwise privileged document to a non-adversary government agency. See generally Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1431 (3rd Cir. 1991) (when disclosure of work product "is made to a non-adversary, it is appropriate to ask whether the circumstances surrounding the disclosure evidenced conscious disregard of the possibility that an adversary might obtain the protected materials"). An exception should be made when release to the non-adversarial agency necessarily follows the advice given and work performed by the attorney and the communication shall remain confidential upon release. In the instant case, the privilege should not be waived because: (1) the [plaintiff] must make the disclosure to DHS in order to obtain the benefit of her attorney's advice; (2) the [plaintiff] can remain confident that the statutory confidentiality provision protects against disclosure to the [defendant] and to any other person outside of the federal agency personnel adjudicating her immigration petition; and (3) no public policy interest would be served by declaring the privilege waived.

To find that the privilege is waived upon submission of a VAWA immigration case to DHS would be to give the [plaintiff] a Hobson's choice: she can follow the advice of counsel to file a VAWA Self-Petition (or other VAWA immigration case) in an attempt to gain independence and safety from her abuser, or she can withdraw the instant legal proceedings – necessary to protect her [and/or her children's] safety and well-being – so as to protect discovery of any confidential information under the VAWA.

Because of VAWA's confidentiality provisions, the only way the [plaintiff's] adversary – *e.g.*, her abusive husband – could obtain protected, confidential VAWA immigration case information (assuming any exists) would be if this Court were to provide it to him through discovery. For this reason the Immigration and Customs Enforcement division of the Department of Homeland Security, in their online course for enforcement personnel "Violence Against Women Act (VAWA 2005)," stated the following regarding VAWA confidentiality: "In addition to DHS, it applies to family court officers, criminal court judges, and law enforcement officers." Therefore, for all the reasons set forth above, the existence and substance of any VAWA Self-Petition or other confidential VAWA immigration case should be held protected by the attorney-client privilege and not discoverable.

IV. THE EXISTENCE AND SUBSTANCE OF A VAWA SELF-PETITION ARE IRRELEVANT TO THE CASE AT BAR.

[Develop this section as appropriate under the facts of each case.]

CONCLUSION

[Defendant's] attempt to discover whether [plaintiff] has petitioned for immigration benefits under the provisions of the Violence Against Women Act is improper because of the risk to the [plaintiff] if the existence or substance of such a petition is revealed to the [defendant], the highly confidential nature of such petitions, the public policy supporting this confidentiality and because the existence and substance of any such petition are subject to the attorney-client privilege.

Further, the [defendant] should not be assisted by this Court in his attempts to circumvent federal confidentiality protections and discover federally protected, confidential information.

For the foregoing reasons, [plaintiff] respectfully requests that this Court enter a protective order prohibiting discovery related to any VAWA immigration case that may or may not exist.

Dated: [MONTH, DAY, YEAR]

By: /s/
[NAME
TITLE
CONTACT INFORMATION]

[**INSERT COURT NAME AND JURISDICTION**]

[INSERT NAME OF PLAINTIFF]	)
	)
Plaintiff,	)
	)