UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED FARM WORKERS	)	
	)	
and	)	
	)	
FARMWORKER JUSTICE,	)	
	)	C.A. No. 07-2241 (HHK)
Plaintiffs,	)	
	)	
v.	)	
	)	
DEPARTMENT OF LABOR,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiffs United Farm Workers and Farmworker Justice move for summary judgment on the grounds that no genuine issue of material fact exists and plaintiffs are entitled to judgment as a matter of law. In support of this motion, plaintiffs submit a memorandum of law; a statement of undisputed material facts with Exhibits AA-HH; the declaration of Virginia Ruiz with Exhibits 1-4; and a proposed order.

Respectfully submitted,

/s/ Michael T. Kirkpatrick

Michael T. Kirkpatrick (DC Bar #486293)
Adina H. Rosenbaum (DC Bar #490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Bruce Goldstein (DC Bar #446848)
Virginia Ruiz (DC Bar #483800)
Marni Willenson (Bar # IL0011)
FARMWORKER JUSTICE
1126 16th Street, NW, Suite 270
Washington, DC 20036
(202) 293-5420

Dated: April 11, 2008

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED FARM WORKERS	)	
	)	
and	)	
	)	
FARMWORKER JUSTICE,	)	
	)	C.A. No. 07-2241 (HHK)
Plaintiffs,	)	
	)	
v.	)	
	)	
DEPARTMENT OF LABOR,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs United Farm Workers (UFW) and Farmworker Justice (FJ) brought this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, seeking a declaratory judgment that defendant U.S. Department of Labor (DOL) violated FOIA by failing to produce requested records and by failing to waive the fees associated with plaintiffs' requests.[1] The requested documents are employer applications for certification to hire temporary foreign agricultural workers through the H-2A guestworker program, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) & 1188, and all related documents. Plaintiff FJ, a national advocacy organization for migrant and seasonal farmworkers, and plaintiff UFW, the agricultural labor union founded by Cesar Chavez, engage in numerous

[1]Plaintiffs' Complaint (Doc. 1) and Amended Complaint (Doc. 7) also sought a declaratory judgment that DOL violated FOIA by failing to expedite the processing of plaintiffs' sixth and seventh requests. DOL has now responded to plaintiffs' sixth and seventh requests and, although DOL has not produced all responsive records, the issue of whether plaintiffs are entitled to expedited processing is moot. *See* 5 U.S.C. § 552(a)(6)(E)(iv).

activities regarding the H-2A program, including monitoring its operations in the U.S. and abroad; disseminating information to the public and specific groups such as farmworker organizations through written reports, websites, and conferences; and advocating for and otherwise representing workers, both foreign and domestic, affected by the H-2A program in the courts, Congress, and before administrative agencies. As explained in detail below, DOL's motion for summary judgment should be denied and plaintiffs' cross-motion for summary judgment should be granted.

With regard to fee waiver, DOL asserts that disclosure of the requested records will not contribute to public understanding of the H-2A program because, according to DOL, "almost all of the information provided in the requested documents is publicly available" through other sources, and "the small amount of information that is not already publicly disclosed would not enhance the public's understanding of the subject in question to a significant extent." Def. Mem. at 8-9. DOL is wrong. It is not true that "almost all" of the requested information is publicly available through the two sources identified by DOL; rather, those sources contain only a small fraction of the information in the requested records. Moreover, the two information sources identified by DOL are incapable of providing an adequate substitute for the requested records, because the information is either not gathered in a central location or is not available in a timely manner.

With regard to DOL's failure to produce all the requested records, DOL has not asserted, much less shown, that the redacted portions of the documents it produced are exempt from disclosure under FOIA. Further, although DOL claims that it produced all documents responsive to plaintiffs' sixth request, DOL did not produce a single document related to H-2A applications in Louisiana, even though the sixth request sought all applications seeking certification for H-2A workers in Louisiana that were in effect or would commence between October 23, 2007 and April 30, 2008.

DOL should be ordered to grant plaintiffs a fee waiver and to produce all the requested documents.

FACTS

1. The H-2A Program

The H-2A program permits agricultural employers to obtain temporary work visas for foreign citizens and hire them to perform temporary or seasonal agricultural work in the United States, but only if DOL certifies that the employer is experiencing a bona fide labor shortage and the wages and working conditions offered to the H-2A workers will not adversely affect the wages and working conditions of farmworkers who are U.S. citizens or lawful permanent immigrants. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) & 1188; 20 C.F.R. § 655.101 *et seq.* DOL may grant an employer's petition for H-2A certification only if the employer has actively recruited U.S. workers and offered them employment that includes specified terms such as certain transportation expenses, adequate housing, and workers' compensation insurance. These requirements are intended to protect the jobs, wages, and working conditions of U.S. workers and to prevent the exploitation of vulnerable guestworkers.

An employer seeking permission to import H-2A workers must file an application with DOL's Office of Foreign Labor Certification (OFLC). Within seven days of receipt of the application, DOL must notify the employer whether the application is accepted or rejected. If the application is accepted, the employer is instructed to engage in efforts to recruit U.S. workers, and the State Workforce Agency (SWA) serving the area of intended employment is instructed to circulate the employer's job offer. DOL notifies the employer in writing of its decision to grant or deny certification. After DOL issues a labor certification, the Department of Homeland Security

(DHS) allots the employer a number of temporary work visas to bring in foreign laborers. The H-2A employers then arrange for the U.S. consulates in a foreign country to issue the visas to individual workers recruited by the employers.

The H-2A program, and DOL's administration of it, has been the subject of considerable controversy. *See, e.g.,* Exs. GG & HH (congressional testimony and newspaper articles describing controversy); Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-subordination Approach to the Labor-based Admission of Nonprofessional Foreign Nationals*, 21 Geo. Immigr. L.J. 521 (2007); Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* (2007), http://www.splcenter.org/pdf/static/SPLCguestworker.pdf. The controversy surrounding the H-2A program has been part of the broader public debate over immigration reform, and guestworker programs in particular. There is significant disagreement as to whether sufficient U.S. workers are available to meet the labor demands of agricultural employers and whether guestworkers are treated fairly. The substantial public interest in the H-2A program is reflected in pending proposals by DOL and DHS to make major changes to the H-2A program regulations. *See* 73 Fed. Reg. 8538 (Feb. 13, 2008) (DOL notice of proposed rulemaking); 73 Fed. Reg. 8230 (Feb. 13, 2008) (DHS notice of proposed rulemaking). Thus, the public has a strong interest in knowing how DOL handles employer applications for H-2A certification.

2. The Requested Records

Plaintiff UFW made seven separate FOIA requests. Exs. A, E, I, K, N, S, and T. Plaintiff FJ joined with UFW in the sixth and seventh requests. Each request sought all records related to applications for H-2A certification and was limited by geography and time period. The first and second requests sought documents based on the date of the application; the other five requests sought documents based on the dates that the requested certification would be in effect.[2]

DOL has identified records responsive to plaintiffs' requests. The volume of documents is substantial:

Request	Pages of Responsive Material	
First	700	(Ex. B)
Second	0[3]	(Exs. F & G)
Third	1,400	(Ex. J)
Fourth	550	(Exs. L & M)
Fifth	480	(Ex. P)
Sixth	8,297	(Ex. Y)
Seventh	513	(Ruiz Decl. ¶ 2)

On February 29, 2008, DOL produced records responsive to plaintiffs' sixth and seventh requests after plaintiffs deposited funds in the Court's registry to secure release of those documents pending resolution of the fee waiver issue. Each H-2A application and its related documents

[2]In its memorandum and its statement of undisputed facts, DOL repeatedly errs by characterizing the third through seventh requests as seeking documents related to applications *submitted* between certain dates, rather than documents related to applications for certifications that would be *in effect* between certain dates.

[3]Despite an 8.5 hour search, DOL was unable to locate any documents responsive to the second request other than a single spreadsheet listing the names and addresses of 172 employers, which DOL produced on CD Rom. Exs. F & G.

averages about 68 pages.[4] An example of an H-2A application file is attached as Exhibit 1 to the Ruiz declaration. Although no two application files are entirely the same, in general, the file for each application includes the following categories of documents:

1) **ETA 750 Form**. The ETA 750 is the Application for Alien Employment Certification. It includes basic information such as the employer name and address; location of work; type of job; wage rate and work schedule; educational and experiential requirements; ETA certification date (if applicable); number of openings; dates of need; description of recruitment efforts; employer certifications and signature; and agent's name (if applicable).

2) **ETA Certification or Denial Letter**. The certification letter grants H-2A temporary alien labor certification. The certification letter includes the employer's name; the number and title of job opportunities certified; the crop and activity; the area of employment; and the period covered by the certification. If certification is denied, the letter outlines the application's deficiencies and the reasons certification was denied.

3) **ETA 790 Form and Attachments**. The ETA 790 is the Agricultural and Food Processing Clearance Order. It elaborates on the basic information contained in the ETA 750 and includes location and directions to the work site; location, directions to and description of the housing; board arrangements; referral instructions; anticipated hours of work per day; wage rates, special pay information and deductions, including hourly wage rate or piece rate, bonus systems, minimum guarantees, and payroll periods; transportation arrangements and advance subsistence payments; terms for termination; employer furnished tools and equipment; training and time allowed to reach the production standards, and other assurances. The ETA 790 is used by SWAs to prepare job orders to refer applicants to H-2A employers.

4) **Summary of Insurance Coverage**.

5) **Correspondence**. Correspondence between the employer or employer's agent and DOL or other government agencies and the SWA, often regarding deficiencies in the job order or H-2A application; information about employer efforts to recruit U.S. workers interested in the job and DOL's oversight of this process; and information about housing inspections and DOL's oversight of this process.

---

[4]In response to the sixth request, DOL produced 118 application files totaling 8,297 pages. In response to the seventh request, DOL produced 11 application files totaling 513 pages. Thus, an H-2A application file averages about 68 pages.

6) **Housing Inspection Reports and Checklists**.

7) **Advertising Evidence**. Documents showing the extent of any employer efforts to recruit U.S. workers.

8) **ETA Acceptance Letter**. The acceptance letter acknowledges receipt of the initial H-2A application and contains an initial determination to grant certification subject to certain conditions being met. The acceptance letter includes the employer's name; the number of job openings and the job title; and the period of employment; and the requirements that must be met to receive certification.

See, e.g., Ruiz Decl., Ex. 1.

With regard to all seven requests, plaintiffs sought a fee waiver on the basis that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). Plaintiffs explained that it is necessary to review all of the various documents in the H-2A application file to determine how the H-2A program is operated. Plaintiffs further explained that the requested information would be used to inform U.S. workers and their advocates of the existence of pending labor certifications, the terms and conditions of those certifications, and the potential availability of work for U.S. workers with employers to whom those certifications have been granted. Plaintiffs explained that they would analyze the requested information to determine whether the certifications that have been granted contain terms consistent with the local prevailing practices and the mandates of the H-2A program, and would use that information to ensure that both U.S. and foreign workers are provided the protections afforded them under the H-2A program. Plaintiffs also explained the methods by which they intend to communicate the requested information to farmworkers, supporters, collaborating farmworker organizations, and the general public. Exs. C, G, I, K, N, O, S, T, and V.

In letters dated January 31, 2008, DOL denied all seven fee waiver requests on the ground that the requested information is already available to the public through sources other than FOIA. Exs. D, H, J, L, R, and X.

3. Sources of H-2A Application Information Other Than the Requested Records

According to DOL, there are two sources of H-2A application information other than the records plaintiffs requested under FOIA—job orders prepared and circulated by SWAs, and OFLC's annual report.

DOL regulations require that employers file a duplicate application with the SWA serving the area of intended employment and, if OFLC accepts the application, the SWA is required to "prepare a local job order to recruit U.S. workers in the area of intended employment," Def. Mem. at 9. Although the SWA may have access to all information in the employer's application, the job orders prepared and circulated by SWAs contain very little of that information. For example, the job order may not even list the employer's name and will not provide the detailed information found in the ETA 790 form and attachments, such as location and directions to the work site; location, directions to and description of the housing; board arrangements; special pay information and deductions, including bonus systems and minimum guarantees; transportation arrangements and advance subsistence payments; terms for termination; employer furnished tools and equipment; training and time allowed to reach the production standards, and other assurances. *See* Ruiz Decl. Ex. 4; Carlson Decl. Ex. 1. Job orders are intended to be posted and circulated after DOL's acceptance of an H-2A application but most are removed as soon as the H-2A workers leave their home country to travel to the job site. Thus, job orders are available for a very limited time.

OFLC's annual report is issued once a year and consists of a database file available at www.flcdatacenter.com/CaseH2A.aspx. The database file includes applications submitted during a particular fiscal year (October-September). Because the annual report is not made available until about five months after the close of the fiscal year, information regarding an H-2A application received early in the fiscal year will not be available from OFLC's annual report until more than a year after it is submitted.[5] Indeed, of the 129 application files produced by DOL in response to the sixth and seventh requests, only *seven* are in the latest OFLC annual report. Ruiz Decl. ¶ 5. The OFLC annual report includes only a single row of information regarding each H-2A application. *See* Carlson Decl. Ex. 4. Thus, the annual report cannot begin to include the volume of information available from the requested records, which, as noted, average about 68 pages per application.

4. Requested Documents Not Produced

DOL has failed to produce all documents responsive to plaintiffs' sixth request, even though plaintiffs deposited funds to the Court's registry pending resolution of the fee-waiver issue. First, the documents that DOL produced were riddled with redactions, even though DOL never asserted that any of the requested materials are exempt from disclosure under FOIA. *See* Ruiz Decl. Ex. 3 (providing a sample of pages produced with material redacted). Second, the documents produced by DOL in response to the sixth request contain no documents related to H-2A applications in Louisiana. Based on the history of H-2A certifications for Louisiana and a review of the most recent OFLC annual report, it is very likely that, at the time it conducted its search for documents responsive to the sixth request, DOL had applications seeking certification for H-2A workers in

[5]The H2A data for FY 2006 was posted on January 28, 2007. The H2A data for FY 2007 was posted in February 2008.

Louisiana that were in effect or would commence between October 23, 2007 and April 30, 2008, but no such documents were produced. Ruiz Decl. ¶ 9.

ARGUMENT

I. Plaintiffs Are Entitled to a Fee Waiver.

"Intended to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed, . . . the Freedom of Information Act requires federal agencies to disclose information upon request unless the statute expressly exempts the information from disclosure." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (citations and internal quotation marks omitted). FOIA further requires that agencies waive fees "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). Judicial review "[i]n any action by a requester regarding the waiver of fees" is *de novo* and "limited to the record before the agency." 5 U.S.C. § 552(a)(4)(A)(vii). Although the requester bears the initial burden of showing that the fee waiver requirements have been met, Congress intended that FOIA "be liberally construed in favor of waivers for noncommercial requesters." *Rossotti*, 326 F.3d at 1312 (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)) (internal quotation marks omitted).

DOL concedes that disclosure of the requested information is not primarily in the commercial interest of UFW or FJ. Def. Mem. at 5. Thus, the fee waiver issue turns on whether disclosure of the requested information "is likely to contribute significantly to public understanding of the

operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); Def. Mem. at 6. DOL has issued a regulation listing four factors that it uses to assess fee waiver requests:

> (i) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.
>
> (ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.
>
> (iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.
>
> (iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question must be enhanced by the disclosure to a significant extent.

29 C.F.R. § 70.41(2)(i)-(iv).

DOL does not dispute that UFW and FJ have satisfied the first and third factors. Def. Mem. at 7. Indeed, because the requested records relate directly to DOL's operation of the H-2A program, it is beyond dispute that "the subject of the requested records concerns 'the operations or activities of the government.'" 29 C.F.R. § 70.41(2)(i). Similarly, UFW and FJ have demonstrated expertise in agricultural labor issues and have the "ability and intention to effectively convey information to

the public," 29 C.F.R. § 70.41(2)(iii), because both organizations have an extensive record of providing information about the H-2A program to a broad audience. *See, e.g.,* Exs.S, T, GG, and HH.

A. The requested records are meaningfully informative about the H-2A program and are not redundant with material already in the public domain.

With respect to the second factor, DOL does not dispute that the requested records are meaningfully informative about DOL's operation of the H-2A program, but DOL argues that the information is not "'likely to contribute' to [] increased public understanding" because the information "already is in the public domain, in either a duplicative or a substantially identical form." 29 C.F.R. § 70.41(2)(ii); Def. Mem. at 13. Thus, according to DOL, the requested information can add nothing new to the public's understanding of the H-2A program.

An agency that denies a fee waiver based on a claim that the requested information is already in the public domain must substantiate that claim by demonstrating where in the public domain the requested information resides. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1998). But "the mere fact that material is in the public domain does not justify denying a fee waiver; only material that has met a threshold level of public dissemination will not further 'public understanding' within the meaning of the fee waiver provisions." *Id.* (citing *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 815-16 (2d Cir. 1994); *Schrecker v. Dep't of Justice*, 970 F. Supp. 49, 50-51 (D.D.C. 1997); *Fitzgibbon v. Agency for Int'l Dev.*, 724 F. Supp. 1048, 1051 (D.D.C. 1989)). DOL cannot substantiate its claim that the requested information is redundant with material already in the public domain because the two information sources DOL identifies—SWA job orders and OFLC's annual report—are inadequate substitutes for the requested records.

1. The requested records contain considerably more information than the SWA job orders and the OFLC annual report.

The H-2A application files requested by UFW and FJ contain an average of 68 pages of material. The file relating to each H-2A application typically includes the application form; certification letter; agricultural and food processing clearance order with detailed information about the work, housing, wages, transportation, production standards, and guarantees; insurance information, correspondence, housing inspection information, recruitment information, and the acceptance letter. *See* Ruiz Decl. Ex. 2. This detailed information is crucial to understanding how the H-2A program operates.

Although DOL is well-aware of the contents of its H-2A application files, it claims that "the information Plaintiffs seek has been publicly disseminated" through SWA job orders and the OFLC annual report. Def. Mem. at 19. DOL's claim is demonstrably incorrect. A two-page job order or a single row from a spreadsheet in an annual report cannot encompass all of the information set forth in an H-2A application file. *Compare* Carlson Decl. Exs. 1 and 4 *with* Ruiz Decl. Ex. 2.

Throughout its memorandum, DOL ignores the existence of any requested document other than the acceptance or denial letter from DOL to each employer.[6] DOL has conceded that plaintiffs are entitled to a fee waiver for the requested records that relate to denied applications (Def. Mem.

[6] *See, e.g.*, Def. Mem. at 11 ("While the acceptance and denial letters from DOL to each employer are not automatically disseminated to the public, information regarding which applications are accepted, rejected, certified or denied is annually reported by OFLC to the public."); *id.* at 12 ("Notably, the acceptance letters do not contain any substantive information that is not publicly available."); *id.* at 20 ("DOL's acceptance letters provide no further meaningful information, above and beyond what is publicly disseminated."); *id.* at 21 ("A comparison of the information provided in the acceptance letters attached as Exhibit 2 to the Carlson declaration, with the information available from the FY 2007 H-2A Report on ETA's website, Exhibit 4 to the Carlson declaration, reveals that the significant information from these acceptance letters is publicly available.").

at 9 n.5; 11 n.8; 15 n.14), but claims that information in the acceptance letters "is readily available to the public . . . and therefore dissemination of these letters would not be meaningfully informative about DOL's operations or activities." *Id.* at 12. Because the requested records contain far more information than the acceptance letters, DOL's argument fails. *See Rossotti*, 326 F.3d at 1315 (finding entitlement to fee waiver where requester sought "considerably more" than the information already public); *Citizens for Responsibility and Ethics in Washington (CREW) v. U.S. Dep't of Health and Human Services*, 481 F. Supp. 2d 99, 113 (D.D.C. 2006) (finding entitlement to fee waiver where "nothing in the record suggests that the specific content of the requested documents is redundant such that those documents would not reveal new information"); *Judicial Watch v. U.S. Dep't of Trans.*, Civ. No. 02-566, 2005 WL 1606915 at *5 (D.D.C. July 7, 2005) (same).

2. Even if SWA job orders and the OFLC annual report contain some of the requested information, those sources are not an adequate substitute for the requested records.

In its memorandum, DOL explains that its regulations require SWAs to prepare and circulate a job order for each accepted application and argues that, because the job order should contain some of the same information as the acceptance letter, the SWA job orders are an adequate source of the information that UFW and FJ seek to disseminate. Def. Mem. at 9-10. DOL's argument fails for three reasons. First, DOL has not demonstrated where the relevant job orders can be found. *See Campbell*, 164 F.3d at 36 (holding that an agency must identify where in the public domain the requested materials reside); *CREW*, 481 F. Supp. 2d at 111 (same). DOL's failure to show where the relevant job orders can be found is particularly problematic in this case, because DOL assumes that the SWAs have complied with DOL's job order regulations. Indeed, DOL has not submitted even a single example of a job order that relates to any of the requested documents. DOL's sole

example of a job order, attached as Exhibit 1 to the Carlson Declaration, relates to an application for H-2A workers in the state of Washington.

Second, DOL fails to acknowledge that job orders are typically removed from circulation after the work period has begun. Thus, even if a SWA had circulated a job order containing some of the requested information, that job would have been available for only a short window of time.

Third, even if the relevant SWA job orders were available, the fact that they are not collected in a central location shows that "that they are not available in a manner which would further public understanding." *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 24 (D.D.C. 2006). In *Prison Legal News*, the court held that the requester was entitled to a fee waiver even though the government claimed that the requested information was available in the public domain through either the internet or by conducting a search of court records, because "[t]here is a significant difference between locating the requested information in courthouses around the country and on the internet, as opposed to having access to the information in a single document." *Id.* at 25 (citation omitted). For the same reason, DOL's assertion that some of the requested information may be in the public domain by virtue of SWA job orders scattered about the country is insufficient to show that the information "has met a threshold level of public dissemination" such that the requested records will not contribute to increased public understanding. *Campbell*, 164 F.3d at 36.

DOL also claims that the requested records cannot contribute to increased public understanding because some of the requested information is available through OFLC's annual report. This argument fails because the OFLC annual report is not released until well after UFW and FJ would disseminate the requested information to the public. For example, the FY 2007 report was not released until February 2008, and it contains information relating to only *seven* of the 129 H-2A

applications that DOL produced in response to the sixth and seventh requests. Information relating to the other 122 applications will not be available until OFLC releases its FY 2008 annual report in early 2009. Thus, it is not true that, by virtue of the OFLC annual report, the requested information "already is in the public domain." 29 C.F.R. § 70.41(2)(ii). Indeed, by the time most of the information responsive to the sixth and seventh requests becomes available through the OFLC annual report, it will be too late for FJ and UFW to use that information to inform U.S. workers of available jobs or to request modifications of labor certifications that contain unlawful job terms. Even if some of the H-2A applications responsive to the first through fifth requests are included in the FY 2007 annual report—and DOL has not shown that they are—DOL denied fee waivers for the first through fifth requests well before the FY 2007 report was issued. *See* Exs. B, F, J, L, and P.

3. The informative value of the requested records is clear from the administrative record and the circumstances of the requests.

In its memorandum, DOL states that it "will grant Plaintiffs a fee waiver for those documents that are responsive to their requests that are not encompassed in the most recent [OFLC annual] report." Def. Mem. at 12 n.9. Thus, DOL does not dispute that the requested documents are meaningfully informative about DOL's operation of the H-2A program. Indeed, DOL bases its denial of a fee waiver on the claim that the requested documents are redundant of materials already in the public domain. Nevertheless, DOL asserts that "Plaintiffs failed to fully substantiate their claim that the information they sought would be meaningfully informative about DOL's activities or operations." *Id.* at 13.

To the extent DOL is complaining that plaintiffs did not describe with sufficient specificity the informative value of the requested records—even though DOL agrees that the records have

informative value—DOL places form over substance. Because DOL recognized the informative value of the requested documents, the point of the request was clear from the circumstances, and nothing more is required. *See, e.g., Fitzgibbon*, 724 F. Supp. at 1050 ("The requester of a fee waiver bears the initial burden of identifying, with reasonable specificity, the public interest to be served, although circumstances may clarify the point of the request.") (citations omitted).

In any event, a review of the administrative record shows that plaintiffs explained the public interest in disclosure of the requested documents with reasonable specificity. In appealing DOL's denial of a fee waiver with respect to the first request, UFW explained that "[i]t is necessary to review the employers' H-2A applications and DOL's responses to determine how the program is operating." Ex. C. Plaintiffs further explained that

> The information requested will be used to inform U.S. workers and their advocates of the existence of pending labor certifications, the terms and conditions of those certifications and the potential availability of work for U.S. workers with employers to whom those certifications have been granted. Additionally, it will be used to determine whether the certifications that have been granted contain terms consistent with the local prevailing practices and the mandates of the H-2A program. This information will also be used for the purpose of ensuring that both U.S. and foreign workers are provided the protections afforded them under federal statute and regulation.

Id. UFW went on to explain the methods by which it would communicate the requested information to farmworkers, supporters, collaborating farmworker organizations, and the general public. *Id.* DOL acknowledged that UFW "provided a substantial amount of additional information to support [its] request for a fee waiver." Ex. D. Plaintiffs provided similar explanations with regard to the second through seventh requests. *See* Exs. G, I, K, N, O, S, T, and V. These explanations were at least as fulsome as the descriptions found to be sufficiently specific in *Rossotti*, 326 F.3d at 1313-14, *CREW*, 481 F. Supp. 2d at 112, and *Prison Legal News*, 436 F. Supp. 2d at 25-26.

B. The requested records are likely to contribute significantly to the public's understanding of the H-2A program.

With regard to the fourth factor DOL uses to assess fee waiver requests—"[w]hether the disclosure is likely to contribute 'significantly' to public understanding of government operations or activities"—DOL repeats the same arguments it made with regard to the second factor. 29 C.F.R. § 70.41(2)(iv); Def. Mem. at 21. Specifically, DOL claims that the requested information is already in the public domain and, therefore, release of the information to UFW and FJ will do nothing to enhance public understanding of the operation of the H-2A program. As explained above, the requested records contain far more information than the SWA job orders and the OFLC annual report, and, accordingly, those sources are an inadequate substitute for the records that UFW and FJ have requested under FOIA. Thus, for the same reasons that the requested records are "meaningfully informative" about the H-2A program, they are "likely to contribute 'significantly' to public understanding" of the H-2A program. 29 C.F.R. § 70.41(2)(ii) and (iv).

Indeed, the second and fourth factors that DOL uses to guide its fee waiver analysis are closely intertwined. *See Project on Military Procurement v. Dep't of the Navy*, 710 F. Supp. 362, 365 n.8 (D.D.C. 1989) (finding similar second and fourth factors "hopelessly intertwined" and addressing them jointly). To the extent the second and fourth factors differ in any meaningful way, it is only because the fourth factor may incorporate an aspect of the third—whether the requester has the intent and ability to disseminate the requested information to the public. That aspect of the fourth factor is not at issue here, and, in fact DOL has never disputed that UFW and FJ have the expertise, experience, and ability to effectively disseminate the requested information to a broad audience.

II. DOL Has Not Produced All of the Requested Records Responsive to the Sixth Request and Has Failed to Justify its Redactions to the Documents it has Produced.

An agency that withholds requested records under one of FOIA's exemptions has the burden to justify the withholding. *See U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991); 5 U.S.C. § 552(a)(4)(B). If the government does not "carry its burden of convincing the court that one of the statutory exemptions apply," the requested records must be disclosed. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987).

DOL has failed to produce all documents responsive to plaintiffs' sixth request. First, the documents that DOL provided to plaintiffs in response to the sixth FOIA request contain numerous redactions, *see* Ruiz Decl. ¶ 8 and Ex. 3, but DOL has been silent as to the reason for the redactions. Although DOL's motion for summary judgment was due March 11, 2008, DOL has not moved for a judgment that portions of the requested records are exempt from disclosure, and DOL has made no claim that the redacted portions of the records are covered by one of FOIA's narrowly-construed exemptions. Because DOL has not carried its burden of showing the redacted portions of the records are exempt from disclosure, DOL should be ordered to release the requested records in their entirety.

Second, the documents produced by DOL in response to the sixth request contain no documents related to H-2A applications in Louisiana. Based on the history of H-2A certifications for Louisiana and a review of the most recent OFLC annual report, it is very likely that, at the time it conducted its search for documents responsive to the sixth request, DOL had applications seeking certification for H-2A workers in Louisiana that were in effect or would commence between October 23, 2007 and April 30, 2008, but no such documents were produced. Ruiz Decl. ¶ 9. Because DOL

has not shown that the documents related to H-2A applications in Louisiana are exempt from disclosure, DOL should be ordered to produce them.

CONCLUSION

For the foregoing reasons, the Court should deny defendant's motion for summary judgment, grant plaintiffs' motion for summary judgment, and order DOL to grant plaintiffs a fee waiver and produce all the requested records without redaction.

Respectfully submitted,

/s/ Michael T. Kirkpatrick

Michael T. Kirkpatrick (DC Bar #486293)
Adina H. Rosenbaum (DC Bar #490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Bruce Goldstein (DC Bar #446848)
Virginia Ruiz (DC Bar #483800)
Marni Willenson (Bar # IL0011)
FARMWORKER JUSTICE
1126 16th Street, NW, Suite 270
Washington, DC 20036
(202) 293-5420

Attorneys for Plaintiffs

Dated: April 11, 2008