LEGAL AID JUSTICE CENTER

LEGAL AID of NORTH CAROLINA

Thursday, July 8, 2021

Solicitor of Labor
Division of Management and Administrative Legal Services
U.S. Department of Labor
200 Constitution Avenue, NW, Room N2420
Washington, D.C. 20210

VIA EMAIL to foiaappeal@dol.gov

RE: FOIA Appeal, Request No. 2021-F-06458

To Whom It May Concern:

On behalf of Legal Aid of North Carolina and the Legal Aid Justice Center, we are writing to appeal the Department of Labor's partial denial of FOIA request 2021-F-06458[1], pursuant to 5 U.S.C. § 552. The Department of Labor ("DOL") failed to comply with the applicable law on several counts. As explained more fully below, DOL: (i) failed to perform an adequate search for records; (ii) failed to adequately segregate exempt and non-exempt information; (iii) wrongfully asserted exemption 5 for its withholding of information; (iv) wrongfully withheld information under the FOIA Improvement Act of 2016; (v) wrongfully withheld information responsive to the request without asserting an applicable FOIA exemption; and (vi) failed to provide a fee waiver.

I. Background

a. The H-2A program.

The H-2A visa program is a nonimmigrant visa program that allows employers to bring workers to the United States to perform agricultural jobs on a temporary basis. *See* 8 U.S.C. § 1188. To be able to participate in the program, employers must get certification from the Department of Labor. 20 C.F.R. § 655.130. This certification includes a job order, which forms the job contract. 20 C.F.R. § 655.121. As a part of the job order, employers agree to provide numerous worker protections enumerated in 20 CFR § 655.122. *Id.* Pursuant to 20 CFR § 655.122(o), if performance of the contract becomes impossible due to "fire, weather, or other Act of God," the employer can request that the Certifying Officer ("CO") at DOL finds the contract impossible, which if granted thereby terminates the contract.

A determination by DOL to declare a contract impossible affects the workers in important ways. Perhaps most importantly, contract impossibility stops the clock for purposes of the three quarters guarantee. This guarantee is a provision in the contract that promises the worker to be compensated for no less than 75% of the hours promised in the contract regardless of how many hours worked so long as the worker stays at the job through the end date stated on the job order. For example, if a contract promises thirty-five (35) hours a week for ten (10) weeks, for a total of 350 hours, the employer is required to pay the worker for 262.5 hours at the applicable wage rate. If this contract

[1] The request was originally numbered 2021-F-01766, but it was renumbered to 2021-F-06458 after DOL found a check that had been sent but had gone missing.

were declared impossible after five (5) weeks, the worker's guarantee would be cut in half. This can represent a tremendous hardship for the worker and their families.

b. The FOIA request.

On November 16, 2020, Benjamin Williams and Rachel McFarland (by way of Mr. Williams) submitted a FOIA request via email on behalf of Legal Aid of North Carolina and Legal Aid Justice Center, requesting:

- NPC, OFLC, or ETA policy manuals describing how determinations of contract impossibility should be made by Certifying Officers ("COs")
- Any evidence requirements the NPC imposes on H-2A employers before deciding whether to grant or deny a request for contract impossibility
- Any requirement NPC has for COs to consult with the State Workforce Agency (SWA) of the state(s) where the employer seeking contract impossibility employs H-2A workers regarding the request for a declaration of contract impossibility
- Any checklists, forms, evaluations, etc. COs must complete before determining whether a contract should be declared impossible
- Any factors, elements, considerations, COs are required or encouraged to contemplate before declaring a contract impossible
- Training materials that COs receive about contract impossibility determinations
- Policy guidance regarding declarations of contract impossibility issued to COs via memoranda, email, or other means
- Examples of cases where a CO should or should not issue a determination
- What means, if any, H-2A workers have to challenge a determination of contract impossibility
- What data, if any, NPC, OFLC, or ETA keeps about which employers request declarations of contract impossibility, how often such requests are made, and whether they are approved or denied

FOIA Request, Exhibit 1, pp. 1-2. The request further asked that any fees be waived because the offices are "non-profit organization[s] dedicated to providing free legal assistance to low-income Virginians and North Carolinians." Exhibit 1, p. 2.

By letter sent by email on November 18, 2020, DOL confirmed receipt of the request. By letter sent by email on December 1, 2020, DOL emailed Mr. Williams noting "the volume of records and effort [the] request entailed" required DOL to stop processing the request until a check for $160.00 was sent (one-half of the estimated fee). Fee Letter, Exhibit 2, p. 1. Mr. Williams replied by email on December 3, 2020, expanding on why fees should be waived in this instance. Fee Waiver Email, Exhibit 3, pp. 1–2. By letter sent by email on December 9, 2020, DOL replied stating that the request did not meet criteria 1-4 for a fee waiver and thereby only reduced fees to the "Other" category. Fee Waiver Denial, Exhibit 4, pp. 1-2. On April 9, 2021, DOL sent by letter via email the records allegedly found in the search, noting that 142 pages had been found but that only twenty-two (22) were "responsive and available for public disclosure," citing 5 U.S.C. § 552(b)(5) as the exemption. Final Determination, Exhibit 5, p. 1. The final determination letter also noted that while some of the 120 pages DOL did not disclose contained responsive

information, DOL determined the information would not be useful because so much of it would have to be redacted. *See id*. Of the 22 pages, some are duplicates or contain substantially the same information. *See e.g.*, Exhibit 5, pp. 5,18.

For the reasons stated above and detailed more fully below, Legal Aid Justice Center and Legal Aid of North Carolina appeal DOL's partial denial of its FOIA request.

II. DOL Failed to Perform an Adequate Search for Records

When confronted with a FOIA request an agency must conduct "a search reasonably calculated to uncover all relevant documents." *DeBrew v. Atwood*, 792 F.3d 118, 122 (D.C. Cir. 2015).

Based on the communications DOL provided in response to our request thus far, DOL failed to do so here. The final determination communicated that "OFLC Subject Matter Experts" conducted the search but did not disclose their method of searching for responsive documents. Exhibit 5, p. 1. Without more, we lack a definitive basis to determine if DOL performed an adequate search because DOL does not disclose how the search was conducted. Like the government's inadequate response in *DeBrew*, the government here simply communicated its conclusions about what records exist without any underlying details as to how OFLC Subject Matter Experts arrived at those conclusions.

While we cannot know for certain if the search was inadequate because the government provides us no details about *how* it searched for records, we can surmise that it was inadequate based on prior communications and the dearth of records DOL provided to us in April. In December, OFLC informed us that it stopped processing our request due to "the volume of records and effort [the] request entailed." Exhibit 2, p. 1. Such a description is hard to square with a final determination of a mere 142 pages, only twenty-two (22) of which OFLC felt it could pass on to us, some of which are duplicates. Exhibit 5.

The final determination offers one more clue that the search was inadequate. In its April 9, 2021, letter DOL tells us that disclosing responsive records in need of heavy redaction "would not provide any informational value or give tangible information about the Government's proposal to modernize the H-2A Temporary (Agricultural) Labor Program." Exhibit 5, p. 1. Strangely, we did not request records related to any such "modernizing" proposal so its unclear why DOL responded in the way that it did. Instead, we requested records that reflect DOL's final policy as it relates to granting or denying petitions for declarations of contract impossibility from H-2A employers under the already-existing DOL regulation. 20 CFR § 655.122(o). Exhibit 1, p. 1-2. In its determination letter, DOL did not provide us any context for why a request regarding information about how a current regulation is implemented in practice has much to do with any proposals to modernize the H-2A program that DOL may actively be discussing. Exhibit 5, p. 1.

Therefore, not only did DOL in no way show that it performed an adequate search for the requested records, but circumstances strongly indicate that it did not.

III. DOL Failed to Adequately Segregate Exempt and Non-Exempt Information

When applying an exemption to disclosure, the government must "take reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii)(II). Further:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

5 U.S.C. § 552(b). In order to know if the agency has actually taken these steps, it needs to show with "reasonable specificity" that it cannot further segregate the non-disclosed information. *Cause of Action Inst. v. U.S. Dep't of Commerce*, D.D.C. No. 1:19-CV-00778 (CJN), 2021 WL 148386, at *11 (D.D.C. Jan. 14, 2021) (internal citations omitted). For its justification for withholding information, however, DOL only stated that "[a]lthough a few documents subject to Exemption 5 may have portions that could be released, without the heavily redacted information as well, the documents would not provide any informational value or give tangible information about the Government's proposal to modernize the H-2A Temporary (Agricultural) Labor Certification Program." Exhibit 5, p. 1. This gives no indication of whether or not the withheld information was adequately segregated, and DOL's withholding of reasonably segregable information was wrong.

IV. DOL Wrongfully Claimed Exemption Five for its Refusal to Release Responsive Documents

In its final determination, DOL cited 5 U.S.C. § 552(b)(5), exemption 5, as the relevant exemption. Exhibit 5, p. 1. This exemption applies only to government records that are both predecisional and deliberative, *see Judicial Watch v. Dep't of Defense*, 847 F.3d 735, 739 (D.C. Cir. 2017); the records requested by Legal Aid of North Carolina and Legal Aid Justice Center are neither.

In order for a record to be predecisional, it must have been created before the agency's final decision on the matter. *See U.S. Fish and Wildlife Serv. v. Sierra Club, Inc.,* 592 U.S. ____ (2021) (internal citations omitted). To be deliberative, the record must have been generated to help DOL's decision-making process. *See id.* A document cannot be deliberative unless it is predecisional. *See id.* Because exemption 5 requires a document to be both predecisional *and* deliberative, a showing that a document is decisional *or* deliberative is enough to require disclosure.

None of the records requested are predecisional. The contract impossibility provision goes back several years in the regulations. During this time, H-2A employers made requests for contract impossibility related to fires, hurricanes, pandemics, etc. *See* Exhibit 5, pp. 5, 17, 20, 23.

Throughout this, COs were charged to grant or deny requests for contract impossibility, and we seek any guidance or policy the COs followed when making the determination. The COs who made those calls relied on *something* when they chose to either allow or deny the request. We simply seek that *something*. How could COs carry out a policy that has been in the federal register for more than ten years and have virtually all of what they relied on be predecisional? Eventually, a decision was made—even if the decision was to let the CO make each decision on a "case-by-case basis" according to the CO's own judgment. Exhibit 5, p. 16.

Nor are the documents requested here deliberative. None of the records requested relates to how DOL drafted the regulation or changes it may at some point make. We are not interested, at least in this request, in the back-and-forth that may occur at DOL. Instead, we seek the fruit of any deliberative process that possibly occurred in the past and that currently guides DOL in weighing requests for contract impossibility.

Because the records requested are neither predecisional nor deliberative, DOL did not adequately disclose all the records that are responsive to our request, and wrongfully claimed exemption 5.

V. DOL Wrongfully Withheld Information Under the FOIA Improvement Act of 2016

Furthermore, under the FOIA Improvement Act of 2016, DOL is required to disclose information even if it falls within the scope of an exemption, unless it is reasonably foreseeable that disclosure would harm an interest protected by a FOIA exemption or disclosure is prohibited by law. *See* 5 U.S.C. § 552(a)(8)(A)(i). DOL fails to explain why disclosure of the withheld information would result in reasonably foreseeable harm to an interest protected by a FOIA exemption (here, exemption 5) or why disclosure is prohibited by law.

To the contrary, disclosure of how requests for contract impossibly are decided would help streamline requests because employers would better understand the criteria DOL uses to grant or deny their request. This information could be used to draft better requests or withhold frivolous ones. Workers would have more confidence that declarations of contract impossibility are not arbitrary or capricious. Advocates would be better equipped to explain to workers whose season is cut short how such an impactful decision was reached.

VI. DOL Possibly Withheld Information Responsive to the Request Without Asserting an Applicable FOIA Exemption

In its April 9, 2021 response, DOL asserted that "the majority" of the documents are not subject to disclosure under Exemption 5. Exhibit 5, p. 1. As written, it is not clear if by "the majority" DOL means that the 120 of the 142 pages that it withheld constitute this "majority" in whole, or if DOL is asserting that only a majority of the 120 pages that DOL refused to disclose are exempt under Exemption 5. If DOL is relying on Exemption 5 to not disclose a "majority" of the 120 pages, and not all of them, it wrongfully withheld the *minority* of those 120 pages that it withheld without claiming any exemption.

VII. Improper Denial of Fee Waiver

Fee waivers should be granted for FOIA requests "if the disclosure 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)(8)(A)(i). In determining if the disclosure will significantly contribute to the public's understanding of government operations, DOL considers the following four factors:

> (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 the 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(a)(2). These requirements essentially define how DOL interprets the statutory requirement, piece by piece. Looking first at the requirement that "[t]he subject of the requested

records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear," 29 C.F.R. § 70.41(a)(2)(i), this is precisely what the FOIA request was intending to get. Legal Aid of North Carolina and Legal Aid Justice Center's request went directly to the heart of *how* the government makes determinations regarding whether or not to declare as impossible a contract that can only exist by permission from DOL and participation in a highly regulated federal program; in other word, how the government operates this program. DOL's fee waiver denial erroneously claims that the request does not meet this first requirement.[2] *See* Exhibit 4.

Next, the second requirement that "[t]he 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," 29 C.F.R. § 70.41(a)(2)(ii), is also met. There exists essentially no information on how contract impossibility determinations are made, leaving workers and advocates at a loss for how to know when such a determination is proper or improper.

This ties closely into the third requirement that "[t]he 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." 29 C.F.R. § 70.41(a)(2)(iii). As noted *supra*, there being no public information on how these determinations are made, providing these documents would help advocates and workers understand the process better in the future. Indeed, the fact that two separate legal aid lawyers in two different states had the same questions at the same time about the same process shows that this is an area where advocates do not have adequate information. The denial letter indicates that there is no showing that the disclosure would have any impact beyond either the requesters or a narrow subset of people, Exhibit 4, p. 1, but this ignores that, as noted in the reply email sent by Mr. Williams, in FY 2019, more than 200,000 H-2A visas were issued. Exhibit 3. Mr. Williams even specifically noted that this information may be used not only to educate farmworkers in our states, but also farmworker advocates, adding "[i]t is not unfeasible that the information would be used to educate H-2A farmworkers and their advocates throughout and across the country." *Id.* Indeed, the farmworker advocate community nationwide works closely together to stay on top of advancements and challenges in the field, such that this sort of information sharing is the norm. What is more, FOIA does not require that the information be widely shared, but that it reaches a "reasonably broad audience of persons *interested in the subject*." *Cause of Action v. F.T.C.*, 799 F.3d 1108, 1116 (D.C. Cir. 2015) (emphasis added).

Finally, the last requirement in this subsection is that "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(a)(2)(iv). DOL's biggest hang-up seems to be on this piece, "significant contribution." As noted, however, there is very limited understanding on this process, and the process indeed plays a gigantic role in the workers' jobs, as whether or not they are entitled to the ¾ guarantee is impacted by whether or

[2] DOL twice references government operations in its list of things not shown, but in *both* instances bolds and underlines the words "significant contribution"/"significantly contribute," which seems to indicate their concern is with factor iv, not i. *See* Fee Waiver Denial, Exhibit 4, p. 1.

not DOL grants a contract impossibility request, should the employer wish to terminate a contract early. 20 CFR § 655.122(o). This was noted to DOL in the reply email. Exhibit 3.

Given the importance of understanding the contract impossibility determination process for workers and advocates, the limited-to-almost-nil understanding that currently exists for advocates and workers across the country, and the plain connection to government operations, the FOIA request plainly met the four requirements in 29 C.F.R. § 70.41(a)(2).

For a fee waiver to be granted by DOL, two requirements under 29 C.F.R. § 70.41(a)(3) must also be met:

> (i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. The component will consider any commercial interest of the requester (with reference to the definition of "commercial use request" in § 70.38(f) of this subpart), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters will be given an opportunity in the administrative process to provide explanatory information regarding this consideration.
>
> (ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The component ordinarily will presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

These last two requirements are tied into whether there is a commercial interest or not (requirement i), and if so, that the public interest be greater (requirement ii). Unfathomably, DOL seems to be claiming in its partial denial that two legal aid organizations, by definition non-profit organizations, have a commercial interest. By contrast, however, Congress made clear that non-profits are among the groups who are intended to receive fee waivers. *Ettlinger v. F.B.I.*, 596 F. Supp. 867, 872 (D. Mass. 1984) (noting that the 1974 Senate Report indicated that non-profits were consistently associated with fee waiver tests). As explained in the initial request and the follow up email, both organizations that were party to the request are non-profit organizations that,

in part, provide free legal assistance to low-income farmworkers. Exhibit 1, p. 2; Exhibit 3. A "commercial use request" is defined as one where the request is intended to further a "commercial, trade, or profit interest[]." 29 CFR § 70.38(f). Further, "commercial" is defined by its common parlance definition. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987). Legal services organizations cannot have such interests. *See Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 201 (D.D.C. 2009) (noting that plaintiff's status as a 501(c)(3) means it cannot have a commercial interest). It is unclear *what* exactly DOL thinks the commercial interest would be.

Regardless, commercial interests would be plainly outweighed by the public interest, namely farmworkers with H-2A visas, in understanding how an opaque system that can drastically determine how much money they earn in a year functions.

As such, the request met the requirements for a fee waiver, and the waiver should have been granted in full.

VIII. Conclusion

For the above reasons, Legal Aid of North Carolina and Legal Aid Justice Center appeal DOL's partial denial of their FOIA request. Legal Aid of North Carolina and Legal Aid Justice Center ask that DOL undertake an additional search that is "reasonably calculated to uncover all relevant documents," including but not limited to all documents described above. *DeBrew*, 792 F.3d at 122. Legal Aid of North Carolina and Legal Aid Justice Center also expect that, upon conducting an additional search, DOL will produce to them any responsive records that exist at the time of the search, regardless of whether they were created after the Department's April 2021 letter to Legal Aid of North Carolina and Legal Aid Justice Center.

Please direct all future correspondence related to this appeal and the underlying request to both Benjamin Williams at Legal Aid of North Carolina (919-856-2180; benjaminw@legalaidnc.org) and Rachel McFarland at Legal Aid Justice Center (434-529-1813; rmcfarland@justice4all.org).

Please note, we expect a response within twenty (20) working days as provided by law. Thank you for your time.

Sincerely,

Benjamin Williams
Legal Aid of North Carolina

Rachel C. McFarland
Legal Aid Justice Center