

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FARM LABOR ORGANIZING COMMITTEE,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 20-645
)	
U.S. DEPARTMENT OF LABOR,)	
)	
Defendant.)	
)	

PLAINTIFF’S NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiff Farm Labor Organizing Committee (FLOC) notifies the Court of two recent decisions—*Humane Society of the United States v. U.S. Dep’t of Agriculture*, No. 17-cv-02570 (TNM), --- F. Supp. 3d ---, 2021 WL 2652336 (D.D.C. June 28, 2021), and *Reporters Committee for Freedom of the Press v. FBI*, --- F. 4th ---, 2021 WL 2753938 (D.C. Cir. July 2, 2021)—addressing issues raised in the parties’ pending cross-motions for summary judgment (ECF 22 & 23). The cross-motions for summary judgment have been fully briefed since June 21, 2021.

In *Humane Society*, the court held that the agency had not satisfied its burden to justify its withholdings under FOIA exemption 4 because the declarations submitted by the agency did not establish that the submitters customarily and actually kept the information confidential. 2021 WL 2652336, at *8. The court explained that the declarations were “called into question by contradictory evidence in the record,” *id.* (quoting *Gallant v. NLRB*, 26 F.3d 168, 171 (D.C. Cir. 1994)), and concluded that “[w]hen, as here, evidence undermines the credibility of a declaration, the Court will not accept it.” *Id.* The court further noted that evidence in the record showed that the submitters *did* disclose the information at issue. *Id.* at *9. Here, FLOC has demonstrated that

the assertions of confidentiality in the declarations submitted by the Department of Labor (DOL) are belied by contrary evidence in the record showing that the information at issue is not customarily and actually kept private. *See* ECF 23 (FLOC Cross-Mot. for SJ) at 5–15; *see also* ECF 27 (FLOC Reply Br.) at 6–16.

In *Reporters Committee*, a FOIA exemption 5 case, the D.C. Circuit held that the foreseeable-harm requirement of the FOIA Improvement Act of 2016 “‘impose[s] an independent and meaningful burden on agencies.’” 2021 WL 2753938, at *12 (quoting *Center for Investigative Reporting v. United States Customs & Border Prot.*, 436 F. Supp. 3d 90, 106 (D.D.C. 2019)). The court of appeals explained, “Agencies cannot rely on mere speculative or abstract fears, or fear of embarrassment to withhold information. Nor may the government meet its burden with generalized assertions.” *Id.* at *11 (internal marks and citation omitted). The court rejected the agency’s “boilerplate and generic assertions” that release of the information would result in foreseeable harm, *id.* at *12, and it concluded that the foreseeable-harm standard was not met because the government failed to explain as to each *specific* record why there was foreseeable harm to an interest protected by the exemption; instead, the agency declarant “offered nothing more than a perfunctory, sweeping, and undifferentiated declaration that release of every single record” would result in harm. *Id.* at *14. Here, DOL relies on generalized and speculative assertions that do not explain why disclosure of the specific information at issue would result in harm to an interest protected by exemption 4. Thus, DOL fails to satisfy the foreseeable-harm requirement of the FOIA Improvement Act. *See* ECF 23 at 23–25; *see also* ECF 27 at 21–23.

Dated: July 13, 2021

Respectfully submitted,

/s/ Wendy Liu

Wendy Liu (D.C. Bar No. 1600942)

Michael T. Kirkpatrick (D.C. Bar No. 486293)

Public Citizen Litigation Group

1600 20th Street NW

Washington, DC 20009

(202) 588-1000

wliu@citizen.org

Counsel for Plaintiff