IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VOTEHEMP, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	
DRUG ENFORCEMENT ADMINISTRATION et al.,	)	Civil Action No. 02-985 (RBW)
Defendants	)	
	)	

PLAINTIFF'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

This brief is submitted in reply to the opposition of defendant Drug Enforcement Administration ("DEA") to the motion of plaintiff VoteHemp, Inc. ("VoteHemp") for partial summary judgment, with respect to its request for a fee waiver in its Freedom of Information Act request, and in opposition to DEA's cross-motion for partial summary judgment on that issue. In response to plaintiff VoteHemp's Freedom of Information Act request for documents relating to hemp policy—an issue specifically addressed by three separate rulemakings initiated by defendant Drug Enforcement Administration ("DEA")—DEA initially claimed it could locate only five documents, all exempt from disclosure. Now, almost 12 months after VoteHemp filed its initial FOIA request, DEA has belatedly identified some 32,000 pages of documents, relating to these rulemakings, constituting in effect the secret administrative record of DEA's "Interpretive Rule,"

issued without any notice and comment, and for which no administrative record otherwise exists.

In these circumstances, it defies logic for DEA to claim that disclosure of these documents will not be "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government," the first prong of the statutory test for a fee waiver. 5 U.S.C. §552(a)(4)(A)(iii). Further, disclosure of the requested information is manifestly not "primarily in the commercial interest of" VoteHemp which, despite DEA's efforts to portray it as an industry front group, is in fact an advocacy organization for members of the public who believe that American farmers should be allowed to cultivate non-psychoactive low-THC hemp for a multitude of environmental, health and other purposes. For these reasons, plaintiff's motion for partial summary judgment with respect to its request for a fee waiver should be granted, and defendant's cross-motion should be denied.

ARGUMENT

There is no dispute about the legal factors to be considered in determining whether VoteHemp is entitled to a fee waiver under 5 U.S.C. §552(a)(4)(A)(iii). Those factors are set forth in Department of Justice regulations, 28 C.F.R. §16.11(k). In this case, however, DEA has simply misapplied those factors. Its finding that disclosure in response to VoteHemp's FOIA request failed to satisfy the public interest standard was arbitrary and capricious. DEA's Memorandum of Law, filed November 1, 2002 ("DEA Brief ") fails to establish otherwise.

I. VoteHemp Has Demonstrated that Disclosure Is in the Public Interest

DEA does not dispute that the subject of the requested information concerns the "operations or activities" of the government, the first factor to be considered. DEA Brief at 7. DEA does, however, attempt to defend its administrative finding that VoteHemp failed to show that the disclosure requested meets the remaining three tests: namely, (i) factor 2, the "informative value" of the information; (ii) factor three, the contribution of disclosure to "public understanding;" and (iii) factor four, the "significance" of the contribution of disclosure. Id.

A. VoteHemp Has Shown That Disclosure Will Significantly Contribute to Public Understanding of DEA's Operations

The record in this case clearly shows that what VoteHemp has requested is, in effect, the secret administrative record, consisting of an estimated 32,000 pages, of a rulemaking leading to issuance of an "Interpretive Rule" by DEA, with no notice or opportunity for comment, in October 2001. See 66 Fed. Reg. 51530 (Oct. 9, 2001)("Interpretive Rule"); DEA Brief at 7 (32,000 pages of documents identified as potentially responsive). In these circumstances, it is manifest that disclosure of this secret administrative record is "'likely to contribute' to an understanding of government operations or activities." 28 C.F.R. §16.11(k)(2)(ii)(factor 2). Indeed, if, as DEA contends, the "public interest analysis focuses on the informative value and relative contribution to the public's understanding of the expected disclosure," (DEA Brief at 9 (emphasis in original)), factor two is clearly met here: it is difficult to imagine a disclosure more likely to inform the public about the operations and activities of DEA than making public documents forming the basis for agency regulations issued without opportunity for notice or comment. Surely such disclosure would serve the fundamental, central purposes of FOIA itself.

The fourth factor requires a showing that "the public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure" be "enhanced by the disclosure to a significant extent." 28 C.F.R. §16.11(k)(2)(iv)(factor four). Again, as a matter of simple common sense, the public's understanding of the DEA's action in issuing the "Interpretive Rule" will obviously be vastly enhanced through disclosure of the documents relating to promulgation of the "Interpretive Rule," and its companion "Proposed Rule" and "Interim Rule."

DEA argues, first, that some of the information plaintiff seeks is already in the public record, i.e., the three rules themselves, which were published in the Federal Register. "[T]he mere fact that material is in the public domain does not justify denying a fee waiver…." Campbell v. United States Dept. of Justice, 164 F.2d 20, 36 (D.C. Cir. 1998). In any event, surely disclosure of up to 32,000 pages of records is a "significant" enhancement of material previously made public consisting of only a few pages of the Federal Register.

Second, DEA contends that information beyond that already published in the Federal Register "is not likely to be disclosed," because VoteHemp's request is "directed at DEA's internal decision-making" with respect to the formulation of its rules, and records relating to such decision-making will inherently be exempt from disclosure under Exemption (b)(5). DEA Brief at 10. This reasoning is completely unsupportable. That a document is directed at or relates to agency decision-making does not automatically make it exempt from disclosure under Exemption (b)(5). For example, factual material "cannot be exempt under Exemption 5," Mead Data Central, Inc. v. U.S. Dept. of the Air Force, 575 F.2d 932, 934 (D.C. Cir. 1978), nor are post-decisional materials that explain

or discuss a decision already made. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-52, 161 (1975).

In any event, since DEA has not in fact searched the 32,000 pages of records, DEA has no way of knowing how many, if any, of the documents reviewed will in fact be exempt from disclosure. The instant motion is focused solely on the question of a fee waiver. The issue of whether any documents in fact located may be exempt from disclosure is a completely separate issue that, if it arises at all, can be addressed only at a further stage of this proceeding. Indeed, in the very case cited by DEA, Carney v. U.S. Dept. of Justice, 19 F.3d 807 (2d Cir. 1994),(cited at DEA Brief at 10), the Court rejected the prospect of finding exempt documents as a reason for denying a fee waiver:

> [U]nder the circumstances of this case, we do not believe it was proper to deny the fee waivers simply because the records may have been exempt from disclosure. A fee waiver request should be evaluated based on the face of the request and the reasons given by the requester in support of the waiver. . . . If the rule were otherwise, requesters might be deterred from testing the bounds of the FOIA exemptions. An agency could require a requester who is otherwise entitled to a fee waiver to make payment even before the agency's claimed exemption has been tested in court. Moreover, if the request is for records that should be disclosed in the public interest, the agency should not be allowed to charge for searching the records, because the requester is acting in the public interest by attempting to obtain the records.

19 F.3d at 815 (emphasis added). In this case, too, DEA should not be permitted to demand payment for documents on the grounds that most of the documents located may be exempt, "before the agency's claimed exemption has been tested in court." Id.

Finally, DEA states that an entity's status as a public interest organization does not relieve it of the burden of meeting the statutory test for a fee waiver. (DEA Brief at 11). VoteHemp does not disagree. VoteHemp is entitled to a fee waiver in this case because it has, indeed, met the statutory test.

B. VoteHemp Has Established That It Will Effectively Disseminate the Requested Information to a Broad Audience

DEA argues that VoteHemp has not sustained its burden with respect to factor three, --whether disclosure will contribute to "an understanding of the subject by the public," 28 C.F.R. §16.11(k)(2)(iii)—because VoteHemp has not stated specifically how it "actually intends to use the information it receives or whether that use will effectively disseminate the information to the public at large." DEA Brief at 12. To the contrary, VoteHemp has stated quite clearly and specifically how it intends to use the disclosed information, and has demonstrated compellingly why that use will be effective in disseminating information to the public.

First, in its administrative appeal (Declaration of Katherine L. Myrick, submitted by DEA, at Exhibit I), VoteHemp clearly and specifically states that it would use the disclosed "information to educate and inform the public, and their elected representatives, of the reasons behind DEA's actions" in issuing its "Interpretive Rule" relating to edible hemp seed and oil products. In the very next sentence, VoteHemp stated that it "disseminates its views, including such information, to the public through its website, through press releases and similar materials and through communications with Members of Congress and state legislators" (emphasis added). There is only one possible meaning of these two sentences and that is the obvious one: VoteHemp intends to disseminate the information requested in this FOIA matter through its website, through press releases and similar materials and through communications with Members of Congress and state legislators.

It is impossible to understand, then, how DEA can suggest that VoteHemp has not been sufficiently specific or concrete about its plans to disseminate the requested information. In McClellan, supra, and in Judicial Watch, Inc. v. U.S. Dept. of Justice, 122 F. Supp. 2d 5 (D.D.C. 2000)(Judicial Watch II), relied on by DEA, the courts found that the requester simply did not "express a specific intent to publish or disseminate the information at issue." Judicial Watch II, 122 F. Supp. 2d at 10. That is precisely what VoteHemp has done in this case.

For this reason, the situation in this case is indistinguishable from that in Judicial Watch, Inc. v. U.S. Dept. of Justice, 185 F. Supp. 2d 54 (D.D.C. 2002)(Judicial Watch III). There, the Court found the third factor satisfied where the requester had "described several methods it uses to make information available to the pubic, it has a record of conveying to the public information obtained through FOIA requests, and it has stated its intent to do so in this case." 185 F. Supp. 2d at 62.

DEA's efforts (DEA Brief at 15) to distinguish Judicial Watch III are unavailing. First, although the Court found the requester had not met its burden with respect to other factors, the court did find squarely that the requester had met its burden with respect to factor three—the particular issue with respect to which this case is apposite. Second, the Court did not disregard prior holdings, because the circumstances were different in the earlier Judicial Watch cases.

Finally, contrary to DEA's suggestion, VoteHemp—like the requester in Judicial Watch III—does have a "record of conveying to the public information obtained through FOIA requests." Id. For example, VoteHemp posted on its website a letter, obtained through a FOIA request, dated March 23, 2000, from John Roth, Chief of the Narcotic

and Dangerous Drug Section of the Criminal Division, to the Administrator of DEA, directly contradicting DEA's current legal position as to whether hemp seed and oil are covered by the Controlled Substances Act. See VoteHemp web page, VoteHemp News Center section at page 6, attached to Declaration of Eric Streenstra as Exhibit 1.[1] Further, VoteHemp has a demonstrated record of having its information and views published in dozens of mainstream media outlets including *The Washington Post*, *The Los Angeles Times* and *Time*, as illustrated by the articles and radio and television news excerpts set out in the "Vote Hemp News Center" section of its website.

For these reasons, VoteHemp has sustained its burden with respect to the third factor of the "public interest" prong, of the statutory test for a fee waiver.

II. Disclosure of the Requested Information Will Not Primarily Serve a Commercial Interest of the Requester

In determining whether a FOIA request will primarily serve a "commercial interest," DEA has to consider two factors: (1) "[w]hether the requester has a commercial interest that would be furthered by the requested disclosure;" and (2) "[w]hether 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.'" 28 C.F.R. §16.11(k)(3)(i) &(ii).

DEA insists that VoteHemp has, or is acting on behalf of, a "commercial interest" because it functions as "an advocate for and promoter of the industrial hemp trade."

[1] VoteHemp's entire website should be considered to be part of the record that was before the agency in this fee waiver matter, since DEA itself cited the website in its September 27, 2002 letter denying VoteHemp's appeal of the initial fee waiver decision. See Declaration of Katherine L. Myrick, Exhibit J, at 2-3.

DEA Brief at 16. DEA cites the fact that VoteHemp's website encourages the public to purchase hemp food products, and contains links to several hemp product companies' websites. Id. at 16-17. As a full reading of the website makes abundantly clear, however, VoteHemp is an advocacy group for members of the public, and consumers, who believe in and want to advance the cause of legalizing the use of hemp for a variety of purposes. A significant portion of VoteHemp's website, for example, consists of: "action alerts" asking members of the public to contact their elected representatives; materials about regulation of, and litigation concerning the legality of, hemp products; pages where citizens can register to vote; a voter guide; and a "news center" reporting developments, from the media, with respect to policy relating to industrial hemp.

DEA claims that, unlike the efforts of other advocacy groups, VoteHemp's efforts will not merely "incidentally benefit" the hemp industry, but rather, that VoteHemp's "sole purpose is to create, encourage and promote a market in hemp products." DEA Brief at 17. But the benefit to the industry here is an inherent byproduct of what VoteHemp is trying to achieve, which is full legalization of farming low-THC non-psychoactive industrial hemp for a variety of purposes. Again, if a group is formed to promote use of alternative fuels for automobiles for environmental reasons, everything the group does successfully will necessarily and inherently benefit the ethanol industry. A group formed principally, or perhaps exclusively, to promote mandatory child safety seats for young children in cars, will inherently and necessarily benefit the few companies that manufacture such child safety seats. Such benefits to a commercial entity, or industry, do not mean that groups like these are not promoting views on a serious and legitimate public policy issue.

DEA then argues that VoteHemp is acting "on behalf of" the hemp products industry because "[a]lmost all of the 'VoteHemp Supporters' listed on its website are companies that manufacture and/or sell hemp products." DEA Brief at 17. In fact, since its inception, VoteHemp has received monetary donations from more than 2,200 individuals; and 97.5% of its donors consist of, and 45% of its funding has come from, members of the public with no connection whatsoever with the hemp industry. See Supplemental Declaration of Eric Steenstra, submitted herewith ("Supp. Steenstra Dec."), ¶ 3. No industry trade association, of course, would have such a pattern of substantial funding from members of the public.

Further, DEA suggests that the FOIA request serves a "commercial interest" because the documents requested go to the "heart of the issue being litigated in the Ninth Circuit," and thus, the request seeks "documents that the industry could use to buttress its challenge to the Interpretive Rule." DEA Brief at 18. Clearly, VoteHemp is not trying to further any commercial interest of its own through this litigation, since it is not a petitioner in this case. In any event, none of the petitioner companies have an employee or officer on the board of directors of VoteHemp. Supp. Steenstra Dec. ¶ 4. While any member of the public—including the petitioner companies—will have access to any information obtained through FOIA and disseminated by VoteHemp, that fact surely does not lead to the conclusion that, in making this request, this advocacy group is "acting on behalf of" commercial interests.

Finally, even if VoteHemp had a "commercial interest", or was acting on behalf of such an interest—and it is not—the public interest in disclosure would far outweigh any commercial interest. As noted above, what is at stake here is disclosure of at least

part of a secret administrative record leading to promulgation of a regulation (the DEA "Interpretive Rule"), made effective immediately and issued without notice or comment. When the same rule was simultaneously issued in proposed form, DEA received more than 100,000 comments on the rule from members of the public. Without doubt, there is a high degree of public interest in and concern about this issue, and that interest would be directly served by granting VoteHemp's FOIA request and thereby allowing VoteHemp to disseminate this information (the contents of the secret administrative record) to the public.

For these reasons, VoteHemp has demonstrated that the requested disclosure will not primarily serve any commercial interest.

CONCLUSION

For the reasons stated above, and in plaintiff's Memorandum of Points and Authorities in Support of Its Motion for Partial Summary Judgment, plaintiff's motion for partial summary judgment should be granted, and defendant's cross-motion should be denied.

Respectfully submitted,

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