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U.S. Court of Appeals

GOVERNMENT INFORMATION

PREVAILING PARTY

Where documents sought under Freedom of Information Act would not have been released but for institution and prosecution of suit, plaintiffs are prevailing party for fee application purposes.

CHURCH OF SCIENTOLOGY OF CALIFORNIA v. HARRIS, ET AL., U.S.App.D.C. No. 80-1189, April 17, 1981. *Remanded* per MacKinnon, J. (S. Robinson and Wald, JJ. concur). *Robert A. Seefried* with *Earl C. Dudley, Jr.* for appellant. *Keith A. O'Donnell* with *Charles F. C. Ruff, John A. Terry* and *John R. Fisher* for appellees. Trial Court—June Green, J.

MacKINNON, J.: The Church of Scientology of California ("Scientology") appeals from an opinion and order of the district court which denied its request for an award of attorney's fees and litigation costs under section 552(a)(4)(E) of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552a(4)(E). The district court concluded that Scientology was not *eligible* for such an award because it had not "substantially prevailed" within the meaning of that section. We find that Scientology did substantially prevail and direct the district court on remand to determine whether Scientology is *entitled* to the fees and costs it seeks.

* * *

II.

As the district court recognized, analysis of a section 552(a)(4)(E) motion for fees and costs requires that two questions be asked and answered. 1) is the plaintiff "eligible" for such an award, and if so, 2) is it "entitled" to such an award? *See Crooker v. U.S. Department of the Treasury*, No. 80-1412 (D.C. Cir., October 23, 1980); *Fenster v. Brown*, 617 F.2d 740 (D.C. Cir. 1979); *Cox v. United States Department of Justice*, 601 F.2d 1 (D.C. Cir. 1979).

A FOIA plaintiff is eligible for a section 552(a)(4)(E) award if it has "substantially prevailed." Our cases have established that this is largely a question of causation—did the institution and prosecution of the litigation *cause* the agency to release the documents obtained during the pendency of the litigation? *See e.g., Cox, supra; Nationwide Building Maintenance, Inc. v. Sampson*, 559 F.2d 704 (D.C. Cir. 1977). As we observed in *Cox:*

> It is true that a court order compelling disclosure of information is not a condition precedent to an award of fees, *Foster v. Boorstin*, 182 U.S.App.D.C. 342, 344, 561 F.2d 340, 342 (1977); *Nationwide Building Maintenance, Inc. v. Sampson*, 182 U.S.App. D.C. 83, 87, 89, 559 F.2d 704, 708-10 (1977), but it is equally true that an allegedly pre-

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U.S. Court of Appeals

CIVIL PROCEDURE

STANDING

Court cannot decide complaint that report to Congress was improperly made when Congress has acted already based on the report.

PHYSICIAN'S EDUCATION NETWORK, INC. v. THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ET AL., U.S.App. No. 80-1759, April 27, 1981. *Affirmed per curiam* (MacKinnon, Mikva and Edwards, JJ. concur). *Jamie L. Whithen* with *Martin G. Hamberger* for appellant. *Valerie K. Schurman* with *Charles F. C. Ruff, Royce C. Lamberth* and *Kenneth M. Raisler* for appellee. Trial Court—Pratt, J.

PER CURIAM: Physicians' Education Network (Physicians') represents the interests of opthalmologists. It appeals from a district court ruling that it lacks standing to seek the rescission of a report from the Secretary of the Department of Health, Education and Welfare (HEW) recommending that Medicare reimbursement for eye care limited to services performed by opthalmologists be extended to certain services performed by optometrists. The report was prepared to comply with section 109 of Pub.L.No. 94-102. In accordance with remarks made by the author of the bill on the Senate floor, a panel of consultants was convened to assist the Secretary with the preparation of the report.

Physicians' principal complaint is that the composition of the panel was rigged so as to reflect only the optometrists' viewpoint, and that the panel operated in violation of a number of the provisions of the Federal Advisory Committee Act, Pub.L. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended, Title 5 United States Code, Appendix I. One difficulty with relying on this Act is that Pub.L.No. 94-182 did not authorize the establishment of an advisory committee. Only if had done so would the Advisory Committee Act mandate that the legislation "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented" and "contain appropriate provisions" to guard against "inappropriate[] influence[] by . . . any special interest." 5 U.S.C. App. §5(b)(2), (3). It is thus apparent that not all of the safeguards of the Advisory Committee Act were operative, even assuming that restrictions placed on *legislation* could be invoked against the Secretary.

In any event, Physicians' did not act timely to monitor the progress of the report following the enactment of Pub.L.No. 94-182 in December 1975, despite the fact that the report was subject to a four month deadline. Physicians' does not allege that it sought and was denied participation in the panel's meetings, or that it sought and was denied representation on the panel itself. Allegations of this kind have been

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U.S. Court of Appeals

OTHER ACTIONS

BATON ROUGE MARINE CONTRACTORS, INC. v. FEDERAL MARITIME COMMISSION, ET AL., U.S.App.D.C. No. 79-1502, May 4, 1981. *Remanded* per Ginsburg, J. (S. Robinson and Wilkey, JJ. concur). *Edward S. Bagley* for petitioner. *Robert J. Wiggers* with *Robert B. Nicholson* for respondent, United States of America. *John M. Binetti* for respondent, Federal Maritime Commission.

GINSBURG, J.: Baton Rouge Marine Contractors, Inc. (BARMA), a stevedore, seeks review of an April 1979 report and order of the Federal Maritime Commission (FMC) upholding a "use of services and facilities" charge imposed by intervenor Cargill, Inc., terminal operator for the Port of Baton Rouge. The Commission ruled that the charge Cargill levied against BARMA and all other stevedores was "just and reasonable," and therefore permissible under §17 of the Shipping Act of 1916, 46 U.S.C. §816 (1976). We find that the FMC departed from the approach it took at an earlier stage of this case, as well as from relevant precedent, without a clear explanation supported by substantial evidence. Accordingly, although this inordinately protracted proceeding is now approaching its tenth year, we must remand the matter to the FMC for further consideration.

* * *

THE IZAAK WALTON LEAGUE OF AMERICA, ET AL. v. MARSH, ET AL., ETC., U.S. App.D.C.Nos. 79-2529, 79-2430, 80-1017 and 80-1024, April 24, 1981. *Opinion* per Wright, J. (Robb, J. and Penn, J. concur). *Joseph V. Karaganis* with *Sanford R. Gail, A. Bruce White* and *Joseph D. Feeney* for Izaak Walton League of America, *et al.*, and Atchison, Topeka and Santa Fe Railway Company, *et al.*, appellants in Nos. 79-2529 and 79-2530 and appellees in Nos. 80-1017 and 80-1024. *George V. Allen, Jr.* with *Ramsay D. Potts* and *William P. Barr* for Association for Improvement of the Mississippi River, appellant in Nos. 80-1017 and 80-1024 and appellee in Nos. 79-2529 and 79-2530. *Dirk D. Snel* with

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TABLE OF CASES

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public meeting after receiving congressional authorization so that it could solicit comments on implementation of the project. We disagree, however, with the District Court's decision not to require such a meeting. Thus we affirm in part and reverse in part, remanding so that the District Court may amend its judgment to require the Corps to hold a public meeting. This meeting should be held within 30 days of the time the judgment, as amended, becomes final. To ensure that the meeting is not an empty formality, the District Court should also enter an order requiring the Corps to respond in writing to the objections made at the meeting. This response should be completed no later than 30 days after the meeting is held.

* * *

PARTY

(Cont'd. from p. 1073)

vailing complainant must assert something more than *post hoc, ergo propter hoc, Vermont Low Income Advocacy Council Inc. v. Usery*, 546 F.2d 509, 514 (2d Cir. 1976). Instead, the party seeking such fees in the absence of a court order must show that prosecution of the action could reasonably be regarded as necessary to obtain the information. *Vermont Low Income Advocacy Council, Inc. v. Usery, supra* at 513, and that a causal nexus exists between that action and the agency's surrender of the information, *Cuneo v. Rumsfeld, supra* 180 U.S.App.D.C. at 190, 553 F.2d at 1366. Whether a party has made such a showing in a particular case is a factual determination that is within the province of the district court to resolve. In making this determination, it is appropriate for the district court to consider, *inter alia* whether the agency, upon actual and reasonable notice of the request, made a good faith effort to search out material and to pass on whether it should be disclosed. We have elsewhere had occasion to note both the plethora of Freedom of Information Act cases pending before federal agencies at any given time, and the time-consuming nature of the search and decision process. *See Open America v. Watergate Special Prosecution Force*, 178 U.S.App.D.C. 308, 315, 547 F.2d 605, 612 (1976). If rather than the threat of an adverse court order either a lack of actual notice of a request or an unavoidable delay accompanied by due diligence in the administrative process was the actual reason for the agency's failure to respond to a request, then it cannot be said that the complainant substantially prevailed in his suit.

Cox, supra, 601F.2d at 6 (footnote omitted).

The history of the instant litigation makes clear that Scientology substantially prevailed, for it shows not only that the institution and prosecution of this case was "necessary" to obtain the 150 documents ultimately released by HEW but also that a powerful "causal nexus" exists between the litigation and HEW's surrender of these documents. Throughout the administrative processing of Scientology's FOIA request, HEW maintained that only three card references and three documents fell within the scope of the request. After Scientology filed suit and began discovery, HEW disclosed that over 200 responsive documents existed in the files of the General Counsel, and during the course of the litigation released approximately two-thirds of those documents. There is absolutely no indication in the record that HEW would have actually searched the General Counsel's files or released any of the contents thereof in the absence of this litigation. This is clearly not a case where the agency, "upon actual and reasonable notice, made a good faith effort to search out material and to pass on whether it should be disclosed." *Cox, supra*, 601 F.2d at 6. On the contrary, it is a case in which the agency, upon actual and reasonable notice, decided to act upon an assumption as to the nature of certain material and was then obliged to release most of that material when the light of litigation exposed the error of its assumption. That, in our opinion, is the critical point—*but for the institution and prosecution of this suit, the documents ultimately obtained by Scientology would never have been identified and therefore would never have been released.* Under these circumstances, it is clear that the suit was necessary and causally linked to the release of the documents obtained.

The district court nevertheless found that Scientology had not substantially prevailed because it "only obtained through the discovery process an insubstantial part of what was sought" and "was largely unsuccessful in its efforts to obtain release of the withheld material." The basis for these comments appears to be the district court's conclusion that Scientology received "just fourteen documents" as a result of its suit. The premises underlying this conclusion in turn appear to be twofold: 1) the court's ruling that the 31 documents released in June, 1978 should be excluded from the tally of documents obtained, and 2) the court's subjective belief that the 108 envelopes and transmittal slips were too insignificant to be included in that tally. We think both of these premises are erroneous.

The district court discounted the 31 documents released in June 1978 because it found that they "were released as a result of Attorney General Bell's letter" and not as a result of the litigation. We accept this finding, to the extent that it acknowledges that the Attorney General's letter in the last analysis precipitated release of the documents and was *a* cause of their release. The initiation and prosecution of this litigation, however, was in our opinion the direct cause of their disclosure, for absent this litigation, following the unsuccessful administrative request, the General Counsel's files would never have been searched, the 31 documents would never have been identified as falling within the scope of Scientology's FOIA request, and the documents would never have been evaluated to determine whether they should or could be released under the guidelines set forth in the Attorney General's letter. The timing of the Attorney General's letter does not eliminate the fact that if the litigation had never been brought the documents would never have been disclosed. It was the litigation that *produced* the 31 documents, not the letter.

The government argues that release of these 31 documents should be discounted because to hold otherwise would "punish" HEW for making disclosures more liberal than commanded by FOIA. We disagree. To the extent that HEW is "punished," it is not because the agency released documents whose disclosure FOIA did not require, but because the agency failed to comply with its basic duty to search its files in response to a proper request. Indeed, we think we might be punishing Scientology if we discounted documents whose disclosure, in a very important and fundamental sense, was brought about only as a result of its law suit, and only after this lawsuit forced HEW to comply with the requirements of the Act. *Cf. Halperin v. Department of State*, 565 F.2d 699, 706 n.11

(D.C. Cir. 1977) (Plaintiff substantially prevails when its litigation benefits the nation by making an agency aware of the duties imposed upon it by FOIA) (dicta).

We also think that there is no reason in law or logic to discount the significance of the 108 envelopes and transmittal slips in determining whether Scientology substantially prevailed. FOIA mandates that an agency disclose all identifiable agency "records" in response to a proper FOIA request unless the documents fall within one of the Act's specific exemptions. *See* 5 U.S.C. §§552(a)(3), (b); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 137 (1975). It is not contended that the envelopes and buck slips are not "records" within the meaning of the Act, nor that they are exempt or even arguably exempt from disclosure. Since disclosure of the envelopes and buck slips was required by FOIA, nothing in the Act in general, nor in section 552(a)(4)(E) in particular, suggests that their disclosure should be ignored or discounted in evaluating the relative success of appellant in this litigation.

Indeed, there is case law that points in the opposite direction. In *Founding Church of Scientology of Washington, D.C., Inc. v. Marshall*, 439 F.Supp. 1267 (D.D.C. 1977), the Labor Department released several hundred pages of material pursuant to the plaintiff's administrative appeal. The Department withheld certain documents in their entirety and made deletions in others. The withheld documents consisted of a routing slip, a secretarial referral card, and a note to file. The deletions were of notations and signatures identifying the author of the letter or memorandum, the typist, the person who signed off on the document, and those who were to receive carbon copies of it. *Id.* at 1268. After the plaintiff filed suit and served a set of interrogatories, the Department released the withheld material, and the plaintiff moved for an award of attorney's fees and litigation costs. Although the nature of the material withheld by the Labor Department could have been characterized as unimportant or insignificant, the court made absolutely no mention of this point and simply granted the motion because it found that the suit had caused the release of the material. *Id.* at 1269-70.

In sum, both the 31 documents released in June, 1978 and the 108 envelopes and transmittal slips must be recognized by the district court as having been released as a result of the litigation in determining whether Scientology substantially prevailed. When such circumstances are considered, we find that the litigation caused the release of 150 documents, approximately two thirds of the documents at issue. Given these facts, there can be no doubt that Scientology prevailed in its suit, and prevailed to a substantial degree. Scientology is thus eligible to apply for an award of attorney's fees and litigation costs under section 552(a)(4)(E).

III.

A plaintiff, however, is not automatically "entitled" to an award under section 552(a)(4)(E) merely because it is eligible for such an award. *See e.g., Fenster v. Brown*, 617 F.2d 740 (D.C. Cir. 1979) (District court's denial of attorney's fees and costs to eligible plaintiff affirmed). Rather, the decision as to whether to award fees and costs to an eligible party rests in the sound discretion of the district court, *Cox, supra*, 601 F.2d at 7. Our decisions have touched upon some of the factors the district courts should consider in exercising their discretion, and these include (1) the benefit to the public if any, derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis of law. *Fenster, supra*, 617 F.2d at 742; *see Cox, supra*, 601 F.2d at 7. We have also reminded the district courts that, in determining whether an eligible plaintiff is entitled to an award, they must

> always keep in mind the basic policy of the FOIA to encourage the maximum feasible public access to government information and the fundamental purpose of section 552 (a)(4)(E) to facilitate citizen access to the courts to vindicate their statutory rights. Each of the particular factors . . . must be evaluated in light of these fundamental legislative policies. *The touchstone of a court's discretionary decision under section 552(a)(4)(E) must be whether an award of attorney's fees is necessary to implement the FOIA.*

Nationwide Building Maintenance, Inc., supra, 559 F.2d at 715 (emphasis added).

Because the district court in this case determined that Scientology had not substantially prevailed and thus was not eligible for an award of fees and costs under section 552(a)(4)(E), it did not reach the question whether Scientology was *entitled* to such an award. Scientology nevertheless requests that we direct the district court to award it fees and costs, on the grounds that the district court's refusal to do so on remand would constitute a gross abuse of discretion in light of HEW's "recalcitrant and obdurate conduct, both at the administrative level and during the course of this litigation."

We agree that the propriety of the government's conduct is an important factor to be considered in determining Scientology's entitlement to the award it seeks. We also believe, however, that we are not presently in a position to pass on what would or would not constitute an abuse of discretion given the facts of this case. The propriety of the government's conduct is but one variable in the section 552(a)(4)(E) equation, and a secion 552(a)(4)(E) award must be based upon a reasoned consideration of "all relevant factors." *Nationwide Building Maintenance, Inc., supra*, 559 F.2d at 705; *see also id.* at 714 (district court must consider all factors, and must be careful not to give any particular factor dispositive weight). The record before us is simply insufficient for us to evaluate all the relevant factors, especially since it does not reveal the nature, content or significance of the documents released to Scientology. More importantly, however,

> in this area where, as we have continually emphasized, Congress has relied on the broad discretion of the courts, it is better to have that discretion exercised by the court which has been the most intimately associated with the case.

Id. at 716. *Accord, Crooker, supra*, slip op. at 5; *Cox, supra*, 601 F.2d at 6-7; *Cuneo v. Rumsfeld*, 533 F.2d 1360, 1368 (D.C. Cir. 1977). Accordingly, we remand the case to the district court for consideration of whether Scientology is entitled to an award under section 552(a)(4)(E) and if so to determine the amount thereof.

Reversed and remanded.

LEGAL NOTICES

U.S. COAST GUARD

Notice is hereby given that an order dated 20 May 1981 has been issued by the undersigned authorizing the name of the Oil Screw ABOVE AVERAGE, official number 526279, owned by Douglas William Scheible & Dale E. Scheible, of which Washington, D.C. is the home port, to be changed to BAY KING II. /s/ M. HERRERA, Documentation Officer. By direction of the Officer-in-Charge, U.S. Coast Guard, Marine Safety Office, Baltimore, Maryland.
June 1, 2, 3, 4.

Notice is hereby given that an order dated 21 May 1981 has been issued by the undersigned authorizing the name of the Oil Screw SUN CHASER, official number 598999, owned by James D. Evans, of which Washington, D.C. is the home port, to be changed to BOAT. /s/ M. HERRERA, Documentation Officer. By direction of the Officer-in-Charge, U.S. Coast Guard, Marine Safety Office, Baltimore, Maryland.
June 1, 2, 3, 4.

Notice is hereby given that an order dated 26 May 1981 has been issued by the undersigned authorizing the name of the Oil Screw SOLUS, official number 602103, owned by George E. Cooper and Christine B. Newman, of which Washington, D.C. is the home port, to be changed to EPRIS. /s/ M. HERRERA, Documentation Officer. By direction of the Officer-in-Charge, U.S. Coast Guard, Marine Safety Office, Baltimore, Maryland.
June 2, 3, 4, 5.

Notice is hereby given that an order dated 26 May 1981 has been issued by the undersigned authorizing the name of the Oil Screw BESSIE-R, official number 595248, owned by William H. and Jean G. Weeks, of which Washington, D.C. is the home port, to be changed to MARY ELLEN. /s/ M. HERRERA, Documentation Officer. By direction of the Officer-in-Charge, U.S. Coast Guard, Marine Safety Office, Baltimore, Maryland.
June 2, 3, 4, 5.

FIRST INSERTION

BEATY, Kathryn R. Deceased

James R. Sharp, *Attorney*
1200 North Nash Street, Suite 821
Arlington, Virginia 22209
Superior Court of the District of Columbia
Probate Division
No. 37-81, Administration.

This is to give notice that the subscriber, of the State of Virginia, has obtained from the Superior Court of the District of Columbia, Probate Division, Letters Testamentary, on the estate of Kathryn R. Beaty, late of the District of Columbia, deceased. All persons having claims against the deceased are hereby warned to exhibit the same, with the vouchers thereof, legally authenticated, to the subscriber, on or before the 18th day of September, A.D. 1981; otherwise they may by law be excluded from all benefit of said estate. Given under my hand this 19th day of May, 1981. JAMES R. SHARP, 1200 North Nash Street, Suite No. 821, Arlington, Virginia 22209. Attest: JOAN R. SAUNDERS, *Deputy Register of Wills for the District of Columbia. Clerk of the Probate Division.* [Seal.]
June 2, 9, 16.

DEWEY, Charles S. Deceased

Gardner, Carton & Douglas, *Attorneys*
1875 Eye Street, N.W., Suite 1050
Washington, D.C. 20006
Superior Court of the District of Columbia
Probate Division
No. 235-81, Administration.

This is to give notice that the subscriber, of the State of Illinois, has obtained from the Superior Court of the District of Columbia, Probate Division, Letters Testamentary, on the estate of Charles S. Dewey, late of the District of Columbia, deceased. All persons having claims against the deceased are hereby warned to exhibit the same, with the vouchers thereof, legally authenticated, to the subscriber, on or before the 5th day of October, A.D. 1981; otherwise they may by law be excluded from all benefit of said estate. Given under my hand this 18th day of May, 1981. THE NORTHERN TRUST COMPANY, By: Robert J. Waters, Vice President, 50 South LaSalle Street, Chicago, Illinois 60675. Attest: JOAN R. SAUNDERS, *Deputy*