ORAL ARGUMENT NOT YET SCHEDULED

No. 09-5402

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ED BRAYTON,

Appellant,

v.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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May 13, 2010

CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND RELATED CASES UNDER CIRCUIT RULE 28(a)(1)

Pursuant to Rule 28(a)(1) of this Court, counsel for appellant Ed Brayton certifies as follows:

A. Parties and Amici

Ed Brayton was the plaintiff in the district court and is the appellant in this Court. The Office of the United States Trade Representative (USTR) was the defendant in the district court and is the appellee in this Court.

B. Rulings Under Review

Appellant seeks review of district court Judge Ricardo M. Urbina's September 28, 2009, opinion and order denying appellant's motion for a determination of his eligibility for and entitlement to attorney fees and costs. The order appears in the appendix at page 69. The opinion appears in the appendix starting at page 56. The opinion is unreported but is available at 2009 WL 3069668.

C. Related Cases

This case has not previously been before this Court, except on USTR's motion for summary affirmance, which was denied. This case has not previously been before any other court except the court below. Counsel for appellant are not aware of any related cases.

Respectfully submitted,

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GLOSSARY

FOIA	Freedom of Information Act
USTR	Office of the United States Trade Representative
WTO	World Trade Organization

STATEMENT OF JURISDICTION

This appeal is from a district court decision in a Freedom of Information Act (FOIA) case, denying plaintiff's motion for a determination of his eligibility for and entitlement to attorney fees and costs. The district court had jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. The district court's order, dated September 28, 2009, disposed of all claims of all parties. (App. 69). Plaintiff filed a timely notice of appeal on November 18, 2009. (App. 70). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

As amended by the Open Government Act of 2007, FOIA provides that a plaintiff substantially prevails, and therefore may receive attorney fees and costs, if he obtains relief as a result of a voluntary change in position by the government, as long as the plaintiff's claim "is not insubstantial." The issue in this case is whether the district court erred in ruling that a FOIA plaintiff who receives relief under such circumstances may not receive fees and costs unless his claim was not only "not insubstantial" but also correct on the merits.

STATUTORY PROVISIONS INVOLVED

The attorney fee provision of FOIA, 5 U.S.C. § 552(a)(4)(E), as amended, provides:

(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either –

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

STATEMENT OF THE FACTS AND CASE

A. FOIA's Attorney Fee Provision

FOIA provides that a substantially prevailing party may receive attorney fees. Before 2002, this Court applied the "catalyst theory" to determine whether a plaintiff had substantially prevailed, allowing the plaintiff to recover fees if the litigation substantially caused the agency to release the records, even absent a court judgment in the plaintiff's favor. *See Summers v. Dep't of Justice*, 569 F.3d 500, 502 (D.C. Cir. 2009). After the Supreme Court rejected the catalyst theory's application to another fee-shifting statute in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598

(2001), however, this Court held that FOIA plaintiffs were eligible for awards of attorney fees only if they obtained relief by a court order. *See Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452, 456-57 (D.C. Cir. 2002).

In the OPEN Government Act of 2007, Pub L. No. 110-175, § 4(a), 121 Stat. 2524, 2525, Congress amended FOIA to enable plaintiffs in FOIA cases once again to receive attorney fees if the government releases withheld records during the course of litigation. The amendment also specified in FOIA's text for the first time how meritorious such a plaintiff's claim has to be for a court to award fees. In relevant part, the amendment provides that "a complainant has substantially prevailed if the complainant has obtained relief through . . . a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." *Id*. at § 4(a)(2), *codified* at 5 U.S.C. § 552(a)(4)(E)(ii).

B. Ed Brayton's FOIA Request and the Decision Below

On December 19, 2007, appellant Ed Brayton filed a FOIA request with the Office of the United States Trade Representative (USTR) for a copy of an agreement reached between the United States and the European Union under procedures that permit a World Trade Organization (WTO) member country to modify or withdraw a service sector committed to WTO jurisdiction only after

compensating other WTO member countries interested in that service sector for future lost revenue. *See* Declaration of Julia Christine Bliss Exh. 1 (App. 16). USTR withheld the requested agreement, claiming in its response to Brayton's administrative appeal that the agreement was properly classified under Executive Order 12958, as amended—and therefore exempt under FOIA Exemption 1, 5 U.S.C. § 552(b)(1)—because WTO rules required that such agreement be kept secret. *See* Declaration of Ed Brayton Exh. C (App. 27). The appeal response stated that the requested agreement was entered into as part of a "multinational process under the purview of the" WTO and that the record would become public after the "multinational negotiation process is complete." *Id*. After Brayton filed suit and cross-motions for summary judgment were fully briefed, however, USTR released the agreement, even though the multinational negotiating process was not yet complete. *See* Declaration of Bonnie I. Robin-Vergeer Exh. A (App. 49-50).

Brayton moved for an award of attorney fees and costs on the ground that he had substantially prevailed under the language added to FOIA by the OPEN Government Act. On September 28, 2009, the district court denied the motion. Citing cases relying on law predating the OPEN Government Act, the court stated that, to be awarded fees, a party both must have substantially prevailed, and therefore be eligible for fees, and must be entitled to fees. Mem. Op. at 4 (App.

59). The court explained that, under that case law, courts generally balance four factors in determining whether a plaintiff is entitled to fees—"(1) the public benefit derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) the reasonableness of the agency's withholding of the requested documents," *id*. at 4-5 (App. 59-60)—but that "'a party is not entitled to fees if the Government's legal basis for withholding requested records is correct.'" *Id*. at 5 (App. 60) (quoting *Chesapeake Bay Found., Inc. v. U.S. Dep't of Agric*., 11 F.3d 211, 216 (D.C. Cir. 1993)). According to the district court, "nothing in the OPEN Government Act of 2007, which broadened the meaning of 'substantially prevailed' under the eligibility prong of the attorney's fees analysis, abrogated" the rule established in case law applying pre-OPEN Government Act standards, "that a party is not entitled to attorney's fees if the agency's withholding of the document was correct as a matter of law." *Id*. at 6 n.2 (App. 61).

Thus, although, as amended, FOIA states that a plaintiff who has obtained relief through a unilateral change in position by the agency *may* obtain fees as long as his claim "is not insubstantial," the district court held that a plaintiff may *not* receive fees if the government's legal basis for withholding was correct, no matter how substantial the plaintiff's claim may have been. *Id*. at 5 (App. 60).

The district court decided that USTR's decision to withhold the agreement had been correct and therefore concluded—without discussing whether Brayton's claim was insubstantial or considering any other factor relevant to whether Brayton is entitled to fees—that Brayton was not entitled to an award of attorney fees and costs. *Id*. at 12 (App. 67).

SUMMARY OF ARGUMENT

Relying on precedents that did not apply the OPEN Government Act of 2007, the district court denied Brayton's motion for attorney fees and costs on the ground that "'a party is not entitled to fees if the Government's legal basis for withholding requested records is correct.'" Mem. Op. at 5 (App. 60) (quoting *Chesapeake Bay Found*., 11 F.3d at 216). After the 2007 legislation, however, the merits of the agency's legal position in withholding the documents cannot be dispositive. In the OPEN Government Act, Congress addressed the precise circumstances under which the degree of merit of a FOIA plaintiff's claim absolutely bars an award of fees in cases involving a unilateral release of records by the agency—and that is when the plaintiff's claim is "insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii)(II). In ruling that a FOIA plaintiff is categorically barred from receiving fees unless his claim is not only "not insubstantial" but also correct on

the merits, the district court rendered superfluous the OPEN Government Act's "not insubstantial" language.

The district court's holding that a FOIA plaintiff cannot be awarded fees if the government's legal basis for withholding was correct, even if the plaintiff's claim was not insubstantial, is inconsistent with FOIA's statutory language. It is also at odds with the OPEN Government's Act legislative history, which demonstrates that Congress understood that, under the language it was enacting, FOIA plaintiffs would sometimes be able to receive fees even if the government's original position was correct. And the holding threatens to turn all fee motions in FOIA cases in which the government releases documents without a court order into litigation over the merits of the case, thereby discouraging settlement and wasting judicial resources. The district court erred as a matter of law, and, accordingly, abused its discretion, in holding that plaintiffs cannot receive fees if the government's original position was correct.

STANDARD OF REVIEW

This Court reviews a denial of attorney fees under FOIA for abuse of discretion. *Davy v. CIA*, 550 F.3d 1155, 1158 (D.C. Cir. 2008). A "district court 'abuses its discretion if it did not apply the correct legal standard . . . or if it misapprehended the underlying substantive law.'" *Kickapoo Tribe v. Babbitt*, 43

F.3d 1491, 1497 (D.C. Cir. 1995) (citation omitted). The Court determines whether the district court applied the correct legal standard de novo. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001).

ARGUMENT

FOIA's plain language, its legislative history, and policy considerations all show that the district court erred in denying Brayton fees based solely on a determination that the USTR's original position was correct.[1]

I. FOIA Provides That FOIA Plaintiffs Who Receive Relief Through a Unilateral Change in Position by the Government May Receive Fees If Their Claims Are Not Insubstantial.

The language of FOIA, as amended by the OPEN Government Act, states that *in any case* in which a FOIA plaintiff receives relief through a unilateral or voluntary change in position by the government, he *may* receive fees if his claim is not insubstantial. *See* 5 U.S.C. § 552(a)(4)(E)(i), (ii). "[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *Dodd v. United States*, 545 U.S. 353, 359 (2005) (internal quotation marks

[1]Brayton believes that USTR's original position was not, in fact, correct and that the district court erred in holding to the contrary. However, Brayton is limiting this appeal to the question whether the district court erred as a matter of law in denying him fees solely on the basis of a determination that the government's position was correct.

and citation omitted). Here, Brayton's claim was far from insubstantial.[2] Because Brayton received relief through a voluntary change in position by the government and his claim was not insubstantial, he may be awarded fees, and the district court erred in holding to the contrary. *See Judicial Watch, Inc. v. Bureau of Land Mgmt*., 562 F. Supp. 2d 159, 172 (D.D.C. 2008) ("[Plaintiff] obtained its desired relief, the release of various documents, due to a voluntary change in position by defendant, and its claim was substantial . . .. Since this is the sole criterion that

[2]As Senator Kyl, who introduced the amendment that added the "not insubstantial" language to the OPEN Government Act, explained, "[s]ubstantiality is a test that is employed in the Federal courts to determine whether a federal claim is adequate to justify retaining jurisdiction over supplemental or other State law claims. It is generally understood to require only that the plaintiff's complaint not be clearly nonmeritorious on its face and not be clearly precluded by controlling precedent." 153 Cong. Rec. S10989 (daily ed. Aug. 3, 2007) (Statement of Sen. Kyl); *see also, e.g., Hagans v. Lavine*, 415 U.S. 528, 538 (1974) ("A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'") (citation omitted); *Best v. Kelly*, 39 F.3d 328, 330 (D.C. Cir. 1994) ("[The insubstantiality doctrine] demands that the claims be flimsier than 'doubtful or questionable'—they must be 'essentially fictitious.'") (citation omitted). Brayton's claim was plainly not insubstantial, as his summary judgment briefing below demonstrated. *See* Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment (Docket No. 8); Reply Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment (Docket No. 12). Indeed, USTR did not argue either below or in its motion for summary affirmance that plaintiff's claim was insubstantial.

must be met in order to have 'substantially prevailed' under the statute, plaintiff is entitled to attorney's fees.").

The district court relied on *Davy v. CIA*, 550 F.3d 1155, to hold that plaintiffs are not entitled to fees if the government's legal position was correct. However, in *Davy*—and in *Judicial Watch, Inc. v. FBI*, 522 F.3d 364 (D.C. Cir. 2008), on which USTR relied in its reply in support of its motion for summary affirmance—the government released the records prior to the enactment of the OPEN Government Act, which this Court has determined does not apply retroactively. *See Summers*, 569 F.3d at 505. Thus, the OPEN Government Act did not apply to either *Davy* or *Judicial Watch*, and this Court did not address in either case whether, after the Open Government Act, a FOIA plaintiff is categorically barred from recovering an attorney fee award when he obtains the document through a unilateral or voluntary change in position by the agency, if the agency's decision to withhold the document would ultimately have been upheld in litigation.

The district court held that although the OPEN Government Act broadened the meaning of when a plaintiff has "substantially prevailed" and thus of when a plaintiff is *eligible* for fees, it did not alter the standard for determining whether a plaintiff is *entitled* to fees, and therefore did not overrule prior case law stating

that a party is not entitled to fees if the government's position was correct. To be sure, an award of fees and costs under FOIA remains discretionary, *see* 5 U.S.C. § 552(a)(4)(E)(i) ("The court *may* assess against the United States reasonable attorney fees and other litigation costs . . ..) (emphasis added), and this Court's prior case law has required a FOIA requester seeking fees to show both that she is a substantially prevailing party who is eligible for fees and also that she is entitled to fees. *See, e.g., Davy v. CIA*, 456 F.3d 162, 166 (D.C. Cir. 2006). In determining whether a party that is eligible for fees is also entitled to fees, the Court has looked to four factors—the public benefit derived from the case, the commercial benefit to the requester, the nature of the requester's interest, and the reasonableness of the government's position. *Id*. And in assessing the last factor under the law predating the OPEN Government Act, the Court has stated that "a party is not entitled to fees if the Government's legal basis for withholding requested records is correct." *Chesapeake Bay Found.*, 11 F.3d at 216.

But neither the district court's discretion nor the judicially adopted entitlement factors can be applied in a way that conflicts with congressional intent embodied in the statutory text. In drafting the OPEN Government Act, Congress made the decision that it wanted FOIA requesters whose claims were not insubstantial to be able to be awarded fees when they receive relief through the

government's unilateral change in position. Under the district court decision, however, requesters who receive relief under such circumstances are *categorically barred* from being awarded fees, even if their claims were not insubstantial, unless the government's position on the merits was incorrect. Labeling the issue one of "entitlement" rather than "eligibility" does not alter the fact that the district court held that a court categorically *may not* award fees in a class of cases in which Congress provided that the court *may* award fees.

Put differently, although the district court claimed to be deciding "entitlement" rather than "eligibility," it is meaningless to say that plaintiffs whose claims are not insubstantial but who would have lost on the merits are "eligible" for fees when they will never receive such fees. If there are *no* circumstances under which a plaintiff can receive fees, that plaintiff is not, in fact, "eligible" for them. *See Merriam-Webster Online Dictionary* (2010) (defining eligible as "qualified to participate or be chosen"). And when Congress makes clear that a certain category of people are eligible for something, a court cannot declare that category of people *ineligible* simply by giving a different name to part of its test for eligibility. Thus, for example, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S.Ct. 1431, 1437 (2010), the Supreme Court held that a state statute providing that class actions "may not be maintained" unless certain

conditions were met conflicted with a federal rule stating class actions "may be maintained" under certain other conditions. The Court rejected the argument that the statute and rule did not conflict because the statute addressed whether a type of claim is "eligible" for class treatment while the rule addressed whether a class can be certified. *Id*. at 1438. According to the Court, "the line between eligibility and certifiability is entirely artificial" because "[b]oth are preconditions for maintaining a class action." *Id*. Distinguishing between conditions related to "eligibility" and conditions related to "certifiability" did not resolve the conflict created when the state statute placed conditions on maintaining a class action above those in the federal rule. Similarly, here, the line between "eligibility" and "entitlement" is artificial: Both the "not insubstantial" language in the statute ("eligibility") and the court's holding below ("entitlement") address the conditions under which a plaintiff can be categorically barred from receiving fees based on the merits of his claim. Because they establish different conditions, the court's holding conflicts with the statutory text.

Under the district court's reasoning, not only must the plaintiff's claim be "not insubstantial" for the plaintiff to be awarded fees, it must also be correct. Plaintiffs will *never* receive fees if their claims are not insubstantial unless the defendants' decision to withhold the documents also was incorrect on the merits.

Because the merits of plaintiffs' claims must meet a higher standard than being "not insubstantial" in order for plaintiffs to receive fees, the district court's decision renders the OPEN Government Act's "not insubstantial" language entirely superfluous. The sole purpose of the statutory definition of "substantially prevailed" is to determine when a plaintiff's claim is meritorious enough that she may be awarded fees, so requiring that the plaintiff's claim meet some standard of merit *beyond* being "not insubstantial" to qualify for fees entirely nullifies the use of "not insubstantial" as the statutory benchmark for a claim that has "substantially prevailed." It is "'a cardinal principle of statutory construction,'" however, "that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *see also, e.g.*, *Laurel Baye Healthcare of Lake Lanier, Inc. v. N.L.R.B.*, 564 F.3d 469, 472 (D.C. Cir. 2009) (rejecting interpretation of statute that violated this principle of statutory interpretation); *Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005) (same). It is the court's "duty to give effect, if possible, to every clause and word of a statute." *Duncan*, 533 U.S. at 174 (internal quotation marks and citation omitted).

Moreover, courts "are not free to rewrite the statute that Congress has enacted." *Dodd*, 545 U.S. at 359. Under the district court's rule, however, no plaintiff who substantially prevails under the "not insubstantial" standard enacted by Congress will ever receive fees unless he also would have prevailed had Congress, instead, passed a statute stating that a complainant substantially prevails if he obtains relief through "a voluntary or unilateral change in position by the agency, *if the complainant would have prevailed on the merits had the case been litigated to judgment*." Thus, in refusing to award fees if the defendant's decision to withhold was correct, the lower court effectively rewrote the statute from saying that a court may award fees to a plaintiff who receives relief through a unilateral change in position by the government as long as the plaintiffs' claim is not insubstantial to saying that the court may award fees to such a plaintiff as long as the plaintiff's position was correct.

Congress's choice of "not insubstantial" as the standard for determining whether a plaintiff can be awarded fees was deliberate—indeed, it was much-deliberated. The original version of the OPEN Government Act stated that a plaintiff could be awarded fees under the catalyst theory if his claim "was not frivolous." *See* S. 849, 110th Cong. § 4 (2007) (as introduced in Senate). Senator Kyl, however, thought the "not frivolous" language would set too low a standard,

and, after negotiating with other members of the Senate, introduced an amendment that changed the standard to "not insubstantial." *See* 153 Cong. Rec. S10987, S10989 (statement of Sen. Kyl). The Court should not write this carefully chosen provision out of the statute by holding that plaintiffs' claims must not just be "not insubstantial" to justify fees, but must also be correct.

II. Legislative History and Policy Considerations Confirm That Congress Did Not Intend for FOIA Plaintiffs Who Receive Relief Through a Unilateral Change in Position by the Government and Whose Claims Are Not Insubstantial to Be Barred from Receiving Fees If a Court Determines That the Government's Original Position Was Correct.

The legislative history of the OPEN Government Act demonstrates that Congress understood that, under the language it adopted, plaintiffs with claims that were "not insubstantial" would be able to receive attorney fees even if the government's position were actually correct.

In a floor statement, Senator Kyl explained that the "not insubstantial" standard "is a pretty low standard [that] would allow the requester to be deemed a prevailing party for fee-assessment purposes even if the government's litigating position was entirely reasonable—or even if the government's arguments were meritorious and the government would have won had the case been litigated to a judgment." 153 Cong. Rec. S10989. And he explicitly noted that application of the entitlement factors would not prohibit the award of fees when the

government's position was correct on the merits. "Agencies will still be protected by the discretionary factors considered in the fee-shifting system," he explained, "but the lacks-a-reasonable-legal-basis factor is not always controlling and does not create a guaranteed safe harbor." *Id*. The "not insubstantial" provision, he noted, "will sometimes require the payment of fees to a party whose litigation position lacked merit." *Id*. Thus, even the Senator who expressed the most concern about whether defendants whose positions were correct as a matter of law should have to pay attorney fees recognized, contrary to the decision below, that the enacted language allows that exact result.[3]

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[3]The four entitlement factors to which this Court has looked in determining whether a substantially prevailing party is entitled to fees were also drawn from legislative history—the legislative history of the 1974 amendment that added the original attorney fee provision to FOIA. *See* S. Rep. No. 93-854 (1974), reprinted in H. Comm. on Gov't Operations, S. Comm. on Judiciary, 94th Cong., *Freedom of Information Act & Amendments of 1974, Source Book: Legislative History, Texts, & Other Documents*, at 171 (1975) (Joint Comm. Print) ("Source Book"). Considering only the merits of the government's claim in determining whether to award fees, to the exclusion of all other factors, is inconsistent with this legislative history as well.

The four factors were originally included in the Senate version of the 1974 amendments, *see id.*, but were excluded from the final version of the bill by the conference committee, which believed that "a statement of the criteria may be too delimiting and is unnecessary" in light of "the existing body of law on the award of attorney fees." H.R. Conf. Rep. No. 93-1380 (1974), in Source Book at 227. Existing case law construed similar attorney fee provisions to require an award of fees to a prevailing party, "unless special circumstances would render such an award unjust." *See, e.g., Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968). Moreover, even when the four factors were in the bill's text, the Senate Report explained that they were "intended to provide guidance and direction—not airtight standards—for the

In discussing why the "not insubstantial" language was chosen, Senator Kyl explained that the standard was "well-suited to evaluating attorney's fee requests [because] the 'insubstantiality' of a claim is a quality 'which is apparent at the outset.'" *Id*. (quoting *Rosado v. Wyman*, 397 U.S. 397, 404 (1970)). "It is a standard that courts should be able to apply without further factual inquiry into the nature of a complaint." *Id*.; *see also Miller v. Staats*, 706 F.2d 336, 341 n.31 (D.C. Cir. 1983). ("The [substantiality] standard requires courts to dismiss fee claims based on wholly frivolous lawsuits, but simultaneously constrains them from holding a full trial, or from making ad hoc predictions about plaintiff's chance for success, on the merits.").

In contrast, declaring the merits of the defendant's position dispositive of whether a plaintiff is entitled to fees threatens to turn every motion for attorney fees into "a second major litigation." 153 Cong. Rec. S10989 (quoting *Buckhannon*, 532 U.S. at 609); *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major

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courts to use in determining awards of fees," and that each factor "should be considered independently, so that, for example, newsmen would ordinarily recover fees even where the government's defense had a reasonable basis in law." S. Rep. No. 93-854, in Source Book at 171-72. Thus, even the source of the four entitlement factors demonstrates that Congress never intended for the merit of the government's position, on its own, to be determinative of whether a plaintiff is awarded fees.

litigation"). In determining whether the plaintiff is entitled to fees, the court will have to decide the merits of the underlying case, even if the parties settled precisely so that they could avoid briefing and a judgment on the issue. Full litigation of the merits of the case, however, requires considerable investment of resources by the parties and the judiciary. And the incentives to settle a case before judgment will be reduced if, absent a settlement on fees as well as on the merits, the parties have to engage in the exact litigation they sought to avoid through settlement.

This case illustrates the problem. Although USTR's release of the requested agreement relieved the district court of the need to determine the merits of defendant's exemption claim during the merits stage of the litigation, the court felt the need to address that exact question in resolving the motion for fees. And the problem would have been exacerbated had the defendant released the record earlier in the course of litigation. Here, the parties had at least fully briefed the merits on cross-motions for summary judgment, so they could refer to their memoranda and supporting declarations in their fee motions. Had USTR released the agreement before the issue was fully briefed, the parties would have had to brief the merits of USTR's decision to withhold the document and prepare and submit declarations in support of those briefs for the first time in the fee motion,

even if USTR had released the document precisely to avoid having to litigate that issue.

Moreover, when the court decides the merits of the case at the attorney-fee stage, it sets precedent on the underlying issue, even though that issue itself is not before the court. Here, for example, although the question whether the requested agreement was properly classified and exempt from disclosure under FOIA became moot in November 2008, when USTR released the agreement to Brayton, the district court issued an opinion on that important Exemption 1 issue in September 2009, when it denied Brayton's motion for attorney fees. But precedent on important FOIA issues, which can have far-reaching consequences for the parties and the public beyond the particular suit in question, should not be established through the back door of attorney-fee litigation. *Cf. Pierce v. Underwood*, 487 U.S. 552, 561 (1988) (in the context of attorney fees under the Equal Access to Justice Act, 5 U.S.C. § 2412(d), cautioning against establishing "circuit law in a most peculiar, secondhanded fashion"). Brayton has chosen not to appeal the district court's determination that the requested agreement was exempt from disclosure—although he believes the district court erred in so holding and such an appeal would provide another ground for reversal of the

district court's decision—because he does not believe that precedent on merits issues should be set through fee litigation.

In short, the statutory text and legislative history of the OPEN Government Act demonstrate that Congress intended at least some plaintiffs who obtained relief through a voluntary or unilateral change in position by the defendant and whose claims were not insubstantial—but who would not have won on the merits—to be able to receive fees, a conclusion that is supported by policy considerations against multiplying litigation. After the 2007 amendments, a determination that the agency's legal position was correct cannot, on its own, be dispositive of whether a plaintiff is awarded fees in a case in which the plaintiff received relief through a voluntary or unilateral change in position by the agency. Other factors relevant to whether the plaintiff is entitled to fees must be considered as well. Accordingly, the district court erred as a matter of law and hence abused its discretion in denying Brayton fees without considering any factor other than whether the defendant's decision to withhold the compensation agreement was correct.

CONCLUSION

For the foregoing reasons, the district court's decision should be vacated and the case should be remanded for further consideration of plaintiff's motion for attorney fees and costs.

Respectfully submitted,

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May 13, 2010

RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (WordPerfect), the brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 5,031 words.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that on this date, May 13, 2010, I am electronically filing this brief through the ECF system, which will send a notice of electronic filing to counsel for all parties in this case.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum