

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE COUNCIL,)
)
Plaintiff,)
) 01-2545 (GK)
v.)
)
DEPARTMENT OF ENERGY,)
)

Defendant.)

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S EXPEDITED MOTION
FOR AN ORDER TO SHOW CAUSE AS TO WHY DEFENDANT SHOULD NOT BE
HELD IN CONTEMPT, AND REQUEST FOR A STATUS HEARING**

Introduction

Despite this Court's Order that defendant Department of Energy ("DOE") take the necessary steps to complete the processing of plaintiff Natural Resources Defense Council's April 2001 Freedom of Information Act request, and "provide plaintiff Natural Resources Defense Council (NRDC) with a package" containing "the vast majority" of the records responsive to that request by "no later than March 25, 2002," see Order of Feb. 21, 2002, that day came and went without DOE providing responsive records to NRDC. See Second Declaration of Sharon Buccino ("Buccino Decl."), ¶ 7. Instead of taking the steps necessary to comply with the letter and spirit of the Court's Order, DOE devoted assertedly scarce resources to (a) allowing some of the documents to be selectively released to the media several days before March 25th; (b) preparing a detailed 23 page summary of DOE's slanted characterization of these records to provide to the media on March 25th; and (c) distributing copies of the records and DOE's summary to multiple parties other than NRDC on the evening of March 25th. Id., ¶¶ 5, 8, 12.

In light of these events, NRDC seeks appropriate relief. First, given defendant's apparently willful failure to comply with the Court's Order by refusing to timely provide responsive records to NRDC, the Court should issue a Show Cause Order instructing DOE to explain why the agency should not be held in contempt. Second, in light of the substantial time and staff resources DOE now apparently has available to handle this FOIA request -- e.g., with selective records being made available for early release and with DOE preparing a detailed "summary" of the long-secret documents -- NRDC can see no reason why DOE should not be required to immediately disclose the remaining documents and the Vaughn index. Moreover, in light of what has transpired, DOE should be directed to provide any additional materials directly to NRDC no later than Noon on the due date. To address these matters, plaintiff respectfully requests a Status Hearing as promptly as possible.

BACKGROUND

A. Plaintiff's Motion for Release of Records and The Court's February 21, 2002 Order

As plaintiff detailed in its Motion for Release of Responsive Records, for close to a year DOE has stonewalled NRDC's Freedom of Information Act ("FOIA") request, 5 U.S.C. § 552, as amended, for records related to the Vice-President's Energy Task Force. See Memorandum in Support of Plaintiff's Expedited Motion for Release of Responsive Records and for a Vaughn Index at 1-3. Thus, at the same time the Administration has been administratively implementing many of the Task Force's recommendations, and is asking Congress to pass legislation to implement others, DOE, and other agencies, have been refusing to let the public know answers to fundamental questions concerning who was consulted in developing these recommendations. Id.

After DOE Answered plaintiff's Complaint in this action in January 2002, the agency suggested that NRDC might obtain responsive records in approximately three more months. Id. at 8. In light of DOE's continued stonewalling, plaintiff asked the Court to Order DOE to provide responsive records, and a Vaughn index concerning any records withheld. Id. at 12.

DOE responded to plaintiff's Motion by claiming that the agency was busy working on the Request, but, in light of limited resources, would need several more months to complete the process. See Defendant's Opposition to Plaintiff's Expedited Motion for Release of Responsive Records at 6. In the sworn declaration accompanying defendant's brief, DOE FOIA Officer Abel Lopez asserted that were the Court to order an expedited release of the records, "it would disrupt the operations of the FOIA division." Declaration of Abel Lopez ("Lopez Decl."), ¶ 36.

On February 21, 2002, the Court granted plaintiff's Motion. See NRDC v. DOE, 2002 WL 276357 (D.D.C. Feb. 21, 2002). Questioning "what in the world Department personnel were doing from July 2001 through December 2001 when they were conducting 'periodic' reviews" of responsive records, the Court found that DOE "has been woefully tardy in its processing of Plaintiff's FOIA request." Id. at *1. The Court explained that "in addition [to DOE's] having no legal, or practical, justification for working at a glacial pace on Plaintiff's FOIA request until suit was filed in December, the material which plaintiff seeks is of extraordinary public interest." Id. at *2. Noting plaintiff's concerns about the "current implementation of the Task Force's recommendations and their environmental implications, about the secrecy in which the Task Force operated, the participation of various non-governmental officials who were consulted in developing the Task Force's recommendations, and whether there was compliance with the Federal Advisory Committee Act," the

Court concluded that "[t]he government can offer no legal or practical excuse for its excessive delays" Id.

In light of these findings, the Court issued an Order requiring that DOE produce responsive records to NRDC on three dates. First, the Court Ordered DOE to provide NRDC "with a package" containing "the vast majority of the non-exempt materials" "no later than March 25, 2002." Second, the Court Ordered DOE to provide NRDC "with a final package of all non-exempt records, and parts of records," "no later than April 10, 2002." Third, the Court Ordered DOE to provide NRDC with a complete Vaughn index concerning withheld records "no later than April 25, 2002." See Order of Feb. 21, 2002.

B. Developments Since the Court's Order

During the past several weeks, plaintiff's counsel has had several telephone conversations with defendant's counsel concerning the production of documents due on March 25, 2002. See Buccino Decl., ¶¶ 2, 4-6; Second Declaration of Howard Crystal ("Crystal Decl."), ¶¶ 2-8. When defendant's counsel initially suggested that the documents might not be produced until March 26th, plaintiff's counsel wrote defendant's counsel to clarify that DOE was required to "mak[e] these documents available on March 25th." See Crystal Decl., ¶ 3 and Attachment 1 (letter of Mar. 15, 2002).

Late last week plaintiff's counsel sought to confirm specifically the time and manner in which DOE would comply with the Court's Order on March 25th. By the end of last week, plaintiff's counsel and defendant's counsel had agreed that the documents would be produced on the 25th, and that they would be delivered directly to NRDC. Id., ¶ 5; Buccino Decl., ¶ 4. On Friday afternoon, March 22,

2002, defendant's counsel promised to find out several details, including precisely when the documents would be delivered, and whether they would include some kind of index. Id.

In the meantime, on March 22, 2002, a story in the Washington Post indicated that the administration had already selectively released some of these documents to the media. See Mike Allen, "Energy Department Says It Tried To Engage Green Groups," Mar. 22, 2002 at A25. The story explained DOE's "spin" that responsive documents to NRDC's request showed that the Task Force participants tried to consult with environmental groups in forming their recommendations. Id. Yet, while the administration had found the resources to provide these selective documents to the media, no documents were provided to NRDC at that time. Buccino Decl., ¶ 5.

On the morning of March 25, 2002, plaintiff's counsel called defendant's counsel to find out when to expect the documents that day. Defendant's counsel stated that he would get back to plaintiff's counsel with a response. Id., ¶ 6; Crystal Decl., ¶ 6. However, by early afternoon defendant's counsel had not called plaintiff's counsel back, despite several phone messages. Plaintiff's counsel then faxed defendant's counsel a letter stating that, unless the documents were going to be produced by close of business -- i.e., 5 pm -- plaintiff would seek an immediate telephonic hearing with the Court. Crystal Decl., ¶ 7, and Attachment 2 (letter of Mar. 25, 2002).

Shortly thereafter, defendant's counsel represented that he understood NRDC would receive the documents by 5pm, and would confirm that fact as soon as he could. Id., ¶ 8. A little later, defendant's counsel called again, and informed plaintiff's counsel that the documents would be

delivered, to NRDC, sometime between 5pm and 7pm that day. Counsel also indicated that there was an index which accompanied the documents. Id.¹

Because of these representations, plaintiff agreed not to pursue an immediate Court hearing. Crystal Decl., ¶ 8. Instead, plaintiff's representatives waited patiently at their offices for hours for the documents which the Court had Ordered DOE to deliver. Buccino Decl., ¶ 7. In light of the "extraordinary public interest" in this material, NRDC, 2002 WL *2, plaintiff had assembled a team of approximately thirty staff people to work on immediate review of the material. Buccino Decl., ¶ 7.

Seven o'clock, and then eight o'clock, came and went, and no package was delivered to NRDC. Id. In the meantime, at approximately 8:30 pm NRDC found out that representatives of the media -- but not NRDC -- had learned that at 8:00 pm DOE would be making copies of the records DOE had been ordered to produce to NRDC available at DOE headquarters. Id., ¶ 8. Thus, at 8 pm copies of these records were provided to others, but not to NRDC. Id. The copies provided at that time also included a lengthy briefing paper DOE had prepared, providing more of DOE's "spin" on the documents' contents, including that the Task Force Report somehow represented NRDC's own views. Id., ¶ 12 and Attachment 2 (DOE's Press Release and "Summary").²

¹ Defendant's counsel also informed plaintiff's counsel that DOE intended to make the records available electronically in the next several days. Crystal Decl., ¶ 8.

² That 23 page Summary includes (a) a lengthy press release arguing that the documents demonstrate an "Open Process with both Environmental and Industry Views Represented"; (b) a seven page Table purporting to demonstrate which recommendations by NRDC and other groups the Task Force adopted; and (c) separate summaries purporting to detail the recommendations of the National Mining Association, the Nuclear Energy Institute, the New Democrats, and NRDC, and which of those recommendations were incorporated into the Task Force's Report. See Buccino Decl., Att. 2.

Once NRDC learned that the documents were available at DOE, NRDC sent two staff members to DOE headquarters. Id., ¶ 10. The staff members were given three boxes, which appear to contain NRDC's "package" of documents, and which included a cover letter to NRDC. Id., ¶ 11 and Attachment 1 (cover letter). NRDC finally obtained this package at approximately 9:00 pm that night. Presumably, had NRDC not learned that others had already obtained these materials, and that they were "available" at DOE headquarters, NRDC still would not have them. Moreover, the agency did not include DOE's Summary in the package to NRDC, which NRDC obtained elsewhere. Id., ¶ 12.³

ARGUMENT

A. The Court Should Issue an Order to Show Cause As To Why DOE Should Not Be Held In Contempt.

It is well established that “an order of the court . . . , by its very nature, vests the court with equitable discretion to enforce the obligations imposed on the parties.” United States v. Local 359, 55 F.3d 64, 69 (2d Cir. 1995); see also Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (“there can be no question that courts have inherent authority to enforce compliance with their lawful orders,” quoting Shillitani v. United States, 384 U.S. 364, 370 (1966)). In addition, the district court “has both an inherent and a statutory power to enforce compliance with its orders and may exercise that authority through civil contempt.” Petties v. District of Columbia, 897

³ Although DOE had represented to the Court that it had completed its search and identified 7,500 responsive records, see Lopez Decl., ¶ 30, apparently the search was not complete, because DOE's release included approximately 11,000 pages, see Buccino Decl., Att. 2 -- although many of those pages are heavily redacted. Id., ¶ 13.

F.Supp. 626, 629 (D.D.C. 1995), citing 18 U.S.C. § 401. This “inherent power enables the courts to protect their institutional integrity and to guard against abuses of the judicial process with contempt citations, fines, awards of attorneys fees, and such other orders and sanctions as they find necessary” Cobell v. Babbitt, 37 F.Supp.2d 6, 9 (D.D.C. 1999), quoting Shepherd v. ABC, Inc., 62 F.3d 1469, 1472 (D.C. Cir. 1995).

On its face, the Court's Order here is clear and unambiguous -- it compels DOE to "provide Natural Resources Defense Council with a package of non-exempt records, and parts of records, responsive to NRDC's April 2001 Freedom of Information Act (FOIA) request no later than March 25, 2002." See Order of Feb. 21, 2002. However, DOE did not deliver the documents to NRDC during normal business hours, or, for that matter, at any time, as obviously contemplated by the Court, and agreed-upon by the parties.

Moreover, as noted above, before the first due date provided by the Court's Order, plaintiff made every reasonable effort to arrange with DOE the precise manner in which that production would take place. Thus, DOE confirmed that the documents would be delivered directly to NRDC, and plaintiff's counsel even provided defendant's counsel with several alternative telephone numbers to ensure that the documents could be delivered. Buccino Decl., ¶ 4. In addition, plaintiff's counsel made numerous attempts to find out precisely what time the documents would be provided. Id., ¶¶ 4,6; Crystal Decl., ¶¶ 2-8. Indeed, when defendant's counsel was refusing to tell plaintiff the precise time, plaintiff insisted that the materials be provided by 5pm, and explained that otherwise plaintiff's counsel would seek an immediate hearing with the Court. Id., ¶ 7 and Att. 2. It was only because, in response

to this demand, DOE's counsel promised that the documents would be delivered to NRDC by 7 pm, that NRDC agreed not to seek the Court's intervention at that time. Id., ¶ 8.

Despite all these efforts, and despite DOE's counsel's express representations, DOE failed to provide the records to NRDC as Ordered by the Court and as promised by DOE's counsel. Instead, the only reason NRDC obtained these records at all is that NRDC's staff learned that others had obtained copies of the records by going to DOE headquarters, and they sent representatives to DOE headquarters to demand NRDC's copy. Thus, only by taking these affirmative steps was NRDC able to obtain the records the Court had Ordered DOE to produce to NRDC, and this did not occur until close to 9:00 pm on the 25th. Buccino Decl, ¶¶ 7-11.⁴

However, at the same time DOE was refusing to comply with this Court's Order, the agency was apparently devoting its resources to making available selective releases of these documents before March 25th, and to making multiple copies available to others on March 25th. See supra at 5. Thus, rather than use its resources to comply with the FOIA, or with the Court's Order, DOE chose to use its resources for other purposes.

In light of these events, plaintiff requests that the Court issue an Order to Show Cause insisting that DOE explain why it should not be held in contempt. Given that DOE failed to (a) provide the documents to NRDC during normal business hours -- i.e., 5 pm; (b) did not provide them to NRDC within the time frame DOE itself promised -- i.e., 7 pm; (c) never delivered the documents to NRDC as

⁴ Although plaintiff's counsel and NRDC in-house counsel left defendant's counsel several messages concerning the failure to comply with the parties' agreed-upon schedule, plaintiff has not heard from defendant. Crystal Decl., ¶ 9; Buccino Decl., ¶ 9.

promised; and (d) instead made the materials, and a detailed summary, available to others, DOE should at the very least be required to explain to plaintiff and the Court how it has acted consistently with the FOIA, the Court's Order, and with the representations it made to the Court concerning its limited resources, see Lopez Decl., ¶ 36. See, e.g., Food Lion v. United Food & Commercial Workers Union, 103 F.3d 1007, 1019 (D.C. Cir. 1997) (finding contempt where party “did not seek a clarification of [the court’s] order, nor did it ask for an extension of the [] deadline for compliance”). Moreover, given DOE's counsel's misrepresentations to plaintiff's counsel -- misrepresentations upon which plaintiff relied in deciding not to seek Court intervention Monday -- it seems apparent that, without a finding of contempt, DOE cannot be expected to be candid with the Court, and opposing counsel, in the future.

Plaintiff certainly does not propose this lightly, and is not seeking a contempt citation at this time. Instead, as a next step the Court should issue a Show Cause Order permitting DOE to explain to the Court why the agency should not be found in contempt. Once DOE has responded to that Order, plaintiff will propose an appropriate next step to address this issue, including appropriate discovery should that prove necessary in light of DOE's submission to the Court. Because of DOE's apparently willful violation of the Court's Order, as agreed upon by the parties, has plaintiff reluctantly concluded that only by initiating contempt proceedings can DOE be shown the need to scrupulously comply with this Court's Orders in the future.

B. The Court Should Hold A Status Hearing To Address Steps To Ensure That the Remaining Materials Are Delivered To NRDC As Promptly As Possible And Without Further Evasions By DOE.

In light of DOE's admitted violations of the FOIA in this case, plaintiff had originally asked the Court to Order DOE to produce all responsive records and a Vaughn index within ten days. See Expedited Motion for Release of Responsive Records. In responding to this request, DOE's only purported defense to plaintiff's time line for the production of these materials was that it would be an undue burden on the agency's purportedly limited staff and resources. See Lopez Decl., ¶ 36.

However, in the past week it has become evident that, contrary to Mr. Lopez' assertions, DOE apparently has a great deal of resources to devote to this matter. Thus, for example, the administration was able to comb through documents in order to provide the media with a selective release of materials on March 22, 2002 -- without, of course, DOE providing those records to NRDC at that time. Buccino Decl., ¶ 5.

Similarly, DOE had the resources, on March 25th, to prepare multiple copies of the records, and to contact the media and make those documents available at approximately 8:00 pm last evening -- again, without informing NRDC at all. Buccino Decl., ¶¶ 8-9.

Finally, and perhaps most insidiously, DOE had the resource to prepare its own, 23 page summary of the documents, which purports to provide the Administration's view of the documents' contents. Id., Att. 2. That Summary, for example, falsely asserts that many of NRDC's

recommendations were incorporated in to the Task Force's recommendations. Id. It also argues that the Task Force considered both industry and conservation viewpoints. Id., Att. 1 at 1.⁵

Certainly, if DOE has the extra resources to engage in all these activities related to the FOIA request, it presumably has the resources to complete the production of responsive records, and the Vaughn Index, in short order. Accordingly, plaintiff respectfully requests that the Court hold a Status Hearing as promptly as possible to consider expediting the release of any remaining responsive records, and the production of a complete Vaughn index. Indeed, particularly given the redactions provided thus far, it is evident that plaintiff will not obtain some of the most critical material to which it is entitled until after yet another round of briefing, challenging the patent inadequacy of DOE's withholdings. The sooner that process can begin, the sooner NRDC can finally obtain the records to which the organization is statutorily entitled under the FOIA.⁶

In addition, in light of what has occurred, on any date a production of materials is due to NRDC, DOE should be directed to provide those materials directly to NRDC's offices no later than Noon on that day. See Securities Ind. Assn v. Board of Gov. of the Fed. Reserve System, 628 F. Supp. 1438, 1441 (D.D.C. 1986) ("Courts necessarily have the power to enter such orders as may be necessary to enforce and effectuate their lawful orders and judgments, and to prevent them from being

⁵ As the New York Times reports today, while DOE's "Summary" states that the Secretary of Energy met with 36 industry representatives on task force matters, the documents actually reveal that he "heard from more than 100 energy industry executives, trade association leaders and lobbyists" Don Van Natta Jr. and Neela Banerjee, "Documents Show Energy Official Met Only With Industry Leaders," New York Times, Mar. 27, 2002 at A1.

⁶ NRDC also has not received the complete index of the documents which defendant's counsel stated had been prepared, and this index should be released as well. See Crystal Decl., ¶ 8.

thwarted and interfered with by force, guile, or otherwise.") (other citations omitted); see also, e.g., Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) ("In shaping equity decrees, the trial court is vested with broad discretionary power."). Moreover, in the event DOE is able to provide some of those materials to others prior to the Court imposed deadline -- as has occurred thus far -- DOE should also be required to provide those materials to NRDC at that time. Given DOE's patent violations of the FOIA here, and plea of administrative burden in order to obtain more time, there is simply no excuse for DOE to use its resources to provide others with responsive materials before they are provided to NRDC. Once again, NRDC requests that these matters be addressed at a Status Hearing as soon as practicable.⁷

⁷ Alternatively, the Court should consider plaintiff's request for a Status Hearing as a Motion to modify the Court's February 21, 2002 Order to provide the additional relief outlined herein. A proposed Order providing this relief, including instructing DOE to provide all remaining materials, and a Vaughn index, by April 1, 2002, is attached.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the Court Order defendant to Show Cause as to why DOE should not be held in contempt, and set a Status Hearing to resolve the manner in which additional materials will be produced in response to NRDC's FOIA request.

Respectfully submitted,

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March 27, 2002