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NOTES

FEE AWARDS FOR PRO SE ATTORNEY AND NONATTORNEY PLAINTIFFS UNDER THE FREEDOM OF INFORMATION ACT

INTRODUCTION

Congress enacted the Freedom of Information Act (FOIA or Act)¹ in 1966 to encourage openness in the operation of government agencies and to provide for citizen access to government information in order to facilitate the informed deliberation essential to self-government.² In 1974, when it became clear that the Act was not serving

1. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1982)). The Act requires federal agencies to publish or make available for inspection a wide variety of descriptions, rules, statements, opinions, manuals, and records. *Id.* The FOIA specifically exempts from its requirements nine categories of government information: (1) defense or foreign policy documents classified pursuant to executive order, (2) matters related solely to internal personnel practices of the agency, (3) information specifically exempted by statute, (4) trade secrets and privileged commercial information, (5) inter-agency or intra-agency documents that would not be available to a party other than an agency in litigation with the agency, (6) personnel and other files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, (7) certain investigatory records compiled for law enforcement purposes, (8) matters related to reports prepared for an agency responsible for the regulation or supervision of financial institutions, or (9) geological or geophysical information and data concerning wells. 5 U.S.C. § 552(b) (1982). “[T]he exemptions in the FOIA were not intended by Congress to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they merely mark the outer limits of information that *may* be withheld . . .” Senate Comm. on the Judiciary, 93d Cong., 2d Sess., Freedom of Information Act Source Book 2 (Comm. Print 1974) [hereinafter cited as FOIA Source Book].

2. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 12 (1966) (“A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies.”), *reprinted in* 1966 U.S. Code Cong. & Ad. News 2418, 2429, *and in* FOIA Source Book, *supra* note 1, at 33; S. Rep. No. 813, 89th Cong., 1st Sess. 2-3 (1965) (“[A]n informed electorate is vital to the proper operation of a democracy . . .”), *reprinted in* FOIA Source Book, *supra* note 1, at 38; *see* H.R. Rep. No. 1419, 92d Cong., 2d Sess. 77 (1972) (“Congress passed the Freedom of Information Act in response to a persistent problem . . . of obtaining adequate information to evaluate Federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information . . .”) (quoting *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971)), *reprinted in* House Comm. on Government Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book 8, 84 (Joint Comm. Print 1975) [hereinafter cited as *Amdts. Source Book*]; Kennedy, *Foreward: Is the Pendulum Swinging Away From Freedom of Information?*, 16 Harv. C.R.-C.L. L. Rev. 311, 317 (1981) (“Public access to government information is a cornerstone of democratic institutions.”).

these functions as well as Congress had intended,³ Congress amended

The Freedom of Information Act as originally passed in 1966 was an attempt to remedy the failures of § 3 of the Administrative Procedure Act (APA), Pub. L. No. 404, ch. 324, 60 Stat. 237, 238 (1946), the "first Congressional attempt to formulate a general statutory plan to aid in free access" to government information. FOIA Source Book, *supra*, at 6. Section 3 of the APA, because of its vague wording and broad enumeration of exceptions, quickly became a vehicle for agency secrecy rather than a mechanism for disclosure. H.R. Rep. No. 1419, 92d Cong., 2d Sess. (1972), *reprinted in Amdts. Source Book, supra*, at 9; H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6 (1966), *reprinted in 1966 U.S. Code Cong. & Ad. News 2418, 2422-23, and in FOIA Source Book, supra* note 1, at 26-27; S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in FOIA Source Book, supra* note 1, at 38.

The original FOIA required publication or disclosure by government agencies of a wide variety of documents, Pub. L. No. 89-487, § 3(a)-(b), 80 Stat. 250, 250-251 (1966) (codified as amended at 5 U.S.C. § 552(a)(1)-(2) (1982)), and set out nine specific exemptions to the disclosure requirement. *Id.* at 251. The FOIA made three major changes in the governmental disclosure system by (1) eliminating the APA requirement that the requester be "properly and directly concerned" with the information, (2) placing the burden on the government to prove that the requested information fit within an exemption, H.R. Rep. No. 1419, 92d Cong., 2d Sess. 3 (1972), *reprinted in Amdts. Source Book, supra*, at 10, and (3) providing for judicial review of agency denials of disclosure. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1-2 (1966), *reprinted in 1966 U.S. Code Cong. & Ad. News 2418, 2419, and in FOIA Source Book, supra* note 1, at 23. Private litigation was to be the FOIA's enforcement mechanism. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965), *reprinted in FOIA Source Book, supra* note 1, at 43; H.R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966), *reprinted in 1966 U.S. Code Cong. & Ad. News 2418, 2426, and in FOIA Source Book, supra* note 1, at 30. The importance of judicial enforcement proceedings is further evidenced by the provision that FOIA court actions be "expedited in every way." 5 U.S.C. § 552(a)(4)(D) (1982). It was clear, however, that "[t]he success of the FOIA [was] . . . inextricably a function of the cooperative spirit with which the agencies administer the Act." Note, *The Freedom of Information Act: A Seven Year Assessment*, 74 Colum. L. Rev. 895, 908 (1974); *see* Nader, *Freedom From Information: the Act and the Agencies*, 5 Harv. C.R.-C.L. L. Rev. 1, 2 (1970); Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 Notre Dame Law. 417, 441 (1964-1965).

3. *See* S. Rep. No. 854, 93d Cong., 2d Sess. 2-4 (1974) [hereinafter cited as Senate Report], *reprinted in Amdts. Source Book, supra* note 2, at 154-56; H.R. Rep. No. 1419, 92d Cong., 2d Sess. 8-9 (1972), *reprinted in Amdts. Source Book, supra* note 2, at 15-16. Especially discouraging were reports of bureaucratic foot-dragging and agency delaying tactics. *See* H.R. Rep. No. 1419, 92d Cong., 2d Sess. 20-42 (1972), *reprinted in Amdts. Source Book, supra* note 2, at 27-49; Katz, *The Games Bureacrats Play: Hide and Seek Under the Freedom of Information Act*, 48 Tex. L. Rev. 1261, 1262, 1284 (1970); Nader, *supra* note 2, at 5-13. Public interest and media groups, who had been among the FOIA's main proponents in 1966, were making little use of the statute. Senate Report, *supra*, at 17-18, *reprinted in Amdts. Source Book, supra* note 2, at 169-70; H.R. Rep. No. 1419, 92d Cong., 2d Sess. 8, 16-17 (1972), *reprinted in Amdts. Source Book, supra* note 2, at 15, 23-24; *see also* Loftus, *New Freedom of Information Law: Fact-Seekers Testing Its Effectiveness*, N.Y. Times, Feb. 18, 1968, at 61, col. 2 ("Delay is often the equal of denial. What is news today may be worthless tomorrow."), *reprinted in Senate Comm. on the Judiciary, 90th Cong., 2d Sess., The Freedom of Information Act (Ten Months Review) 183, 185 (1968)* [hereinafter cited as Ten Months Review]. Many of the difficulties could

the Act⁴ to provide a more useful tool for citizens seeking government information.⁵ The 1974 amendments include a provision, section (a)(4)(E) of title 5 of the United States Code, authorizing courts that hear FOIA cases to "assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which the complainant has substantially prevailed."⁶ A primary purpose of this section was to encourage citizen suits to enforce the

be traced to the "cumbersome and costly legal remedy." H.R. Rep. No. 1419, 92d Cong., 2d Sess. 8 (1972), *reprinted in* Amdts. Source Book, *supra* note 2, at 15.

The high cost of litigation meant that few requesters could afford judicial review of agency denials of disclosure. H.R. Rep. No. 1419, 92d Cong., 2d Sess. 73-74 (1972), *reprinted in* Amdts. Source Book, *supra* note 2, at 80-81. Those individuals who could litigate were confronted with the tremendous legal and monetary resources of the government. *Id.* at 74, *reprinted in* Amdts. Source Book, *supra* note 2, at 81; Senate Report, *supra*, at 3, *reprinted in* Amdts. Source Book, *supra* note 2, at 155. Furthermore, agency delays in filing responsive pleadings meant that information ultimately released would often be received too late to be of any use, especially for the media. H.R. Rep. No. 1419, 92d Cong., 2d Sess. 74-76 (1972), *reprinted in* Amdts. Source Book, *supra* note 2, at 81-83; *see Koch, The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 Md. L. Rev. 189, 196-97 (1972). Congress did note that in the few FOIA cases that were litigated, courts (especially in the District of Columbia) had been diligent in enforcing the statute, H.R. Rep. No. 1419, 92d Cong., 2d Sess. 70-73 (1972), *reprinted in* Amdts. Source Book, *supra* note 2, at 77-80, and that in some cases the mere filing of a lawsuit led to disclosure by the agency. *Id.* at 26, 73, *reprinted in* Amdts. Source Book, *supra* note 2, at 33, 80; *see Loftus, supra*, at 61, col. 2, *reprinted in* Ten Months Review, *supra*, at 184.

4. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552 (1982)). The 1974 amendments were passed over a veto by President Gerald R. Ford. *See* Amdts. Source Book, *supra* note 2, at 398-480 & app. 1 (President's veto message).

Congress recognized that "the primary obstacles to the Act's faithful implementation by the executive branch have been procedural rather than substantive." Senate Report, *supra* note 3, at 1, *reprinted in* Amdts. Source Book, *supra* note 2, at 153. Of the eleven major changes made in the statute in 1974, nine were procedural provisions designed to ease citizen access to government documents and to facilitate judicial review of agency refusals to disclose information. *See* Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act app. III-B, attachment D, *reprinted in* Amdts. Source Book, *supra* note 2, at 571.

5. The general purposes of the 1974 amendments were "to facilitate freer and more expeditious public access to government information, to encourage more faithful compliance with the terms and objectives of the FOIA, to strengthen the citizen's remedy against agencies and officials who violate the Act, and to provide for closer congressional oversight of agency performance under the Act." Senate Report, *supra* note 3, at 1, *reprinted in* Amdts. Source Book, *supra* note 2, at 153.

6. Act of Nov. 21, 1974, Pub. L. No. 93-502, § (b)(2), 88 Stat. 1561, 1562 (1974) (codified at 5 U.S.C. § 552(a)(4)(E) (1982)). The 1974 amendments also established alternate venue in the District of Columbia for all FOIA actions. *Id.* at 1562 (codified at 5 U.S.C. § 552(a)(4)(B) (1982)).

substantive provisions of the FOIA,⁷ but the attorney fee section itself has engendered a great deal of litigation.⁸

One issue that has not been uniformly resolved is whether pro se plaintiffs are eligible for attorney fee awards.⁹ This difficulty is further complicated when the pro se plaintiff is also an attorney. In the District of Columbia Circuit, for example, fees are available for all

7. Senate Report, *supra* note 3, at 18, reprinted in Amdts. Source Book, *supra* note 2, at 170; *The Freedom of Information Act: Hearings on H.R. 5425 and H.R. 4960 Before a Subcomm. of the House Comm. on Gov't Operations*, 93d Cong., 1st Sess. 272 (1973) [hereinafter cited as *House Hearings*] (testimony of John Shattuck, Staff Counsel, American Civil Liberties Union). See *infra* note 52 and accompanying text.

8. Of the 1751 FOIA cases reported by the Justice Department as of September 1983, more than 10% involved disputes over the attorney-fee provision. Office of Information and Privacy, United States Dep't of Justice, Freedom of Information Case List 289 (1983).

9. The majority position is that pro se plaintiffs are not eligible for fee awards under § (a)(4)(E). *Wolfel v. United States*, 711 F.2d 66, 68 (6th Cir. 1983); *Clarkson v. IRS*, 678 F.2d 1368, 1371 (11th Cir. 1982); *Cunningham v. FBI*, 664 F.2d 383, 388 (3d Cir. 1981); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1090 (5th Cir. 1981) (suit under Privacy Act, 5 U.S.C. § 552a (1982), and FOIA; court applied FOIA criteria), *cert. denied*, 455 U.S. 950 (1982); *Crooker v. United States Dep't of Justice*, 632 F.2d 916, 922 (1st Cir. 1980); *Burke v. United States Dep't of Justice*, 559 F.2d 1182, 1182 (10th Cir. 1977), *aff'g* 432 F. Supp. 251, 253 (D. Kan. 1976); *cf. Pitts v. Vaughn*, 679 F.2d 311, 313 (3d Cir. 1982) (no award to pro se litigant under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1976 & Supp. V 1981)); *Cofield v. City of Atlanta*, 648 F.2d 986, 987 (5th Cir. 1981) (same); *Lovell v. Snow*, 637 F.2d 170, 171 (1st Cir. 1981) (same); *Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (same); *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387, 389 (4th Cir.) (no fee award to pro se litigant under the Truth in Lending Act (TILA), 15 U.S.C. § 1640(a)(3) (1982)), *cert. denied*, 447 U.S. 923 (1980); *Hannon v. Security Nat'l Bank*, 537 F.2d 327, 329 (9th Cir. 1976) (same). A minority of courts, chiefly in the District of Columbia Circuit, has allowed pro se plaintiffs to collect fee awards. *Crooker v. United States Dep't of the Treasury*, 663 F.2d 140, 141 (D.C. Cir. 1980) (per curiam); *Cox v. United States Dep't of Justice*, 601 F.2d 1, 5-6 (D.C. Cir. 1979) (per curiam); *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977); *Jones v. United States Secret Service*, 81 F.R.D. 700, 702 (D.D.C. 1979); *Marschner v. United States Dep't of State*, 470 F. Supp. 196, 201 (D. Conn. 1979); *Holly v. Acree*, 72 F.R.D. 115, 116 (D.D.C. 1976), *aff'd by order sub nom. Holly v. Chasen*, 569 F.2d 160 (D.C. Cir. 1977). The Second Circuit has indicated that it might approve a fee award to a pro se litigant who can show that prosecution of the FOIA suit diverted time from income-producing activity. *Crooker v. United States Dep't of the Treasury*, 634 F.2d 48, 49 (2d Cir. 1980). For general discussions of the issue of pro se eligibility for FOIA attorney fees, see Note, *Attorney Fees For Pro Se Plaintiffs Under the Freedom of Information and Privacy Acts*, 63 B.U.L. Rev. 443 (1983) [hereinafter cited as *Attorney Fees*]; Comment, *Pro Se Litigant's Eligibility for Attorney Fees Under FOIA: Crooker v. United States Department of Justice*, 55 St. John's L. Rev. 520 (1981); 27 Vill. L. Rev. 1244 (1981-1982); 24 Wayne L. Rev. 1045 (1978); Annot., 56 A.L.R. Fed. 573 (1982).

plaintiffs,¹⁰ whereas in the Sixth Circuit, no pro se plaintiffs are eligible for fees.¹¹ Finally, the Fifth Circuit has held that although section (a)(4)(E) awards generally are not available for pro se plaintiffs, a pro se plaintiff is eligible for a fee award if he or she is an attorney.¹²

This Note argues that the purposes of the Act are best furthered if all plaintiffs are eligible for attorney fee awards. Part I analyzes the application of section (a)(4)(E) when the complainant has proceeded pro se. It argues that the wording of the provision is inconclusive but that the policies that led to its enactment can best be effectuated if fee award eligibility is construed to cover attorney and nonattorney pro se plaintiffs. Part II discusses the valuation problems presented by pro se legal work and concludes that the difficulty of these problems can be minimized by the exercise of judicial discretion in accordance with the policies underlying the Act.

I. APPLICATION OF SECTION (a)(4)(E)

Application of section (a)(4)(E) requires judicial determination of both the plaintiff's eligibility for and entitlement to an award of attorney fees. The threshold eligibility criterion is that the complainant has "substantially prevailed."¹³ Judicial interpretations of this criterion are nearly uniform. The plaintiff must establish that the prosecution of the suit was reasonably necessary to secure the documents and that the action has had a substantial causative effect on the disclosure of the requested information.¹⁴ Accordingly, it is not necessary that a court order directing disclosure be obtained to show that the plaintiff has substantially prevailed.¹⁵ This standard prevents an

10. *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977); *cf.* *Ellis v. Cassidy*, 625 F.2d 227, 230-31 (9th Cir. 1980) (pro se attorney defendants granted attorney fees in frivolous civil rights action).

11. *See* *Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983); *cf.* *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387, 389 (4th Cir.) (no attorney-fee awards for pro se plaintiffs under TILA), *cert. denied*, 447 U.S. 923 (1980); *Duncan v. Poythress*, 572 F. Supp. 776, 779-80 (N.D. Ga. 1983) (no attorney-fee award for pro se plaintiff under § 1988).

12. *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983).

13. 5 U.S.C. § 552(a)(4)(E) (1982).

14. *Lovell v. Alderete*, 630 F.2d 428, 432 (5th Cir. 1980); *Cox v. United States Dep't of Justice*, 601 F.2d 1, 6 (D.C. Cir. 1979) (per curiam); *Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976).

15. *See, e.g.*, *Lovell v. Alderete*, 630 F.2d 428, 432 (5th Cir. 1980); *Cox v. United States Dep't of Justice*, 601 F.2d 1, 6 (D.C. Cir. 1979) (per curiam); *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1364 (D.C. Cir. 1977); *Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976); *Kaye v. Burns*, 411 F. Supp. 897, 902 (S.D.N.Y. 1976).

agency from mooted the action by releasing the material before judgment in an attempt to avoid fee liability.¹⁶

If the plaintiff has substantially prevailed, the plaintiff has met the statutory threshold requirement for the award of attorney fees. At this stage the court must also decide as a matter of law if pro se attorney and nonattorney litigants are to be eligible for section (a)(4)(E) awards. Once the plaintiff before the court is determined to have met the threshold criteria, the decision whether the circumstances of the case justify making the award is within the discretion of the court.¹⁷ The Senate version of section (a)(4)(E)¹⁸ included four factors to be considered in the exercise of this judicial discretion: "[t]he benefit to the public, if any, deriving from the case,"¹⁹ "the commercial benefit to the complainant,"²⁰ "the nature of his interest in the records

16. *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 709-10 (D.C. Cir. 1977); *Marschner v. United States Dep't of State*, 470 F. Supp. 196, 200 (D. Conn. 1979).

17. *Lovell v. Alderete*, 630 F.2d 428, 431 (5th Cir. 1980); *Cox v. United States Dep't of Justice*, 601 F.2d 1, 7 (D.C. Cir. 1979) (per curiam); *Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976); Senate Report, *supra* note 3, at 19, *reprinted in* Amdts. Source Book, *supra* note 2, at 171; *see* *Blue v. Bureau of Prisons*, 570 F.2d 529, 533 (5th Cir. 1978); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 714 (D.C. Cir. 1977); 120 Cong. Rec. 6814 (1974) (remarks of Rep. Alexander).

18. S. 2543, 93d Cong., 2d Sess. § (a)(4)(E) (1974) (amendment proposed by Senate Comm. on the Judiciary) [hereinafter cited as Senate Version], *reprinted in* Senate Report, *supra* note 3, at 50-51, *and in* Amdts. Source Book, *supra* note 2, at 202-203 (codified as amended at 5 U.S.C. § 552(a)(4)(E) (1982)).

19. Senate Version, *supra* note 18, *reprinted in* Senate Report, *supra* note 3, at 50, *and in* Amdts. Source Book, *supra* note 2, at 202. The Senate Report noted that under this criterion, fees ordinarily would be awarded to media and public interest groups, but not to businesses which use the FOIA to obtain data about a competitor or as a substitute for discovery in litigation with the government. Senate Report, *supra* note 3, at 19, *reprinted in* Amdts. Source Book, *supra* note 2, at 171. Although every FOIA plaintiff acts to some degree in the public interest, *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1367 (D.C. Cir. 1977), courts require a public benefit greater than simple governmental compliance with the FOIA. *See* *Blue v. Bureau of Prisons*, 570 F.2d 529, 533 (5th Cir. 1978); *Maxwell Broadcasting Corp. v. FBI*, 490 F. Supp. 254, 257 (N.D. Tex. 1980). Emphasizing the congressional policy of FOIA disclosure as a mechanism for good government, courts take into account the degree of dissemination and the likely public impact of the information. An increase in the fund of information available for making political choices as a result of disclosure causes a corresponding increase in the public benefit deriving from the case. *Blue v. Bureau of Prisons*, 570 F.2d 529, 533-34 (5th Cir. 1978); *see* *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1053-54 (5th Cir. 1983); *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979); *Maxwell Broadcasting Corp. v. FBI*, 490 F. Supp. 254, 257 (N.D. Tex. 1980); *Consumers Union v. Board of Governors*, 410 F. Supp. 63, 64, (D.D.C. 1976).

20. Senate Version, *supra* note 18, *reprinted in* Senate Report, *supra* note 3, at 50, *and in* Amdts. Source Book, *supra* note 2, at 202. The Senate Report indicated that under this criterion fees would generally be recovered by indigents and nonprofit

sought,"²¹ and "whether the government's withholding of the records sought had a reasonable basis in law."²² The Senate Report stated that in a suit advancing the complainant's commercial interests, ordinarily there would be no need to award fees to insure that the action is brought.²³ A fee award would be mandated in such a situation, however, if the agency officials had been "recalcitrant in their opposition to a valid claim or [had] otherwise engaged in obdurate behavior."²⁴

The four factors were eliminated in conference because the committee believed that the existing law²⁵ on fee awards recognized such factors and that enumeration would be "too delimiting."²⁶ Nonethe-

public interest groups, but not by large corporate interests, and that news interests were not to be considered commercial. Senate Report, *supra* note 3, at 19, *reprinted in* Amdts. Source Book, *supra* note 2, at 171. This is interpreted as evidencing "a preference for public interest groups, indigents and disinterested scholars over private commercial enterprises' efforts for disclosure." *Blue v. Bureau of Prisons*, 570 F.2d 529, 534 (5th Cir. 1978); *see* *Veteran's Educ. Project v. Secretary of the Air Force*, 509 F. Supp. 860, 862 (D.D.C. 1981), *aff'd mem.*, 679 F.2d 263 (D.C. Cir. 1982); *Consumers Union v. Board of Governors*, 410 F. Supp. 63, 64 (D.D.C. 1981).

21. Senate Version, *supra* note 18, *reprinted in* Senate Report, *supra* note 3, at 50-51, *and in* Amdts. Source Book, *supra* note 2, at 202-03. The Senate Report envisioned that awards will generally be made when the requester's interest is scholarly or public-interest oriented, but not if it is of a frivolous or purely commercial nature. Senate Report, *supra* note 3, at 19, *reprinted in* Amdts. Source Book, *supra* note 2, at 171. For example, in a case in which a prisoner sought a United States Marshal's manual containing information regarding prison security and weaponry, the court described the relationship between the status of the plaintiff and the nature of the request as "obvious and potentially ominous." *Cox v. United States Dep't of Justice*, 601 F.2d 1, 7 n.4 (D.C. Cir. 1979) (*per curiam*).

22. Senate Version, *supra* note 18, *reprinted in* Senate Report, *supra* note 3, at 51, *and in* Amdts. Source Book, *supra* note 2, at 203. The Senate Report indicated that under this criterion no fee should be awarded "where the government's withholding had a colorable basis in law [but that the court should award fees] if the withholding appeared to be merely to avoid embarrassment or to frustrate the requester." Senate Report, *supra* note 3, at 19, *reprinted in* Amdts. Source Book, *supra* note 2, at 171. To meet this criterion, the withheld information need not in fact be exempt, as long as the agency's belief that it is exempt is reasonable. *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1365-66 (D.C. Cir. 1977); *see* *Kaye v. Burns*, 411 F. Supp. 897, 904 (S.D.N.Y. 1976).

23. Senate Report, *supra* note 3, at 19, *reprinted in* Amdts. Source Book, *supra* note 2, at 171.

24. *Id.*, *reprinted in* Amdts. Source Book, *supra* note 2, at 171.

25. The Conference Report does not explain what it means by "the existing body of law on attorney fees." H.R. Rep. No. 1380, 93d Cong., 2d Sess. 9 (1974) (conference report on 1974 amendments) [hereinafter cited as Conference Report], *reprinted in* Amdts. Source Book, *supra* note 2, at 227 (also published as S. Rep. No. 1200, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6285, 6288).

26. Conference Report, *supra* note 25, at 9, *reprinted in* Amdts. Source Book, *supra* note 2, at 227.

less, courts have consistently relied upon the four guidelines in determining both entitlement to and amount of fee awards.²⁷

A. *The Language of Section (a)(4)(E)*

Whether attorney and nonattorney pro se plaintiffs are eligible for section (a)(4)(E) awards is not made clear by the language of the statute. The semantic debate focuses on the word "incurred" in the phrase "reasonable attorney fees and other litigation costs reasonably incurred."²⁸ If "reasonably incurred" modifies only "other litigation costs," reasonable attorney fees may be awarded regardless of whether fee liability was actually incurred.²⁹ Under this reading of the provision, all pro se litigants would be eligible for fee awards.

On the other hand, it is plausible to interpret "reasonably incurred" as modifying both "reasonable attorney fees" and "other litigation costs."³⁰ Under this interpretation, "reasonable attorney fees . . . reasonably incurred" mandates that the amount of the fee not be excessive and that the use of an attorney in the circumstances be reasonable.³¹ In such a case, the statute would authorize a fee award only if an attorney's services are used and a fee is incurred.

Alternatively, "incurred" may require an attorney-client relationship but not actual fee liability. Thus, as in civil rights cases,³² a fee

27. The four criteria are to be weighed, *Blue v. Bureau of Prisons*, 570 F.2d 529, 534 (5th Cir. 1978); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 714 (D.C. Cir. 1977), but "[e]ven when these factors were incorporated in the proposed statutory language, they were 'intended to provide guidance and direction—not airtight standards.'" 559 F.2d at 714 (quoting Senate Report, *supra* note 3, at 19, *reprinted in* Amdts. Source Book, *supra* note 2, at 171). "By eliminating [the four] criteria, the conferees [did] not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion . . . to take into consideration such criteria." Conference Report, *supra* note 25, at 9-10, *reprinted in* Amdts. Source Book, *supra* note 2, at 227.

28. 5 U.S.C. § 552(a)(4)(E) (1982).

29. See *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977); *Holly v. Acree*, 72 F.R.D. 115, 116 (D.D.C. 1976), *aff'd by order sub nom.* *Holly v. Chasen*, 569 F.2d 160 (D.C. Cir. 1977); *Marschner v. United States Dep't of State*, 470 F. Supp. 196, 201 (D. Conn. 1979); *Attorney Fees*, *supra* note 9, at 449-451.

30. See *Clarkson v. IRS*, 678 F.2d 1368, 1371 n.3 (11th Cir. 1982); *Cunningham v. FBI*, 664 F.2d 383, 385 (3d Cir. 1981); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *Crooker v. United States Dep't of Justice*, 632 F.2d 916, 921 n.7 (1st Cir. 1980).

31. *Clarkson v. IRS*, 678 F.2d 1368, 1371 n.3 (11th Cir. 1982); *Cunningham v. FBI*, 664 F.2d 383, 385 (3d Cir. 1981); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *Crooker v. United States Dep't of Justice*, 632 F.2d 916, 921 n.7 (1st Cir. 1980); see *Wolfel v. United States*, 711 F.2d 66, 68 (6th Cir. 1983) (quoting *Barrett*, 651 F.2d at 1090); *Maxwell Broadcasting Corp. v. FBI*, 490 F. Supp. 254, 256 (N.D. Tex. 1980).

32. See *Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (§ 1988 fee award "presupposes a relationship of attorney and client"); *Johnson v. Georgia Highway*

award could be based on the reasonable value of or prevailing rate for such services, even though that amount may not represent an actual fee liability.³³

A related argument, sometimes called the "closed-shop philosophy,"³⁴ is that the statute provides for the award of "attorney fees" and that only an attorney can qualify for attorney fees.³⁵ This lends some support to the position that only attorney pro se plaintiffs should be entitled to section (a)(4)(E) awards. It is equally plausible, however, to interpret the section as authorizing an award for legal services regardless of whether they are performed by an attorney. A functional

Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974) ("[w]hether or not [the plaintiff] agreed to pay a fee and in what amount is not decisive") (quoting *Clark v. American Marine*, 320 F. Supp. 709, 711 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971)); *Miller v. Amusement Enters., Inc.*, 426 F.2d 534, 538 (5th Cir. 1970) ("[A]ll . . . that is required is the existence of a relationship of attorney and client, a status which exists wholly independently of compensation.") (footnote omitted) (case arose under attorney fee provision of 1964 Civil Rights Act); *cf. Palmigiano v. Garrahy*, 616 F.2d 598, 601-02 (1st Cir. 1980) (§ 1988 fee award for services of public interest organization), *cert. denied*, 449 U.S. 839 (1980); *Mid-Hudson Legal Services, Inc. v. G & U Inc.*, 578 F.2d 34, 37-38 (2d Cir. 1978) (§ 1988 award to federally funded legal services corporation); *Sellers v. Wollman*, 510 F.2d 119, 123 (5th Cir. 1975) (fee award to TILA plaintiff represented by legal aid society).

33. *Jordan v. United States Dep't of Justice*, 691 F.2d 514, 523-24 (D.C. Cir. 1982) (fee award to unpaid law students is "to be measured by the market value of the services rendered") (footnote omitted); *Consumers Union v. Board of Governors*, 410 F. Supp. 63, 65 (D.D.C. 1976) ("When . . . counsel serve . . . for far less than fair market compensation [to] further the public interest, the Court has the authority to award them the actual value of their service.") (citation omitted); *see Falcone v. IRS*, 714 F.2d 646, 648 (6th Cir. 1983) ("Both a client and an attorney are necessary ingredients for an award of fees in a FOIA case."); *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1060 (5th Cir. 1983) (Garwood, J., dissenting) (attorney-client relationship, but not actual fee liability, is required for fee award) (quoting *Miller v. Amusement Enters., Inc.*, 426 F.2d 534, 538-39 (5th Cir. 1970)); *Cunningham v. FBI*, 664 F.2d 383, 385 n.1 (3d Cir. 1981) (fee award not foreclosed when plaintiff employs counsel but incurs no fee); 120 Cong. Rec. 17020 (1974) (remarks of Sen. Kennedy) ([C]ourts should "look to the prevailing rate on attorneys' fees."). *See infra* notes 131, 132.

34. *Johnson v. Avery*, 393 U.S. 483, 491-92 (1969) (Douglas, J., concurring); *see Comment, Pro Se Litigant's Eligibility for Attorney Fees Under FOIA: Crooker v. United States Department of Justice*, 55 St. John's L. Rev. 520, 530 n.39 (1981).

35. *See Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089 (5th Cir. 1981) (services of attorney must be utilized and fees incurred), *cert. denied*, 455 U.S. 950 (1982); *Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (no § 1988 fee award to pro se paralegal plaintiff); *Hannon v. Security Nat'l Bank*, 537 F.2d 327, 329 (9th Cir. 1976) ("[Plaintiff] was not an attorney and could not provide attorney services.") (TILA case); *Burke v. United States Dep't of Justice*, 432 F. Supp. 251, 253 (D. Kan. 1976) (no fee for "time and efforts" of pro se nonattorney litigants), *aff'd*, 559 F.2d 1182 (10th Cir. 1977).

approach to the issue would recognize that pro se plaintiffs perform essentially as attorneys in prosecuting their cases.³⁶

The plain language of the statute is susceptible to several interpretations, none of which is persuasive,³⁷ and there is no evidence that Congress considered the pro se issue in wording the statute. Consequently, an analysis of the public policy concerns underlying the enactment of section (a)(4)(E) is required to determine the eligibility of attorney and nonattorney plaintiffs for fee awards.³⁸

B. Policies Underlying Section (a)(4)(E)

Four distinct policies of section (a)(4)(E) may be identified. First, the attorney-fee provision compensates FOIA complainants for the costs of litigation. Further, it punishes past agency violations of the Act and deters future violations. Finally, it provides an incentive to citizen enforcement of the FOIA.

Section (a)(4)(E) was designed to compensate prevailing FOIA plaintiffs by reimbursing them for attorney fees,³⁹ rather than to reward them for prevailing.⁴⁰ The availability of such compensation enables complainants to consult competent counsel equipped to

36. *Holly v. Acree*, 72 F.R.D. 115, 116 (D.D.C. 1976) (“[W]hen persons exercise their right to represent themselves before the bar of justice they are in every sense functioning as attorneys: they do research, file pleadings, and advocate their cause.”), *aff’d by order sub nom. Holly v. Chasen*, 569 F.2d 160 (D.C. Cir. 1977); *see Crooker v. United States Dep’t of the Treasury*, 663 F.2d 140, 141 (D.C. Cir. 1980)(per curiam); *Jones v. United States Secret Service*, 81 F.R.D. 700, 701 (D.D.C. 1979).

37. *See Cazalas v. United States Dep’t of Justice*, 709 F.2d 1051, 1056 (5th Cir. 1983); *Crooker v. United States Dep’t of the Treasury*, 634 F.2d 48, 49 (2d Cir. 1980).

38. *Cf. 2A C. Sands, Sutherland’s Statutes and Statutory Construction* §§ 48.01-48.03, at 181-197 (4th ed. 1973) (discussing use of legislative history in statutory interpretation); *Frankfurter, Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527, 538-44 (1947) (discussing use of legislative purposes in statutory interpretation).

39. Senate Report, *supra* note 5, at 18-19, *reprinted in Amdts. Source Book, supra* note 3, at 169-70; *Cunningham v. FBI*, 664 F.2d 383, 387 (3d Cir. 1981); *Crooker v. United States Dep’t of Justice*, 632 F.2d 916, 921 (1st Cir. 1980); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 711 (D.C. Cir. 1977); *see Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983); *Wolfel v. United States*, 711 F.2d 66, 68 (6th Cir. 1983); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1090 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *cf. Pitts v. Vaughn*, 679 F.2d 311, 312 (3d Cir. 1982) (§ 1988); *Cofield v. City of Atlanta*, 648 F.2d 986, 988 (5th Cir. 1981) (same); *Hannon v. Security Nat’l Bank*, 537 F.2d 327, 328-29 (9th Cir. 1976) (TILA); *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579, 581 (D.D.C. 1981) (Copyright Act).

40. *See Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983); *Cunningham v. FBI*, 664 F.2d 383, 385 (3d Cir. 1981); *Crooker v. United States Dep’t of Justice*, 632 F.2d 916, 920 (1st Cir. 1980); *Nationwide Bldg. Maintenance v. Sampson*, 559 F.2d 704, 711 (D.C. Cir. 1977).

present genuine challenges to the Justice Department attorneys who represent the agencies.⁴¹ It encourages skilled lawyers to accept FOIA cases from plaintiffs who might otherwise be unable to pay their fees.⁴² Section (a)(4)(E) was designed to remove the economic barrier to litigation posed by high legal bills, thereby ensuring all citizens equal access to judicial review of agency denials of requests for information.⁴³ If the compensatory purpose is the sole policy underlying the fee provision, pro se litigants should not be eligible for section (a)(4)(E) awards because they incur no fee liabilities for which they may be compensated.⁴⁴

There is ample evidence, however, that Congress intended that the fee award provision serve other goals. First, section (a)(4)(E) represents an attempt to deter dilatory tactics and other FOIA violations by government agencies.⁴⁵ An agency faced with the possibility of paying

41. See *Wolfel v. United States*, 711 F.2d 66, 68 (6th Cir. 1983); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089-90 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *cf. Cofield v. City of Atlanta*, 648 F.2d 986, 988 (5th Cir. 1981) (§ 1988); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974) (1964 Civil Rights Act); *Duncan v. Poythress*, 572 F. Supp. 776, 778-79 (N.D. Ga. 1983) (§ 1988); *Grooms v. Snyder*, 474 F. Supp. 380, 384 (N.D. Ind. 1979) (same).

42. *Cunningham v. FBI*, 664 F.2d 383, 387 n.3 (3d Cir. 1981); *cf. White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387, 388 (4th Cir.), *cert. denied*, 447 U.S. 923 (1980) (TILA). *But see infra* notes 119-23 and accompanying text.

43. Senate Report, *supra* note 3, at 18-19, *reprinted in* Amdts. Source Book, *supra* note 2, at 169-70; *see Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983); *Wolfel v. United States*, 711 F.2d 66, 68 (6th Cir. 1983); *Cunningham v. FBI*, 664 F.2d 383, 387 (3d Cir. 1981); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1090 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *Crooker v. United States Dep't of Justice*, 632 F.2d 916, 921 (1st Cir. 1980); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 711 (D.C. Cir. 1977).

44. *Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983) ("The award of attorney's fees to successful FOIA plaintiffs was intended to relieve plaintiffs with legitimate claims of the burden of legal costs; it was not intended as a reward for successful claimants or as a penalty against the government."); *Wolfel v. United States*, 711 F.2d 66, 68-69 (6th Cir. 1983) (Congress intended fee awards to be made "in those instances in which the services of an attorney were utilized and fees incurred.") (quoting *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089-90 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982)); *Crooker v. United States Dep't of Justice*, 632 F.2d 916, 921 (1st Cir. 1980) (interpreting § (a)(4)(E) to disallow "any award which provides compensation in excess of actual costs incurred in prosecuting a suit vindicating a specific right.").

45. Senate Report, *supra* note 3, at 3, *reprinted in* Amdts. Source Book, *supra* note 2, at 155; *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983); *Maxwell Broadcasting Corp. v. FBI*, 490 F. Supp. 254, 256 (N.D. Tex. 1980); *Kaye v. Burns*, 411 F. Supp. 897, 902 (S.D.N.Y. 1976); *see Blue v. Bureau of Prisons*, 570 F.2d 529, 534 (5th Cir. 1978) (threat of fee may encourage compliance without litigation); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 711 (D.C. Cir. 1977) (§ (a)(4)(E)'s purpose is to remove incentive for administrative resistance); *Marschner v. United States Dep't of State*, 470 F. Supp. 196, 200 (D. Conn. 1979) (same); 120 Cong. Rec. 6814 (1974) (remarks of Rep. Alexander) ("The

a FOIA complainant's legal fees from its own budget⁴⁶ will be encouraged to comply voluntarily with the Act and will be discouraged from litigating when its case is weak.⁴⁷ Without the availability of fee awards, few suits will be brought to compel disclosure of government information.⁴⁸ In such a situation, the citizen-suit mechanism of the FOIA does little to encourage agency compliance with the Act because the agency knows that most of its denials of FOIA disclosure requests will not be challenged. The prospect of fee liability encourages the agency to consider the strength of its arguments before forcing the citizen to resort to litigation.⁴⁹ Furthermore, requiring an agency that has acted unreasonably to pay the complainant's attorney fees out of its own budget⁵⁰ serves a punitive purpose.⁵¹

committee feels that once the Government has to take full responsibility for litigating indefensible cases, it will think twice before going to the mark in the first instance."); Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 Colum. L. Rev. 895, 959 n.359 (1974) (assessment of costs would result in fewer agency denials).

46. All fees and costs assessed against the defendant agency in FOIA litigation are to be paid from that agency's budget. Senate Report, *supra* note 3, at 17, *reprinted in* Amdts. Source Book, *supra* note 2, at 169; *see Attorney Fees, supra* note 9, at 452.

47. Senate Report, *supra* note 3, at 17, *reprinted in* Amdts. Source Book, *supra* note 2, at 169; 120 Cong. Rec. 6810 (1974) (remarks of Rep. Thone); *see* Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act app. III-B, at 17, *reprinted in* Amdts. Source Book, *supra* note 2, at 555 ("[T]he attorney's fee provision increases substantially the likelihood that an agency will be sued when it issues a denial having weak or doubtful justification.").

48. *See* *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 711 (D.C. Cir. 1977); *Marschner v. United States Dep't of State*, 470 F. Supp. 196, 200 (D. Conn. 1979); Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 805 (1967).

49. Senate Report, *supra* note 3, at 17, *reprinted in* Amdts. Source Book, *supra* note 2, at 169; 120 Cong. Rec. 6810 (1974) (remarks of Rep. Thone); *see* *Grooms v. Snyder*, 474 F. Supp. 380, 383 (N.D. Ind. 1979) (without fee provision, the government could frustrate the FOIA's purposes by litigating every request).

50. *See supra* note 46.

51. *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983); *cf. Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (1964 Civil Rights Act); *Cofield v. City of Atlanta*, 648 F.2d 986, 988 n.4 (5th Cir. 1981) (§ 1988 case characterizing § (a)(4)(E) as a sanction for unfounded resistance to requests for information); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 716 (5th Cir. 1974) (1964 Civil Rights Act); *Duncan v. Poythress*, 572 F. Supp. 776, 779 (N.D. Ga. 1983) (§ 1988); *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579, 581 (D.D.C. 1981) (Copyright Act); *Grooms v. Snyder*, 474 F. Supp. 380, 383 (N.D. Ind. 1979) (§ 1988). *But see* *Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983); *Wolfel v. United States*, 711 F.2d 66, 68 (6th Cir. 1983); *Cunningham v. FBI*, 664 F.2d 383, 385 (3d Cir. 1981); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *Crooker v. United States Dep't of Justice*, 632 F.2d 916, 920 (1st Cir. 1980).

Congress' intent that § (a)(4)(E) serve punitive purposes is further evidenced by the Senate Report's indication that in cases in which other factors militate against a fee

The fee provision is also a positive incentive to citizens to litigate to enforce the FOIA and thereby uphold the important public policy of governmental disclosure.⁵² Congress contemplated that FOIA enforcement suits by private citizens would be the primary mechanism used to further the public good of open government.⁵³ Thus, it is not unreasonable that the public should in some cases bear the litigation costs of both sides.⁵⁴ Congress sought to encourage more aggressive challenges to agency denials despite the fact that FOIA disclosure may not result in pecuniary benefit to the average requester.⁵⁵ It is therefore proper to interpret section (a)(4)(E) as an incentive to citizen enforcement of the FOIA.

award, the court should nevertheless make the award if the agency has been recalcitrant or obdurate. Senate Report, *supra* note 3, at 19, *reprinted in* Amdts. Source Book, *supra* note 2, at 171. In addition, Congress' punitive intent is demonstrated by its provision in the 1974 amendments authorizing disciplinary proceedings against agency personnel who have "acted arbitrarily or capriciously with respect to the withholding." Act of Nov. 21, 1974, Pub. L. No. 93-502, § (b)(2), 88 Stat. 1561, 1562 (1974) (codified as amended at 5 U.S.C. § 552(a)(4)(F) (1982)).

52. *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983); *Lovell v. Alderete*, 630 F.2d 428, 433 & n.6 (5th Cir. 1980); *LaSalle Extension Univ. v. FTC*, 627 F.2d 481, 484 (D.C. Cir. 1980); *Cox v. United States Dep't of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (per curiam); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 715 (D.C. Cir. 1977); *Maxwell Broadcasting Corp. v. FBI*, 490 F. Supp. 254, 256 (N.D. Tex. 1980); *Jones v. United States Secret Service*, 81 F.R.D. 700, 701 (D.D.C. 1979); *Kaye v. Burns*, 411 F. Supp. 897, 902 (S.D.N.Y. 1976); *Holly v. Acree*, 72 F.R.D. 115, 116 (D.D.C. 1976), *aff'd by order sub nom. Holly v. Chasen*, 569 F.2d 160 (D.C. Cir. 1977); *Goldstein v. Levi*, 415 F. Supp. 303, 305 (D.D.C. 1976); see H.R. Rep. No. 876, 93d Cong., 2d Sess. 6-7 (1974), *reprinted in* Amdts. Source Book, *supra* note 2, at 126-27 (fee provisions desirable for suits that advance a strong congressional policy); *House Hearings, supra* note 7, at 272 (testimony of John Shattuck, Staff Counsel, American Civil Liberties Union).

The Senate Report noted the "role of statutory allowance of attorneys' fees to plaintiffs in encouraging individuals 'to seek judicial relief' for the purpose of 'vindictating national policy.'" Senate Report, *supra* note 3, at 18 (quoting *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam)), *reprinted in* Amdts. Source Book, *supra* note 2, at 170.

53. See *supra* note 7.

54. Without a fee provision, the citizen-plaintiff's taxes pay the government's litigation costs. Senate Report, *supra* note 3, at 19, *reprinted in* Amdts. Source Book, *supra* note 2, at 171 ("[I]t would seem tantamount to a penalty to require the wronged citizen to pay his attorneys' fee to make the government comply with the law."); H.R. Rep. No. 1419, 92d Cong., 2d Sess. 74 (1972), *reprinted in* Amdts. Source Book, *supra* note 2, at 81; see 120 Cong. Rec. 36866 (1974) (remarks of Sen. Kennedy) ("Government agencies spend millions of dollars to promote dissemination of information they want the public to have. It is not too much to ask that they use some of these funds to provide the public and press with information they specifically request.").

55. Congress in 1972 noted that corporations or private law firms constituted the largest single group of FOIA requesters, H.R. Rep. No. 1419, 92d Cong., 2d Sess. 73 (1972), *reprinted in* Amdts. Source Book, *supra* note 2, at 80, and sought through the

C. Section (a)(4)(E) Policies in the Context of Pro Se Litigation

A fee award to a pro se complainant does not, strictly speaking, constitute compensation for actual costs. Opponents of such section (a)(4)(E) awards argue that pro se plaintiffs never assume the financial burden that Congress intended to ease by enacting the fee provision.⁵⁶ The Senate Report refers to removing barriers to litigation,⁵⁷ and it can be argued that pro se plaintiffs face no such barriers because they incur no legal bills and because the fee provision enables them to hire attorneys.⁵⁸ This argument fails to recognize that pro se plaintiffs do indeed face formidable barriers to judicial enforcement of their FOIA rights.

Poor plaintiffs often must proceed pro se because they cannot retain lawyers to represent them in FOIA cases.⁵⁹ The fee provision may be an insufficient incentive to a lawyer to accept a FOIA case on a contingency basis for two reasons. First, the likelihood of substantially prevailing is uncertain because the document that is the goal of the litigation is unknown.⁶⁰ The plaintiff must challenge the government's withholding of the material without knowing its contents or even if it

fee provision to ensure "that the average citizen can take advantage of the law to the same extent as the giant corporations." Senate Report, *supra* note 3, at 18 (quoting Sen. Thurmond), *reprinted in* Amdts. Source Book, *supra* note 2, at 170. By directing courts, in their discretion, to look to the commercial nature of the request, Congress indicated its desire to encourage FOIA litigation by average citizens who lack "substantial private and pecuniary incentive to pursue their claims." *Lovell v. Alderete*, 630 F.2d 428, 433 n.6 (5th Cir. 1980); *see Note, The Freedom of Information Act: A Seven-Year Assessment*, 74 Colum. L. Rev. 895, 958 (1974) ("The benefits of the [as yet unamended] Act have inured predominantly to private, not public interests. It is the corporation seeking through disclosure an economic, competitive or legal advantage, not the common citizen seeking civic enlightenment, that has most often challenged wrongful agency withholding of public information.").

56. *Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983); *see Cunningham v. FBI*, 664 F.2d 383, 386 (3d Cir. 1981); *Maxwell Broadcasting Corp. v. FBI*, 490 F. Supp. 254, 256 (N.D. Tex. 1980).

57. Senate Report, *supra* note 3, at 17 ("Too often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law."), *reprinted in* Amdts. Source Book, *supra* note 2, at 169.

58. *See Crooker v. United States Dep't of Justice*, 632 F.2d 916, 920 (1st Cir. 1980) (§ (a)(4)(E) eliminates obstacle of attorney fees and allows equal access to judicial enforcement of statutory rights); *Attorney Fees*, *supra* note 9, at 454 ("Courts denying pro se fee awards state that pro se litigants face no economic barriers to litigation because the fee provisions enable the plaintiff to hire an attorney."). *See supra* note 42 and accompanying text.

59. *Robbins & Hermann, Pro Se Litigation, Litigating Without Counsel: Faretta or for Worse*, 42 Brooklyn L. Rev. 629, 678 (1976) ("[M]ost civil litigants approach the courts *pro se* only when they have no other choice."); *see Attorney Fees*, *supra* note 9, at 455-57 (discussing difficulty of obtaining an attorney in FOIA cases).

60. *Attorney Fees*, *supra* note 9, at 455 ("The attorney must litigate essentially in the dark—arguing that the information is not exempt from disclosure without even

exists at all. With this dearth of information about the object of the suit, it is difficult to make an intelligent judgment as to the litigant's chances of prevailing. Second, the fee award is discretionary and may not be awarded even if the plaintiff does prevail.⁶¹

In addition, *pro se* plaintiffs face economic barriers to litigation that are not removed by the award of actual costs. Prosecution of a lawsuit requires a significant investment of time and energy, and courts have recognized the costs incurred by sacrificing work and leisure time in order to conduct a FOIA suit.⁶² This sacrifice is compounded because the value of the documents is often speculative before release. Even if the suit is successful, the released documents may not provide a pecuniary benefit. These inherent uncertainties discourage the investment of personal time and resources. A section (a)(4)(E) award to a *pro se* plaintiff would remove such obstacles to litigation.

Government agencies may fear that section (a)(4)(E) awards to *pro se* plaintiffs will provide an incentive to citizen suits and therefore will greatly increase the amount of FOIA litigation, burdening the agencies and the courts.⁶³ Such a result would not be contrary to congres-

knowing what the information is.") (footnote omitted); see H.R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966) (before suing, citizen will not know the reasons for the agency action), *reprinted in* 1966 U.S. Code Cong. & Ad. News at 2426, and in FOIA Source Book, *supra* note 1, at 30.

61. See *supra* note 17.

62. *E.g.*, *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1056 (5th Cir. 1983) ("Appellant amply demonstrated the costs she incurred, both from other work foregone and in terms of personal energy, due to her *pro se* work."); *Cunningham v. FBI*, 664 F.2d 383, 386 (3d Cir. 1981) (holding *pro se* litigants ineligible for section (a)(4)(E) awards, but noting that "*pro se* litigants are likely to incur non-monetary costs that might serve as the basis for compensation"); *Crooker v. United States Dep't of the Treasury*, 634 F.2d 48, 49 (2d Cir. 1980) (A barrier to the citizen's "ability to secure compliance with the Act . . . may well be presented by the prospect of having . . . to forgo an opportunity to earn one's regular income . . . in order to prepare and pursue a *pro se* suit."); *Holly v. Acree*, 72 F.R.D. 115, 116 (D.D.C. 1976) (FOIA policy furthered by allowing *pro se* plaintiffs "to recover fees for time spent in the role of their own attorneys"), *aff'd by order sub nom. Holly v. Chasen*, 569 F.2d 160 (D.C. Cir. 1977); see *Lovell v. Alderete*, 630 F.2d 428, 437 (5th Cir. 1980) (Clark, J., dissenting) ("[The *pro se* litigant's] time has value and he should be compensated for it."); *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579, 581 (D.D.C. 1981) ("To deny [a prevailing *pro se*] litigant attorney's fees [under the Copyright Act] solely on the grounds that he did not incur any liability to pay attorney's fees ignores the fact that a *pro se* litigant must forego other activities in order to prepare and pursue his case.").

63. See letter from Malcolm D. Hawk, Acting Assistant Attorney General, to Rep. Chet Holifield, Chairman of the House Comm. on Gov't Operations (Feb. 20, 1974) (characterizing fee awards as particularly inappropriate "in a type of litigation which can be initiated by anyone"), *reprinted in* H.R. Rep. No. 876, 93d Cong., 2d Sess. app. 1 (1974), and in *Amdts. Source Book*, *supra* note 2, at 139.

64. See *supra* notes 7, 52, 53 and accompanying text.

sional intent.⁶⁴ Congress perceived that agencies were delaying or not complying with the Act and that the original FOIA was not being sufficiently enforced by private litigation.⁶⁵ Accordingly, the 1974 amendments were designed to eliminate this problem by encouraging suits.⁶⁶ Furthermore, Congress clearly intended that the agencies be deterred from unnecessarily withholding information in the first instance.⁶⁷ Invocation of any of the nine exemptions from the FOIA's disclosure requirement is authorized but not mandatory,⁶⁸ and the government is to litigate only strong cases.⁶⁹ Thus, even if the availability of fees causes more citizens to bring lawsuits when confronted with agency violations of the FOIA, fewer such suits will be necessary because agencies will have voluntarily complied with the Act more frequently. The fee provision's deterrent effect on the agency therefore would offset somewhat the incentive to the citizen, and the amount of FOIA litigation would not increase dramatically.

Concern that the availability of pro se fee awards will encourage frivolous litigation is unfounded. It may be true that if potential FOIA complainants consulted objective attorneys before commencing suits, frivolous claims could be weeded out.⁷⁰ Even a lawyer representing himself cannot serve an objective weeding-out function.⁷¹ The statutory requirement that the complainant substantially prevail,⁷² how-

65. See *supra* note 3.

66. See *supra* notes 3, 52.

67. See *supra* notes 45-49 and accompanying text.

68. H.R. Rep. No. 1419, 92d Cong., 2d Sess. 3 (1972), *reprinted in* Amdts. Source Book, *supra* note 2, at 10. See *supra* note 1.

69. See *supra* note 47.

70. See *Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983) (fee provision intended to encourage potential claimants to retain counsel, which might prevent unnecessary litigation); *Wolfel v. United States*, 711 F.2d 66, 68 (6th Cir. 1983) ("Persons contemplating legal action should be encouraged to consult with attorneys. Litigation may not be necessary.") (quoting *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982)); *Cunningham v. FBI*, 664 F.2d 383, 386 (3d Cir. 1981) ("[S]elf-representation does not supply the objectivity and detachment that an outside attorney can provide as a check against groundless or unnecessary litigation.").

71. *Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983) ("An attorney who represents himself in litigation may have the necessary legal expertise but is unlikely to have the 'detached and objective perspective' necessary to fulfill the aims of the Act.") (quoting *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387, 388 (4th Cir.), *cert. denied*, 447 U.S. 923 (1980)); see *White*, 614 F.2d at 388 ("[E]ffective legal representation is dependent not only on legal expertise, but also on detached and objective perspective. The lawyer who represents himself necessarily falls short of the latter."), *cert. denied*, 447 U.S. 923 (1980). *But see* *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1056 (5th Cir. 1983) (finding "little evidence . . . that the purpose of the fee provision is to insure *objective* representation by an attorney. On the contrary, the fee provision is designed to promote *vigorous advocacy* on behalf of citizens seeking government information . . .") (emphasis in original).

72. See *supra* notes 13, 14 and accompanying text.

ever, means that frivolous suits will not lead to fee awards. Once the plaintiff meets this threshold the suit is by definition not frivolous.

The agencies' real fear may be an increase in what they regard as frivolous document requests. However, the original FOIA's⁷³ elimination of the Administrative Procedure Act's requirement that the requester be "properly and directly concerned"⁷⁴ with the information evidences congressional intent that the FOIA mechanism be used for a broad range of requests. In addition, the legislative history of the 1974 amendments reflects concern with underutilization of the FOIA,⁷⁵ so an increased number of requests would comport with congressional intent. Increased requests will not unduly hamper the government, because in a vast majority of cases the agency need only release the requested documents.⁷⁶ Moreover, because the awarding of attorney fees is discretionary, and one of the factors to be considered is the public interest in disclosure, judges are unlikely to award fees where the request is frivolous.

Arguably, section (a)(4)(E) awards should be made only to attorneys, whether representing themselves or others, because the intervention of an attorney often leads to agency disclosure of the material without litigation.⁷⁷ Unlike the average pro se complainant, an attorney may prevent needless litigation because of his or her ability to resolve disputes.⁷⁸ It is clearly bad policy, however, to encourage agencies to respond only to the overtures of lawyers and not to the legitimate requests of lay citizens. Congress realized that the success of the FOIA was dependent upon the degree of cooperation between agencies and the public;⁷⁹ this cooperative spirit is not fostered if the level of agency solicitude toward FOIA requests is a function of whether the requester is, or is represented by, an attorney.⁸⁰

73. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, *repealed by* Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54.

74. Pub. L. No. 404, ch. 324, § 3, 60 Stat. 238 (1946), *repealed by* Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 653.

75. See *House Hearings*, *supra* note 7, at 35 (remarks of Rep. Moorhead). See *supra* notes 3, 52.

76. *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1056 (5th Cir. 1983) ("Where a request for information is justified, the government should respond promptly by providing that information and no fee will be necessary."); see Senate Report, *supra* note 3, at 41 ("[T]he government may likely disclose more information to avoid suits in the first place . . ."), *reprinted in* *Amdts. Source Book*, *supra* note 2, at 193.

77. *Wolfel v. United States*, 711 F.2d 66, 68 (6th Cir. 1983); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089-90 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982).

78. *Wolfel v. United States*, 711 F.2d 66, 68 (6th Cir. 1983); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089-90 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982).

79. See *supra* note 2.

80. *Lovell v. Alderete*, 630 F.2d 428, 437 (5th Cir. 1980) (Clark, J., dissenting).

Opponents of fee awards to pro se plaintiffs also cite "the specter of fee generation."⁸¹ The availability of such awards may encourage suits brought solely to generate fees, making FOIA litigation a "cottage industry"⁸² for prisoners and the underemployed.⁸³ Such a practice is more egregious when the fee-generating pro se plaintiff is an attorney. This fear, however, is unrealistic. The agency can avoid having to pay any fee by prompt disclosure of the requested documents or a legitimate claim of exemption.⁸⁴ Furthermore, courts have the ability to recognize fee-generating suits and to deny fees in such cases.⁸⁵ The availability of this judicial discretion makes it unlikely that fee generation will present a problem.⁸⁶

A fee award to a prevailing pro se plaintiff may constitute a windfall because, unlike the represented plaintiff, the pro se plaintiff need not compensate an attorney.⁸⁷ Again, however, the court can consider this factor in determining the fee amount. In addition, the importance of the expressed congressional policy of open government may require that an occasional pro se plaintiff receive a windfall in order to further the other purposes⁸⁸ of the fee provision.

It may be that courts deny pro se fee awards because such litigants are regarded as unprofessional hindrances to the judicial process.⁸⁹ It

81. *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387, 388 (4th Cir.), *cert. denied*, 447 U.S. 923 (1980); *see Falcone v. IRS*, 714 F.2d 646, 648 (6th Cir. 1983); *Cunningham v. FBI*, 664 F.2d 383, 387 (3d Cir. 1981).

82. *Crooker v. United States Dep't of the Treasury*, 634 F.2d 48, 49 (2d Cir. 1980).

83. *Id.*; *Falcone v. IRS*, 714 F.2d 646, 648 (6th Cir. 1983); *Wolfel v. United States*, 711 F.2d 66, 69 (6th Cir. 1983); *Cunningham v. FBI*, 664 F.2d 383, 386 (3d Cir. 1981).

84. *See supra* note 76.

85. For example, Michael Alan Crooker, a federal prisoner, was the plaintiff in reported decisions involving § (a)(4)(E) in three circuits in the same year. *Crooker v. United States Dep't of the Treasury*, 663 F.2d 140 (D.C. Cir. 1980) (*per curiam*); *Crooker v. United States Dep't of the Treasury*, 634 F.2d 48 (2d Cir. 1980); *Crooker v. United States Dep't of Justice*, 632 F.2d 916 (1st Cir. 1980). Crooker was denied fees in the First and Second Circuits. The District of Columbia Circuit remanded to the District Court on the question of a fee award. In *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051 (5th Cir. 1983), a case in which the FOIA requester was an Assistant United States Attorney suing outside her official capacity, the court opined that "it would be ludicrous to suggest that appellant sought out a chance for *pro se* litigation to support her otherwise inactive practice." *Id.* at 1056.

86. Congress was aware of the possibility of fee generation. Rep. William Moorhead, chairman of the Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations and sponsor of the 1974 FOIA amendments, termed it "preposterous." *House Hearings, supra* note 7, at 171.

87. *See Cunningham v. FBI*, 664 F.2d 383, 385 (3d Cir. 1981) ("cash bonus"); *Crooker v. United States Dep't of Justice*, 632 F.2d 916, 921 (1st Cir. 1980) ("windfall"). *See supra* note 40 and accompanying text.

88. *See supra* notes 39-55 and accompanying text.

89. *Crooker v. United States Dep't of Justice*, 632 F.2d 916, 920 (1st Cir. 1980); *see Wolfel v. United States*, 711 F.2d 66, 68 (6th Cir. 1983); *Barrett v. Bureau of*

is not unreasonable to assume that a lay litigant will be less skillful than an attorney in conducting a lawsuit. Like the "closed shop philosophy,"⁹⁰ this judicial distaste for lay pro se litigation may support the idea of awarding fees only to pro se plaintiffs who are attorneys. Like all FOIA litigants, however, a nonattorney plaintiff must have substantially prevailed in order to be eligible for a fee award.⁹¹ He or she therefore must have been a fairly competent litigator. More importantly, the pro se plaintiff's victory demonstrates that a government agency has failed to comply with the requirements of the FOIA. Pro se plaintiffs thus further the public interest in governmental disclosure as effectively as represented plaintiffs and serve the congressional policies underlying the fee provision equally well.

D. *Interpreting Section (a)(4)(E) to Effectuate the Policies Underlying the FOIA*

Courts have reached differing results in interpreting section (a)(4)(E) in cases involving attorney and nonattorney pro se plaintiffs. The Fifth Circuit has attempted to distinguish between the two groups, holding that pro se plaintiffs are eligible for fee awards only if they are attorneys.⁹² The court recognized that the fee provision serves incentive,⁹³ deterrent,⁹⁴ and punitive⁹⁵ functions, in addition to compensating for litigation costs.⁹⁶ Two years earlier, however, the same court held that these functions were insufficient to justify finding a nonattorney pro se plaintiff eligible for a section (a)(4)(E) award.⁹⁷ The court attempted to distinguish the two cases on the basis that the attorney pro se plaintiff used legal skills to vindicate FOIA rights, while the lay pro se plaintiff did not.⁹⁸ It gave no indication, however,

Customs, 651 F.2d 1087, 1089-90 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); Comment, *Pro Se Litigant's Eligibility For Attorney Fees Under FOIA: Crooker v. United States Department of Justice*, 55 St. John's L. Rev. 520, 529 and nn. 36 & 37 (1981).

90. See *supra* notes 34, 35 and accompanying text.

91. See *supra* notes 13, 14 and accompanying text.

92. *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983).

93. *Id.* at 1057. See *supra* notes 52-55 and accompanying text.

94. *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983). See *supra* notes 45-49 and accompanying text.

95. *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983). See *supra* notes 50, 51 and accompanying text.

96. *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983). See *supra* notes 39-43 and accompanying text.

97. *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1090 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982).

98. *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983).

why or how the fact that the pro se litigant was an attorney had altered its earlier interpretation of the policies underlying section (a)(4)(E).⁹⁹

A more consistent and defensible view, assuming that pro se plaintiffs in general have been held to be ineligible for attorney fee awards, is that pro se attorney plaintiffs should be similarly treated.¹⁰⁰ There is no evidence that Congress intended to discriminate between pro se plaintiffs on the basis of whether they are members of the bar.

The best view is that all plaintiffs should be eligible for section (a)(4)(E) awards.¹⁰¹ This liberal interpretation of the fee provision will best serve the FOIA's purposes of achieving agency openness and wise self-government. If all FOIA plaintiffs are eligible for fee awards, it can only enhance the purposes of section (a)(4)(E): to compensate for¹⁰² and encourage litigation of¹⁰³ agency denials and to deter¹⁰⁴ and

99. A recent district court case, *Duncan v. Poythress*, 572 F. Supp. 776 (N.D. Ga. 1983), characterized the *Cazalas* court's attempt to distinguish between the two classes of pro se litigants as unconvincing. *Id.* at 780. The *Duncan* court held that because no pro se litigants in the Fifth Circuit were eligible for § 1988 fee awards, *Cofield v. City of Atlanta*, 648 F.2d 986, 987 (5th Cir. 1981), it could not make an award to an attorney pro se plaintiff. The court found no rational basis for treating the pro se litigant differently because he happened to be an attorney. 572 F. Supp. at 779-80.

100. *Falcone v. IRS*, 714 F.2d 646, 648 (6th Cir. 1983).

101. *E.g.*, *Cuneo v. Rumsfeld*, 552 F.2d 1360, 1366 (D.C. Cir. 1977); *Holly v. Acree*, 72 F.R.D. 115, 116 (D.D.C. 1976), *aff'd by order sub nom.* *Holly v. Chasen*, 569 F.2d 160 (D.C. Cir. 1977). In *Cuneo*, for example, a lawyer sued to obtain documents containing government standards for awarding contracts, in the belief that these standards would assist him in advising government contractors. He was represented by his law partners and was considered by the court to be proceeding pro se. *Id.* at 1366. Although the plaintiff was eligible for the fee award, the *Cuneo* court suggested that the district court might want to deny the award because of, among other things, the plaintiff's commercial interest in the documents. *Id.* at 1368. In a factually similar case, *Cliff v. IRS*, 529 F. Supp. 11 (S.D.N.Y. 1981), a tax attorney represented by his partners was denied a fee award because of his commercial interest in the documents and the reasonableness of the agency's denial of his request. *Id.* at 17. In reaching this decision, the court made no mention of the fact that the plaintiff had incurred no fee.

Furthermore, the District Court of the District of Columbia has observed that: no rational ground exists upon which to distinguish awards to [lawyers] from persons such as plaintiff who also function in the role of attorney on their own behalves, merely because one happens to be a member of the bar and the other does not. Such a distinction would be arbitrary and would erect a barrier to the vindication of FOIA rights, contrary to the intent of Congress.

Holly v. Acree, 72 F.R.D. 115, 116 (D.D.C. 1976), *aff'd by order sub nom.* *Holly v. Chasen*, 569 F.2d 160 (D.C. Cir. 1977).

102. See *supra* notes 39-43 and accompanying text.

103. See *supra* notes 52-55 and accompanying text.

104. See *supra* notes 45-49 and accompanying text.

punish¹⁰⁵ agency recalcitrance. These policies are strengthened by granting awards to both pro se and represented complainants. Moreover, there is no principled basis for distinguishing between attorney and nonattorney pro se plaintiffs.

Only the District of Columbia Circuit has given section (a)(4)(E) this broad interpretation, allowing fee awards for all FOIA plaintiffs.¹⁰⁶ Congress in 1974 was aware of the District of Columbia Circuit's expertise in administrative law and its vigorous and liberal record in enforcing the FOIA,¹⁰⁷ and specifically authorized venue in the District of Columbia at the time it provided for the availability of attorney fees.¹⁰⁸ This indicates that Congress would approve of that Circuit's leadership in liberally interpreting section (a)(4)(E).

II. VALUATION

The valuation of pro se legal work also requires inquiry into the policies underlying section (a)(4)(E). The four factors that guide the court's discretion in deciding whether to award the fee¹⁰⁹ should also guide the court in setting a fee amount for pro se litigants.

Compensation for the value of pro se legal work presents a problem because fees are awarded when no costs have been incurred, and the standard to be applied in valuing lay legal work is unclear.¹¹⁰ Valuation may be less difficult when the pro se litigant is an attorney because theoretically the value of the work foregone is equal to the value of the work performed.¹¹¹ This does not, however, justify awarding fees to pro se plaintiffs only if they are attorneys. Nonattorney legal work still has some calculable value,¹¹² and the availability

105. See *supra* notes 50, 51 and accompanying text.

106. *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977); see *Crooker v. United States Dep't of the Treasury*, 663 F.2d 140, 141 (D.C. Cir. 1980) (per curiam); *Cox v. United States Dep't of Justice*, 601 F.2d 1, 5-6 (D.C. Cir. 1979) (per curiam); *Jones v. United States Secret Service*, 81 F.R.D. 700, 701 (D.D.C. 1979); *Holly v. Acree*, 72 F.R.D. 115, 116 (D.D.C. 1976), *aff'd by order sub nom. Holly v. Chasen*, 569 F.2d 160 (D.C. Cir. 1977).

107. See Amdts. Source Book, *supra* note 2, at 112; H.R. Rep. No. 1419, 92d Cong., 2d Sess. 70 (1972), *reprinted in* Amdts. Source Book, *supra* note 2, at 77; 120 Cong. Rec. 17017 (1974) (remarks of Sen. Kennedy).

108. See *supra* note 6.

109. See *supra* notes 18-22 and accompanying text.

110. *Cunningham v. FBI*, 664 F.2d 383, 386 (3d Cir. 1981); *Crooker v. United States Dep't of Justice*, 632 F.2d 916, 921 (1st Cir. 1980); see *Burke v. United States Dep't of Justice*, 432 F. Supp. 251, 253 (D. Kan. 1976) (referring to "arbitrary hourly rates of compensation for the 'time and efforts' of pro se litigants"), *aff'd*, 559 F.2d 1182 (10th Cir. 1977).

111. *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983).

112. See *supra* note 62; *infra* notes 114, 131, 132.

of fees under section (a)(4)(E) could not have been intended to turn on the simplicity with which they can be determined.

One suggestion is that the fee award be based on "opportunity cost"—the value of the time sacrificed by the pro se plaintiff in conducting the suit.¹¹³ One virtue of this approach is that it would not give rise to fee generation because theoretically other uses of the plaintiff's time are just as valuable as the pursuit of the claim.¹¹⁴ The Second Circuit has indicated some support for the opportunity-cost approach, holding that it would not award fees to a pro se plaintiff who had made no showing that prosecution of the suit had diverted time from income-producing activity.¹¹⁵

This approach has some economic appeal because it would permit compensation for actual and opportunity costs, but it may lead to disparity in awards. Those who earn a high hourly wage will receive more than those who earn less,¹¹⁶ and the amount of the fee award will therefore vary in inverse proportion to the litigant's likely financial need.¹¹⁷ This disparity does not justify denial of fee awards to pro se plaintiffs, however, because the litigant's financial need is unrelated to the goals of the Act.

Yet, the court's analysis should not stop at consideration of how to compensate the plaintiff. It must examine the other policies of section

113. The opportunity cost of a good or service is the real economic cost of production, considering what must be foregone in order to produce the good or service. It is sometimes called user cost or alternative cost. *Encyclopedia of Economics* 719 (D. Greenwald ed. 1982); *see generally Attorney Fees, supra* note 9, at 462-67 (discussion of opportunity cost valuation).

114. *Attorney Fees, supra* note 9, at 465-67. In addition, the cost to the agency will probably be less than if an attorney had been employed. *Id.* at 467. *See* H.R. Rep. No. 876, 93d Cong., 2d Sess. 9 (1974) (typical FOIA case estimated to require 40 hours of billable time, costing \$1400 if billed at \$35 per hour), *reprinted in* *Amdts. Source Book, supra* note 2, at 129; Senate Report, *supra* note 3, at 41 (basic cost of FOIA case estimated at \$1000), *reprinted in* *Amdts. Source Book, supra* note 2, at 193. The cumulative value of such payments might, however, be significant enough to serve the fee provision's deterrent, punishment, and incentive functions. *See supra* notes 45-55 and accompanying text.

115. *Crooker v. United States Dep't of the Treasury*, 634 F.2d 48, 49 (2d Cir. 1980). It should be noted that the meaning of this decision is unclear. The court held that it would not award fees at least if the litigant had not made a showing of income diversion. The court has never stated, however, that it would award fees if the litigant does make such a showing. *See Kuzma v. United States Postal Serv.*, No. 83-6221, slip. op. at 823 (2d Cir. Jan. 3, 1984); *In re Emergency Beacon Corp.*, 27 Bankr. 757, 769 (S.D.N.Y. 1983). If, however, the court's income-diversion approach were to be implemented, it presumably would lead to award eligibility for all plaintiffs except prisoners and the unemployed.

116. Presumably the value of the time sacrificed by the pro se litigant is the value of the time he or she would otherwise work.

117. *Cunningham v. FBI*, 664 F.2d 383, 387 (3d Cir. 1981); *see* 120 Cong. Rec. 36866 (1974) (remarks of Sen. Kennedy) ("[F]reedom of information should not be for sale only to the highest bidder.").

(a)(4)(E) and set a fee award that will best further the purposes of the FOIA. The four factors of the Senate Report¹¹⁸ point to the policies courts should consider.

Consideration of the plaintiff's interest in¹¹⁹ and benefit from¹²⁰ obtaining the information is closely related to the policy of encouraging citizen suits to enforce the FOIA.¹²¹ The greater the complainant's commercial interest in and benefit from disclosure, the less a fee award is needed as an incentive to suit. Accordingly, a large award in such a case would be inappropriate.

Similarly, in considering the reasonableness of the government's behavior,¹²² the policies of deterring¹²³ and punishing¹²⁴ agency violations of the Act come into play. The more reasonable the government's withholding of the information, the less desirable it will be to deter and punish such behavior. Consequently, a large fee award in such a case would do little to further those purposes of section (a)(4)(E).

The final factor to be weighed by the court is the public benefit derived from disclosure.¹²⁵ Throughout its consideration of the FOIA and the 1974 amendments, Congress emphasized the essential role played by freedom of information in wise government.¹²⁶ Similarly, it noted the critical role played by private citizens in effectuating that freedom.¹²⁷ The public benefit resulting from disclosure is the goal of the Act;¹²⁸ hence, the section (a)(4)(E) purposes of compensation, deterrence, punishment, and incentive to suit are meaningful only to the extent that they result in public benefit. An increase in the fund of information available for making political choices as a result of disclosure causes a corresponding increase in the public benefit deriving from the case.¹²⁹ In exercising its discretion in setting the fee amount, therefore, the court should give special attention to the public benefit resulting from the private litigant's suit. In this manner, the court will exercise the discretion left it under section (a)(4)(E) to best further the policies underlying the enactment of the FOIA.

118. See *supra* notes 18-22 and accompanying text.

119. See *supra* note 21 and accompanying text.

120. See *supra* note 20 and accompanying text.

121. See *supra* notes 7, 52-55 and accompanying text.

122. See *supra* note 22 and accompanying text.

123. See *supra* notes 45-49 and accompanying text.

124. See *supra* notes 50, 51 and accompanying text.

125. See *supra* note 19 and accompanying text.

126. See *supra* note 2 and accompanying text.

127. See *supra* note 2 and accompanying text.

128. See *supra* note 2.

129. *Blue v. Bureau of Prisons*, 570 F.2d 529, 533-34 (5th Cir. 1978); see *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1053-54 (5th Cir. 1983); *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979); *Maxwell Broadcasting Corp. v. FBI*, 490 F. Supp. 254, 257 (N.D. Tex. 1980); *Consumers Union v. Board of Governors*, 410 F. Supp. 63, 64 (D.D.C. 1976).

When the public benefit from disclosure is high, the corresponding increase in the pro se litigant's award could theoretically result in an inequity. This is because in compensating the represented plaintiff the court looks to actual costs, subject to the statutory requirement of reasonableness, while the pro se litigant's award would be based upon consideration of all four policies underlying section (a)(4)(E).¹³⁰ This inequity is minimized, however, because the pro se award is subject to the same requirement of reasonableness. As in other types of public interest litigation,¹³¹ courts may consider several factors¹³² in calculating the maximum reasonable value of the legal work performed. Thus, consideration of the public benefit in disclosure would not lead to windfall awards to pro se litigants. In this fashion courts will be able to calculate fee awards that serve as an incentive to plaintiffs without overcompensating them and that also deter and punish agency violations of the FOIA.

CONCLUSION

The policies of the FOIA are best served if all plaintiffs are eligible for section (a)(4)(E) awards. The legislative history of the 1974

130. If the public benefit from disclosure is very high, the pro se litigant's award could in theory be larger than that of the represented plaintiff, because the lawyer's fee does not vary with the public benefit. Similarly, when the public benefit is low, the award to the pro se plaintiff will probably be less than the compensation awarded to the represented complainant. This result is acceptable because both compensation and the public interest are properly considered in the exercise of judicial discretion.

131. See *supra* notes 32, 33.

132. The American Bar Association lists several factors to guide in determining the reasonableness of a fee: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly, (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer, (3) the fee customarily charged in the locality for similar legal services, (4) the amount involved and the results obtained, (5) the time limitations imposed by the client or the circumstances, (6) the nature and length of the professional relationship with the client, (7) the experience, reputation and ability of the lawyer or lawyers performing the services, and (8) whether the fee is fixed or contingent. Model Code of Professional Responsibility DR 2-106(B) (1980); see *King v. Greenblatt*, 560 F.2d 1024, 1026-27 (1st Cir. 1977) (endorsing ABA standards), *cert. denied*, 438 U.S. 916 (1978); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (same); cf. *Jordan v. United States Dep't of Justice*, 691 F.2d 514, 524 (D.C. Cir. 1982) (discussing fee for work of law students); *Jones v. United States Secret Service*, 81 F.R.D. 700, 702 (D.C. Cir. 1979) (fees of \$10 per hour awarded but number of hours claimed halved by the court); *Marschner v. United States Dep't of State*, 470 F. Supp. 196, 201 (D. Conn. 1979) (award to pro se litigant computed at minimum wage rate of \$2.65 per hour); *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579, 582 (D.D.C. 1981) (reducing requested amount because pro se law student litigant could not "charge defendant[s] for his education") (quoting *Orgel v. Clark Boardman Co.*, 128 U.S.P.Q. 531, 532 (S.D.N.Y. 1960), *modified*, 301 F.2d 119 (2d Cir. 1962)).

amendments makes clear that private litigation was to be the primary safeguard against noncooperative agencies, and the availability of fee awards for all plaintiffs provides the greatest incentive to private enforcement of FOIA rights and policies. Exposing the obdurate agency to the broadest possible fee liability deters the government from violating the FOIA and punishes it if it does. As the federal government collects more information and makes less of it publicly available, the most liberal interpretation of the FOIA is necessary to ensure that the agencies do not prevent the disclosure so essential to democracy.

A holding that attorney and nonattorney pro se plaintiffs are eligible for fee awards as a matter of law does not mean that a particular complainant will receive a fee award. The fact that Congress clearly left this decision to the discretion of the court shows confidence that judges are capable of balancing competing interests and deciding fee award cases in a manner that will best further the purposes of the FOIA. Even if all plaintiffs—pro se or represented, attorney or nonattorney—were eligible for section (a)(4)(E) awards as a matter of law, sound judicial discretion in deciding entitlement to the award would guard against abuse of the attorney-fee provision.

Cathy Seibel