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COMMENTS

PRO SE LITIGANT'S ELIGIBILITY FOR ATTORNEY FEES UNDER FOIA: CROOKER v. UNITED STATES DEPARTMENT OF JUSTICE

The traditional American rule regarding attorney fees requires that, absent an equitable or statutory exception, each party liti-

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1 The courts have developed three major equitable exceptions to the general rule against fee shifting: the "bad faith" theory, the "common benefit" theory, and the "private attorney general" theory. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 275 (1975) (Marshall, J., dissenting). Whether the private attorney general theory remains a basis for an award of attorney fees is doubtful. See note 2 infra. For a discussion of the rise and fall of the private attorney general theory, see Hermann & Hoffmann, Financing Public Interest Litigation in State Court: A Proposal for Legislative Action, 63 CORNELL L. REV. 173, 175-83 (1978).

The more traditional theories of "bad faith" and "common benefit" derived from the equity powers of the English Court of Chancery. See Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233, 240-41 (8th Cir. 1928), rev'd on other grounds, 281 U.S. 1 (1930). Under the bad faith exception, which was originally recognized in the United States in the case of Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166-67 (1939), an award of attorney fees is justified when a party engages in a continual pattern of evasion and obstruction, Fairley v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974); Bell v. School Bd., 321 F.2d 494, 500 (4th Cir. 1963) (en banc), or where the plaintiff was forced into unnecessary litigation, even if the defendant ultimately prevailed, McEnteggart v. Cataldo, 451 F.2d 1109, 1112 (1st Cir. 1971), cert. denied, 408 U.S. 943 (1972); Marston v. American Employers Ins. Co., 439 F.2d 1035, 1042 (1st Cir. 1971).

The "common fund" theory is based on the premise that a single party should not be charged with the entire cost of attorney fees when his legal victory benefits an entire class. Hall v. Cole, 412 U.S. 1, 5-9 (1973); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939). Although counsel fees generally are drawn from the funds recovered in the litigation, fees may be awarded where no actual monetary fund has been created. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970). For examples of other nonstatutory exceptions to the American rule, notably contractual provisions for attorney fees, see Comment, Theories of Recovering Attorney's Fees: Exceptions to the American Rule, 47 U. MO. KAN. CITY L. REV. 566, 567-68 (1979).

2 The federal statutory exceptions to the rule that each litigant must pay his own attorney are numerous. E.g., Securities Act of 1933 § 11, 15 U.S.C. § 77k(e) (1976); Copyright Act § 101, 17 U.S.C. § 116 (1976); Servicemen's Group Life Insurance Act, 38 U.S.C. § 784(g) (1976). For a list of 90 statutory fee award provisions, see SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE JUDICIARY COMMITTEE, CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF

The statutory exceptions have assumed greater importance in light of the Supreme Court's decision in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). In Alyeska, the Supreme Court severely curtailed use of the "private attorney general" doctrine as a basis for an award of attorney fees. Id. at 269. Confirming prior law to the effect that "bad faith" and "common fund" are proper equitable bases for fee awards, id. at 257-59, the Court stated that courts must find justification for any other award of fees in a specific statutory authorization. Id. at 262. The Court reasoned that it would be a usurpation of legislative power to base a fee award on judicial estimates of the importance of the policy at issue. Id. at 269.


The American rule against "fee shifting" has been severely criticized, however, primarily because it lacks the deterrent qualities inherent in fee shifting and, therefore, may encourage groundless litigation. See Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75, 78 (1963). It also has been contended that the plaintiff is not truly made whole when he still must pay his attorney fee. Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792, 792 (1966). For a discussion of the need to reform the American rule, see Kuenzel, supra, at 78; McLaughlin, The Recovery of Attorney's Fees: A New Method of Financing Legal Services, 40 Fordham L. Rev. 761 (1972); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966). Proponents of the rule argue, however, that a contrary rule unfairly penalizes a litigant who brings a claim in good faith and discourages poorer litigants from pressing claims. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 231 (1872); see Comment, Theories of Recovering Attorneys' Fees: Exceptions to the American Rule, 47 U. Mo. Kan. City L. Rev. 566, 590-91 (1979). Nevertheless, the continuing vitality of the American rule is evident. See Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964).


a court to award “reasonable attorney fees and litigation costs reasonably incurred.” A prerequisite to an award of attorney fees

Advisory Committee Act, 5 U.S.C. app. § 1 (1976). The policy favoring government disclosure is not, however, without exceptions. Congress specifically excluded nine categories of information from the FOIA disclosure requirements. See 5 U.S.C. § 552(b) (1976 & Supp. III 1979). Exempted materials may include national defense secrets, internal agency rules, trade secrets, and medical files. Id. Not all exempt documents, however, must be withheld. Even clearly exempt documents must be released unless the agency determines that such release would be harmful “to the public interest.” Letter from Attorney General Griffin Bell to heads of all Federal Departments and Agencies (May 5, 1977), reprinted in [1979] Gov't Disclosure (P-H) ¶ 300,775. For example, law enforcement material must be released unless public disclosure would decrease the efficacy of specific crime detection techniques. Attorney General’s Memorandum on the 1974 Amendments to the Freedom of Information Act (February 1975), reprinted in [1979] Gov’t Disclosure (P-H) ¶ 300,701.

The 1974 Amendments to the FOIA, Pub. L. No. 93-502, 88 Stat. 1561 (codified at 5 U.S.C. § 552 (1976)), strengthened administrative procedures and penalties in order to effectuate the general aims of the Act and to encourage prompt and complete government responses to requests for information. For example, a strict timetable was enacted whereby agencies must reply to an information request within 10 days of receipt, with either a release of the information or a denial accompanied by a notice of the appeal process. 5 U.S.C. § 552(a)(6)(A)(i) (1976). Appeals must be decided within 20 days, id. § 552(a)(6)(A)(ii), with one discretionary 10 day extension at either the initial or appeal stage. Id. § 552(a)(6)(B). An agency’s failure to comply with the appropriate deadline entitles the complainant to file suit immediately to force disclosure. Id. § 552(a)(6)(C). Also, penalties were imposed for violations of the Act. Agency employees who withhold information “arbitrarily or capriciously” are subject to disciplinary action. Id. § 552(a)(4)(F). See generally Vaughn, The Sanctions Provision of the Freedom of Information Act Amendments, 25 Am. U.L. Rev. 7 (1975).

5 5 U.S.C. § 552(a)(4)(E) (1976 & Supp. III 1979). What amount will be deemed a “reasonable” attorney fee is determined on a case-by-case basis by evaluating various factors. See, e.g., Evans v. Sheraton Park Hotel, 503 F.2d 177, 187-88 (D.C. Cir. 1974). The American Bar Association has suggested eight factors upon which the amount of a fee may be based:

(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 by 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.
(8) Whether the fee is fixed or contingent.

ABA Code of Professional Responsibility, DR 2-106(B) (1976). These criteria have been adopted by the First Circuit, see King v. Greenblatt, 560 F.2d 1024, 1027 (1st Cir. 1977), cert. denied, 438 U.S. 916 (1978), and similar criteria have been used in other circuits, see Finney v. Hutto, 548 F.2d 740, 742 (8th Cir. 1977), aff’d, 437 U.S. 678 (1978); Kerr v. Screen Extra’s Guild, Inc., 528 F.2d 67, 70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-20 (5th Cir. 1974).

Despite the language of the statute, attorney fees do not necessarily have to be “in-
under the FOIA is that the plaintiff must have "substantially prevailed." Once this threshold determination has been made, the court then balances various factors in order to determine whether an award is appropriate in the particular case. Conflict has arisen, in order to be recoverable. Courts have approved awards of attorney fees in cases involving legal service organizations where plaintiffs incur no actual fee, Palmigiano v. Garrahy, 616 F.2d 598, 601 (1st Cir.), cert. denied, 101 S. Ct. 115 (1980); Mid-Hudson Legal Serv., Inc. v. G & U, Inc., 578 F.2d 34, 37 (2d Cir. 1978); Fairley v. Patterson, 495 F.2d 598, 606-07 (5th Cir. 1974), and where legal expenses were covered by insurance, Ellis v. Cassidy, 625 F.2d 227, 230 (9th Cir. 1980).


* 5 U.S.C. § 552(a)(4)(E) (1976). The Senate, however, had proposed that the following factors be considered in making such awards: the benefit to the public from the case; the commercial benefit to the complainant; the nature of the complainant's interest in the records; and whether the government's withholding of information had a reasonable basis in law. S. REP. No. 854, 93d Cong., 2d Sess. 19 (1974), reprinted in HousE COMM. ON GOV'T OPERATIONS & SENATE COMM. ON THE JUDICIARY, LEGISLATIVE HISTORY OF THE FREEDOM OF INFORMATION ACT AMENDMENTS OF 1974, pt. 1, at 171 (Joint Comm. Print 1975). The Senate report also gave examples illustrating each of the four factors:

Under the first criterion a court would ordinarily award fees, for example, where a newsmen was seeking information to be used in a publication or a public interest group was seeking information to further a project benefitting the general public, but it would not award fees if a business was using the FOIA to obtain data relating to a competitor or as a substitute for discovery in private litigation with the government.

Under the second criterion a court would usually allow recovery of fees where the complainant was indigent or a nonprofit public interest group versus [sic] but would not if it was a large corporate interest (or a representative of such an interest). For the purposes of applying this criterion, news interests should not be considered commercial interests.

Under the third criterion a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented, but would not do so if his interest was of a frivolous or purely commercial nature.

Finally, under the fourth criterion a court would not award fees where the government's withholding had a colorable basis in law but would ordinarily award...
however, as to whether the FOIA authorizes an award of attorney fees to an otherwise qualified plaintiff who litigates pro se. Recently, in Crooker v. United States Department of Justice, the First Circuit held that attorney fees are not recoverable under the FOIA by a prisoner appearing pro se.

Michael Crooker, a federal prisoner, wrote to the Department of Justice and requested a copy of specific materials describing the role of the federal prosecutor. After receiving no reply within the

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them if the withholding appeared to be merely to avoid embarrassment or to frustrate the requestor. Whether the case involved a return to court by the same complainant seeking the same or similar documents a second time should be considered by the Court under this criterion.

Id. These criteria were omitted from the final version of the bill, however, because in addition to the belief that they were unnecessary, it was feared that "a statement of the criteria [might] be too delimiting." S. CONG. REP. No. 1200, 93d Cong., 2d Sess. 10 reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6287, 6288. Although courts are not required to employ these standards, they have been adopted widely as a framework within which to consider the prevailing party's claim for attorney fees. See Blue v. Bureau of Prisons, 570 F.2d 529 (5th Cir. 1978); Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977); Vermont Low Income Advoc. Council, Inc. v. Usey, 546 F.2d 509 (2d Cir. 1976); American Fed'n of Gov't Employees v. Rosen, 418 F. Supp. 205 (N.D. Ill. 1976).


Id. at 921-22. A pro se litigant is one who appears on his own behalf without an attorney. Almost 20% of the annual federal caseload is comprised of cases involving pro se litigants, approximately 95% of whom are state and federal prisoners. Zeigler & Hermann, The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts, 47 N.Y.U. L. Rev. 157, 159-60 (1972). A party may choose to appear pro se for a variety of reasons. See Note, The Jailed Pro Se Defendant and the Right to Prepare a Defense, 86 YALE L.J. 292, 293 n.7 (1976). The underlying rationale for official recognition of pro se appearances, however, lies in the need to provide indigent persons with access to the courts. See Note, Litigation Costs: The Hidden Barrier to the Indigent, 56 GEO. L.J. 516, 525 (1968). In fact, most pro se litigants are indigent and file in forma pauperis, pursuant to 28 U.S.C. § 1915 (1976). Zeigler & Hermann, supra, at 187. See also Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 HARV. L. REV. 610, 617-21 (1979). Although the indigent may be assigned counsel, he may prefer to appear pro se because he is convinced that an assigned attorney would not make a sufficient effort on his behalf. Note, Legal Services for Prison Inmates, 1967 WIS. L. REV. 514, 526. In addition, pro se plaintiffs may be litigating issues which are unattractive or "beyond the realm" of the average attorney. See United States v. Satan & His Staff, 54 F.R.D. 282 (W.D. Pa. 1971). The court's dealings with inadequately prepared and agitated pro se litigants are frequently frustrating. Doyle, The Courts Responsibility to the Inmate Litigant, 56 JUDICATURE 406, 406 (1973). Consequently, commentators have suggested modifications directed at weeding out frivolous pro se claims while preserving legitimate suits. See, e.g., Zeigler & Hermann, supra, at 205-19.

11 632 F.2d at 917.
period prescribed by law, Crooker filed a FOIA suit to force disclosure.\(^2\) Subsequently, two documents were tendered by the Department of Justice. Satisfied with the receipt of these materials, Crooker moved for a dismissal of the action and an award of attorney fees.\(^3\) Although the motion to dismiss was granted, the district court denied the motion for attorney fees, holding that no award was warranted since Crooker had not “substantially prevailed” on his claim and had appeared pro se.\(^4\)

On appeal the First Circuit affirmed the denial of attorney fees, holding that awards of attorney fees to pro se litigants are not authorized under the FOIA.\(^5\) Writing for a unanimous panel, Judge Bownes initially addressed the requirement that the plaintiff substantially prevail and concluded that this requirement had been met.\(^6\) The court then turned to the question of whether the

\(^2\) Id.; see note 4 supra. At approximately the same time that Crooker filed suit, the United States Attorney's office advised Crooker that it did not have the documents requested. 632 F.2d at 917. After receiving this response Crooker notified the U.S. Attorney that he had filed suit to compel disclosure. Id. Approximately 6 weeks later, a 42-page pamphlet entitled “Material Relating to Prosecutorial Discretion” was released to Crooker. Id. A second document, specifically relating to prosecution officials in the District of Massachusetts, was released and forwarded 6 months after the initial release. Id. The second release may have been due in part to Crooker's motion requesting a Vaughn-type index. Id. The Vaughn motion, a crucial discovery tool for the FOIA litigant, asks the court to order a detailed justification for the denial of disclosure, indexed by cross reference to the documents. See Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

Although previous FOIA actions had been commenced by Crooker in the District of Columbia, e.g., Crooker v. Bureau of Alcohol, Tobacco and Firearms, 635 F.2d 887 (D.C. Cir. 1980), this action was commenced in the District of Connecticut, which was a proper venue district under the FOIA. See 5 U.S.C. § 552(a)(4)(B) (1976). Crooker may have been influenced by a favorable ruling on pro se fees handed down 2 weeks earlier by the Connecticut district court. See Marschner v. Department of State, 470 F. Supp. 196 (D. Conn. 1979).

\(^3\) Id. at 917. Crooker requested $165 in attorney fees. Id.

\(^4\) Id. at 918. In denying the motion for attorney's fees, the district court found that the reasoning in Vermont Low Income Advoc. Council, Inc. v. Usery (VLIAC), 546 F.2d 509 (2d Cir. 1976), was dispositive. 632 F.2d at 917-18 & n.4; see note 16 infra.

\(^5\) 632 F.2d at 920.

\(^6\) Id. at 919. Examining the request-reply pattern, the court employed the guidelines suggested in Vermont Low Income Advoc. Council, Inc. v. Usery (VLIAC), 546 F.2d 509 (2d Cir. 1976), and concluded that Crooker had substantially prevailed. 632 F.2d at 919. In VLIAC, the Second Circuit set forth the following test for determining whether a FOIA plaintiff had substantially prevailed: “A plaintiff must show at a minimum that [the action was] necessary and that the action had substantial causative effect on the delivery of the information.” Vermont Low Income Advoc. Council, Inc. v. Usery, 546 F.2d 513 (2d Cir. 1976), nor fully responsive, id. at 919. Although the request was not difficult, the government's reluctant and dilatory compliance differed from the efforts at "amicable resolution" which distinguished the VLIAC situation. Id. Moreover, the government's failure to demonstrate
FOIA “encompasses an award of attorney fees where no attorney was involved” and concluded that it does not. In reaching its determination, the court rejected any claim that the provision for attorney fees was intended either to “reward” a successful litigant or to “punish” a recalcitrant agency. Rather, Judge Bownes found that, in permitting the recovery of attorney fees, Congress sought to provide an economic incentive for the prosecution of claims of agency abuse. This purpose, the court concluded, was not served by granting attorney fees where no attorney fees were incurred. Reasoning that a pro se plaintiff incurs no expense in litigating his FOIA suit, the court stated that an award of fees would amount to an impermissible payment for the plaintiff’s time and effort. Instead of an incentive to pursue his disclosure rights, a recovery of “fees” not incurred for representation by an attorney would be a windfall. Judge Bownes found, moreover, that an award of costs actually incurred would suffice to remove any economic barriers to suits by pro se litigants. Therefore, a recovery confined to litigation costs would make a pro se FOIA plaintiff whole, without giving him a windfall.

that their subsequent “piecemeal” disclosures were causally unrelated to Crooker’s suit required the conclusion that Crooker had substantially prevailed within the meaning of the Act. Id.

In FOIA suits, the government has the burden of proof on the issue of whether a withholding of records was proper. 5 U.S.C. § 552(a)(4)(B) (1976). To meet this burden, they must prove “in a concrete manner” that the materials requested were exempt. Crooker v. Department of Justice, 632 F.2d at 919; Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir.), cert. denied, 415 U.S. 977 (1974). Another procedural advantage for a plaintiff seeking information is that FOIA cases generally are expedited at every stage of the litigation. 5 U.S.C. § 552(a)(4)(D) (1976).

The cost of a simple FOIA suit has been estimated at $1,000. Project, Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971, 1133 (1975). More complex suits may generate up to $70,000 in fees. Id. at 1133 n.1018.

Although the Crooker court’s holding extends to all pro se litigants, the identification of costs as the sole “financial barriers” seems uniquely appropriate to the prison situation. This reasoning may be inadequate to justify denial of fees to a pro se litigant who forgoes employment income to pursue his case. See note 24 and accompanying text infra.

Another factor considered by the Crooker court in refusing to award attorney fees to pro se litigants was the difficulty in calculating the value of a nonlawyer’s
In contrast to the First Circuit, the District of Columbia Circuit has held that pro se prisoner plaintiffs are not ineligible per se for an award of attorney fees.\textsuperscript{26} Noting that all pro se plaintiffs function as attorneys, the latter court has refused to disqualify a litigant from receiving a fee award merely because he had not incurred expenses for a lawyer in prosecuting his claim.\textsuperscript{26} Rather, it has determined that a pro se plaintiff who substantially prevails could recover attorney fees in the district court’s discretion.\textsuperscript{27}

It is submitted that the District of Columbia Circuit has expressed the better view on whether a pro se plaintiff may recover an attorney fee under the FOIA. Provided that the factors favoring a fee award are present, no compelling reasons exist for denying attorney fees to pro se litigants. The arguments for denying such fee awards fail to consider that they may advance the aims of the FOIA. Rather than imposing a blanket prohibition on attorney fee awards to pro se litigants, the better view is to allow such awards, relying on the district court to ferret out non-meritorious claims by exercising its discretion.

\textsuperscript{26} Crooker v. Department of the Treasury, No. 80-1421 (D.C. Cir. Oct. 23, 1980). The District of Columbia Circuit first enunciated its position in Holly v. Acree, 72 F.R.D. 115, 116 (D.D.C. 1976), aff’d sub nom. Holly v. Chasen, 569 F.2d 160 (D.C. Cir. 1977), wherein it was held that the language and intentions of the FOIA mandated awards to pro se litigants. See note 24 supra. The court reaffirmed its position in Cox v. Department of Justice, 601 F.2d 1 (D.C. Cir. 1979) (per curiam), holding that a complainant need not actually incur an attorney’s fee in order to be eligible for an award. Id. at 5-6. The Cox court referred to the decision in Cuneo v. Rumsfeld, 553 F.2d 1360, 1364-65 (D.C. Cir. 1977), which awarded fees to an attorney appearing \textit{in propria persona}. See 601 F.2d at 5-6.

\textsuperscript{27} 601 F.2d at 6-7. The circuit court remanded the case to the district court to determine the propriety of awarding attorney fees in the case, and if attorney fees were proper, the amount. Id.
THE CASE AGAINST ATTORNEY FEES FOR PRO SE FOIA PLAINTIFFS

Although Congress' position on pro se litigants' eligibility for attorney fee awards under the FOIA is not apparent from either the statute or its legislative history, it is clear that the courts were empowered to award attorney fees in order to implement the overall purposes of the Act. The FOIA embodies a congressional determination that an informed electorate is essential for the operation of democratic processes. Thus, the FOIA set up a mechanism to promote disclosure of government information. Later, the FOIA was amended with the intention of eliminating government obduracy in compliance. Although not precisely punitive in character, the amendments embody a legislative distaste for government foot-dragging and evasion in complying with the Act. The creation of a right to recover attorney fees was one of several provisions designed to encourage private litigation as a means of discouraging government noncompliance. The decision to exclude nonattorneys appearing pro se from eligibility for an award of fees

30 See note 4 supra.
31 A FOIA request is relatively uncomplicated to make. After ascertaining which agency holds the desired information, the requester must make a written application which must comply with that agency's individual regulations, and which must include the following basic information: (1) identification of the party requesting the information, (2) specific identification of the material to be released, and (3) an address and phone number where the requester can be contacted. [1980] Gov't Disclosure (P-H) ¶ 10,023-024.
must be viewed, therefore, as a judicial determination not to encourage FOIA suits where a lawyer is not representing the complainant. While this determination may be supported by a variety of practical and policy considerations, it is submitted that these considerations can be accommodated without sacrificing the policy reasons favoring the contrary view.

The Fear of Abuse Argument

The judiciary has long been apprehensive about becoming clogged with a flood of frivolous and burdensome pro se suits. Indeed, one federal district court judge has characterized pro se motions as "disorderly, numerous, repetitious, discursive, and sometimes mad." It is argued, moreover, that the award of attorney fees in pro se cases is a response to such concerns. See Cox v. Department of Justice, 601 F.2d 1, 6 n.4 (D.C. Cir. 1979). The Cox court stated that "the court's emphasis on judicial discretion in attorney fee awards, was a responsibility to "encourage or discourage" certain kinds of suits." Id.

Crooker v. Department of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980); Graham v. Riddle, 554 F.2d 133, 135 (4th Cir. 1977); Carter v. Telecon, 452 F. Supp. 944, 946-49 (S.D. Tex. 1977). While recognizing the right to appear without counsel, United States v. Mitchell 137 F.2d 1006, 1010 (2d Cir. 1943), the judiciary remains apprehensive about the layman's ability successfully to represent his own interests, Dioguardi v. Durning, 139 F.2d 774, 775-76 (2d Cir. 1944). Thus, the attitude of the courts toward the pro se litigant is necessarily ambivalent. Describing pro se efforts as "inartistic," id. at 775, "inartfully drawn, unclear and equivocal," Estelle v. Gamble, 429 U.S. 97, 112 (1976), the courts nevertheless attempt to safeguard the legal rights of the pro se litigant. In Haines v. Kerner, 404 U.S. 519 (1972), the Supreme Court refused to dismiss a pro se complaint unless it could be said "with assurance" that the plaintiff could not prove his claim. Id. at 520-21. Furthermore, the Court indicated that pro se pleadings would be judged by "less stringent standards." Id. at 520. Despite the demonstrations of leniency toward pro se litigation, the Court's emphasis is clearly on professional legal assistance. Bounds v. Smith, 430 U.S. 817, 831 (1977); The Bounds majority stated, "[P]ro se petitioners are capable of using law books to file cases raising claims that are serious and legitimate . . . ." Id. at 826-27. In contrast, the dissent took the position that "access to a law library will . . . simply result in the filing of pleadings heavily loaded with irrelevant legalisms—possessing the veneer but lacking the substance of professional competence." Id. at 836 (Stewart, J., dissenting).


A common denominator among pro se litigants is their ignorance of the law and the consequent inadequacy of their legal petitions, applications, and motions. Ziegler & Hermann, supra note 10, at 176-87; cf. Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (pro se complaints held to less stringent standards than attorneys). Lack of legal expertise, and the concomitant judicial exasperation, is the major hurdle for pro se litigants. See, e.g., Marlow v. Tully, 79 App. Div. 2d 546, 547, 433 N.Y.S.2d 787, 789 (1st Dep't 1980). In Marlow, the pro se plaintiff was advised that further proceedings without counsel would only result in "wasteful legally inappropriate procedures." Id.

The courts are especially sensitive to the threat which prisoners "with idle time and
ney fees to nonattorneys would encourage additional spurious litigation because the award of such fees would constitute a “windfall.” The reluctance of the American courts to award attorney fees thus becomes an abhorrence in the case of awards to undeserving laymen. When the pro se litigant is a prisoner, the courts seem particularly anxious to protect the federal fisc against claims for fees, ostensibly since such awards are more difficult to calculate than in the nonprisoner context.

If the FOIA were interpreted narrowly to prohibit the award of attorney fees to pro se plaintiffs, the potential dangers imposed by such awards would be diminished. It is submitted, however, that these objections should not automatically preclude awards of attorney fees to pro se litigants under the FOIA. First, the fear of a free paper present to overcrowded court calendars. Jones v. Bales, 58 F.R.D. 453, 463 (1972) (citing Cruz v. Beto, 405 U.S. 319, 327 (1972) (Rehnquist, J., dissenting)). See Croker v. Department of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980) (“The Freedom of Information Act was not enacted to create a cottage industry for federal prisoners”). Even one active jailhouse lawyer can be responsible for a good deal of legal activity. Turner, supra note 10, at 635. For a detailed study of a pro se prisoner filing 178 cases, see Carter v. Telecron, Inc., 452 F. Supp. 944 (S.D. Tex. 1977). According to the Carter court, as of June 30, 1977, prisoner suits accounted for 15% of pending federal civil cases. Id. at 948. Moreover, in the pro se prisoner context, out-of-court settlements are difficult and rare. Consequently, some kind of judicial action is required on virtually every case. Turner, supra note 10, at 637-38.

Typically, the judicial arguments against pro se fees rest on the narrow premise that only an attorney is an attorney. Hannon v. Security Nat’l Bank, 537 F.2d 327 (9th Cir. 1976). In Hannon, a law school graduate, albeit unlicensed, was denied attorney fees because, as the court stated, “he was not an attorney and could not provide attorney services.” Id. at 329; accord, Davis v. Hurratt, 606 F.2d 717, 718 (8th Cir. 1979) (per curiam); Barrett v. United States Customs Serv., 482 F. Supp. 770, 789 (E.D. La. 1980); Burke v. Department of Justice, 432 F. Supp. 251, 253 (D. Kan. 1976); Bone v. Hibernia Bank, 354 F. Supp. 310, 311 (N.D. Cal. 1973). This approach has been called the “closed shop philosophy.” Johnson v. Avery, 393 U.S. 483, 491 (1969) (Douglas, J., concurring).

Generally, the courts have been less grudging with regard to the attorney who represents himself. Cuneo v. Rumsfeld, 553 F.2d 1360, 1366 (D.C. Cir. 1977); Wells v. Whinery, 34 Mich. App. 626, 192 N.W.2d 81 (Ct. App. 1971). The courts reason that the attorney appearing in propria persona is giving up the economic benefit of other professional opportunities. Winer v. Jonal Corp., 169 Mont. 247, 455 P.2d 1094 (1976). See also Croker v. Department of the Treasury, 534 F.2d 48, 49 (2d Cir. 1980). Moreover, the burden on the defeated party is the same whether or not the plaintiff is an attorney. Winer v. Jonal Corp., 169 Mont. 247, 455 P.2d 1094 (1976). But see Parquit Corp. v. Ross, 273 Or. 900, 543 P.2d 1070 (1975); O’Connell v. Zimmerman, 157 Cal. App. 2d 330, 321 P.2d 161 (1968); Cheney v. Ricks, 168 Ill. 533, 549, 48 N.E. 75, 81 (1897).

Croker v. Department of Justice, 632 F.2d at 921 (1st Cir. 1980); see note 49 infra.
flood of litigation arising from sanctioning fees for pro se parties is often unfounded. To be sure, there has been a sharp increase in the number of FOIA requests since the 1974 amendments were enacted. There is no indication, however, that the cause has been the availability of attorney fees. Moreover, the pro se litigant's chances of being put on a federal court docket are slim. Most complaints are disposed of during the initial stages. Even if the case goes to trial, the plaintiff still must prevail and satisfy the discretionary guidelines before attorney fees may be awarded. In addition, chances of abuse, if any, are minimized by applying the discretionary factors. For example, pro se plaintiffs whose acts are merely fee-generating and serve no public purpose may be denied fees on these grounds without arbitrarily barring recovery by all pro se plaintiffs. Further, abuse can be controlled through methods devised for calculating the value of pro se services.


42 See Open American v. Watergate Special Prosec. Force, 547 F.2d 605, 617 n.3 (D.C. Cir. 1976) (Leventhal, J., concurring) (FBI received 447 FOIA requests in 1974, as compared to 13,875 in 1975).

43 The increase might be attributed to a greater public awareness of the rights conferred by the FOIA. The added burden on the judiciary is not, however, sufficient reason for curtailing fee awards. There are alternative solutions to overcrowded courts. Institution of an individual assignment system and the appointment of additional judges could meet any additional burden precipitated by awards of attorney fees to pro se litigants. See Committee on Federal Courts, Recommendations for the Improvement of the Administration of Pro Se Civil Rights Litigation in the Federal District Courts in the Southern and Eastern Districts of New York, 30 Rec. A.B. Crry N.Y. 107, 108 (1975) [hereinafter cited as Bar Recommendations]. Interestingly, one commentator has noted the connection between judicial attitude and judicial burden: "If those who must decide [pro se] prisoners cases feel that they are a bothersome nuisance, most of the complaints will be read in a narrow grudging manner; most of the cases will be dismissed as frivolous; and the task of deciding so many groundless claims will indeed seem burdensome." Turner, supra note 10, at 638 n.144.

44 See Bar Recommendations, supra note 43, at 109-10; Ziegler & Hermann, supra note 10, at 160.

45 See Bar Recommendations, supra note 43, at 113 n.8. One commentator has noted: It is apparent that it is futile for prisoners to proceed pro se. Not only is it unlikely that the complaints will survive the . . . screening, but even assuming that the cases are not dismissed prior to service, they will languish in the courts' dockets. They are prime candidates for dismissal for failure to prosecute. Prisoners generally have neither the knowledge nor the resources to conduct discovery and move their cases to trial. Turner, supra note 10, at 625.

46 See notes 5 & 7 supra.

47 See notes 71-80 and accompanying text infra.

48 See note 75 and accompanying text infra.

49 The fee awarded a successful pro se litigant does not threaten the federal purse,
The Semantic Argument

Those opposing attorney fee awards for pro se litigants also advance two arguments based on the language of the FOIA's fee provision. As stated previously, the FOIA sanctions an award of especially when compared with the fee that a lawyer would receive in similar FOIA litigation. In contrast with the normal attorney's fee, Crooker requested only $165.00. Crooker v. Department of Justice, No. 80-1421 (D.C. Cir. Oct. 23, 1980). Cf. Jones v. United States Secret Service, 81 F.R.D. 700, 702 (D.D.C. 1979) (pro se award of $425); Holly v. Acree, 72 F.R.D. 115, 116 ($620 awarded to pro se representative). Attorneys have occasionally been less than circumspect in their fee requests. See, e.g., Copeland v. Marshall, 594 F.2d 244, 249 (D.C. Cir. 1978) (excessive fees charged by attorneys in civil right's case); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974) (possible duplication of effort by attorneys).

The problem of how to calculate an attorney fee for a nonattorney is not insurmountable. The District of Columbia Circuit dealt with this problem in Jones v. United States Secret Service, 81 F.R.D. 700, 702 (1979). Therein, the pro se plaintiff, a prisoner, claimed an hourly wage of $50.00 for 85 hours of work. Id. In determining the amount of the award, the court noted plaintiff's inexperience as an attorney, the time spent in nonlegal activities, and the fact that as a public ward, the plaintiff gave up no income and incurred no expense. Id. Concluding that the plaintiff did deserve some award for his "diligence and skill," the court reduced the hourly wage to 10 dollars. Id. Furthermore, the court discounted the hours by one-half, attributing the excess time to plaintiff's lack of experience. Id. The determining factors in the Jones decision have been employed by other courts. For example, the economic distinction between legal and nonlegal work has been used to reduce awards for services performed by nonattorneys. E.g., Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974); Lindy Bros. Builders, Inc., v. American Radiator & Stand. Sanit. Corp., 487 F.2d 161, 167 (3d Cir. 1973). In Lamphere v. Brown, 610 F.2d 46, 48 (1st Cir. 1979), the First Circuit found the work of paralegals "necessary and compensable," but only at the rate of their actual hourly wage. Id. In contrast, courts frequently base awards to attorneys on the fair market value of their services, rather than their normal hourly wage. The fee actually incurred may not always be the fee awarded. See note 7 supra. Many courts use a fair market value standard. See National Treasury Employees Union v. Nixon, 521 F.2d 317, 322 (D.C. Cir. 1975); Alyeska Pipeline Service Co. v. Wilderness Soc'y, 495 F.2d 1026, 1037 (D.C. Cir. 1974) (en banc), rev'd on other grounds, 421 U.S. 240 (1975); Fairley v. Patterson, 493 F.2d 596, 607 (5th Cir. 1974). In Campbell v. United States Civil Serv. Comm'n, 539 F.2d 58, 62 (10th Cir. 1978), an award of $225 was remanded for reconsideration as too low in light of the $35 per hour standard offered in FOIA's legislative history. Id. (citing H.R. REP. No. 876, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6275). Courts also have alluded to the legislatively nurtured opinion that a reasonable fee in a FOIA action is $1,000 to $1,400. American Fed'n of Gov't Employees v. Rosen, 418 F. Supp. 205, 209 (N.D. Ill. 1976) (citing H.R. Rev. No. 876, 93d Cong., 2d Sess. 9 (1974)).

Generally, courts will consider a variety of factors such as customary fees, reputation, time limitations, and results in arriving at an appropriate hourly wage. See Pete v. United Mine Workers of Am. Welfare & Retirement Fund of 1950, 517 F.2d 1275, 1290 (D.C. Cir. 1975); note 8 supra. An additional factor in arriving at a fair market value is loss of income from other employment. 81 F.R.D. at 702. Significantly, this factor is normally considered in relation to the amount of the award. Id.; ABA Code of Professional Responsibility, DR 2-106(B) (1976). It has been used, however, as a rationale for denying fee awards. See Crooker v. Department of the Treasury, 634 F.2d at 49.
"reasonable attorney fees and litigation costs reasonably incurred." It is argued that "incurred" modifies "fees" as well as "costs." Therefore, since attorney fees are not incurred by a party appearing pro se, no award is proper. Alternately, it is argued that the inclusion of nonattorneys as eligible for an award of "attorney" fees violates the "clear language" of the statute. Although enticingly straightforward, both arguments must fail. The first argument overlooks two situations where attorney fees are sanctioned although no fees are "incurred" by the plaintiffs. While neither lawyers appearing in propria persona nor legal service organizations representing FOIA plaintiffs charge their "clients" a fee, attorney fees under the FOIA are recoverable nonetheless. The second argument can be overcome by focusing on an alternate meaning of the term "attorney fees." Commonly, attorney fees are understood to be payments for the services of a qualified lawyer. Additionally, however, the term may mean payments for legal services without regard to whether or not they were performed by a lawyer. Thus, "attorney" fees have been awarded to paralegals and other persons not admitted to the bar for their work in connection with litigation. The existence of this "functional" definition of the term "attorney fees" belies the argument that its meaning is "clear."

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50 Crooker v. Department of Justice, 632 F.2d 916, 921 (1st Cir. 1980).
51 Barrett v. United States Customs Serv., 482 F. Supp. 779, 780 (E.D. La. 1980); accord, Hannon v. Security Nat'l Bank, 537 F.2d 327, 329 (9th Cir. 1976). It is argued further that the absence of a specific inclusion of nonattorneys in the statute implies that Congress did not wish to compensate them for their services. Hannon v. Security Nat'l Bank, 537 F.2d at 328.
52 Mid-Hudson Legal Servs., Inc. v. G & U, Inc., 578 F.2d 34, 37 (2d Cir. 1978); Cuneo v. Rumsfeld, 553 F.2d 1360, 1364 (D.C. Cir. 1977); Lee v. Southern Home Sites Corp., 444 F.2d 143, 147 n.3 (5th Cir. 1971); Miller v. Amusement Enterps., Inc., 426 F.2d 534, 538-39 (5th Cir. 1970). See also Crooker v. Department of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980). The awards to legal service organizations are justified on the ground that attorneys are actually involved. Crooker v. Department of the Treasury, 634 F.2d 48, 49 n.1 (2d Cir. 1980); Crooker v. Department of Justice, 632 F.2d 916, 921 n.7 (1st Cir. 1980) (citing Palmigiano v. Garrahy, 616 F.2d 598 (1st Cir. 1980)). Furthermore, the courts want to support the public interests represented by these organizations. Mid-Hudson Legal Servs., Inc., v. G & U, Inc., 578 F.2d 34, 37 (1978).
53 See note 51 supra.
55 See note 49 supra.
The Economic Barrier Argument

Opponents of awards of attorney fees in pro se suits further argue that such awards are outside the ambit of the FOIA. This argument is based on the premise that the aim of the Act was to promote government disclosure by removing the expense of an attorney as a potential deterrent to prosecuting FOIA claims. The opponents conclude, therefore, that since the pro se litigant never contemplates the payment of such a fee, he does not need the benefit of the statute.

Assuming arguendo that removal of economic barriers to suit is the sole purpose underlying the decision by Congress to sanction fee awards in FOIA suits, this argument still is unpersuasive. Indeed, no economic barrier in the form of a bill for the services of an attorney exists for a pro se litigant. Nevertheless, real economic barriers in other forms do exist. It is difficult for indigent parties to obtain legal counsel, and even more difficult when the indigent party is a prisoner. For these parties, a pro se appearance may be the only realistic route available for forcing disclosure under the FOIA. The indigent’s lack of means bars his appearance by an attorney and forces him to perform this function himself. Additionally, an economic barrier may exist for nonprisoner pro se plaintiffs since they may forego income-producing activity to pursue a FOIA claim. Admittedly, most pro se claims are made by

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67 Croker v. Department of Justice, 632 F.2d at 921.
68 See Nussbaum, Attorney's Fees in Public Interest Litigation, 48 N.Y.U.L. Rev. 301, 306 n.16 (1973). The key to the problem lies in the large number of people below the poverty level and the small number of legal service lawyers. Id.
70 Larsen, A Prisoner Looks at Writing, 56 Calif. L. Rev. 343, 345-46 (1968). One commentator tersely summarized the problem as follows: “Lawyers generally require at least a fifty dollar fee to travel to the prisons to consult with a prisoner. The ones not able to pay this sum must resort to the next best course of action—act as their own lawyers.” Id. at 345. Even if counsel is assigned, the prisoner may be at a disadvantage since “some attorneys do not feel an obligation to put forth their best efforts for a client who is not paying them and who they probably will never see.” Note, Legal Services for Prison Inmates, 1967 Wis. L. Rev. 514, 526.
71 The Second Circuit has recognized that an economic barrier may be presented in either of two ways: “by the prospect of having to pay an attorney or having to forego an opportunity to earn one's regular income for a day or more in order to prepare and pursue a pro se suit.” Croker v. Department of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980). See S. Rep. No. 854, 93d Cong., 2d Sess. 16 (1974) (quoting Sen. Thurmond).
PRISONERS WHO DO NOT LOSE TANGIBLE ECONOMIC BENEFITS IN PURSUING A FOIA CLAIM. This fact, however, does not justify a blanket ban on pro se recovery of fees. It is conceivable that the relatively small number of nonprisoner, pro se complaints indicates that lack of representation and loss of income without reimbursement have been effective economic barriers to the pursuit of the claims.

THE CASE IN FAVOR OF ATTORNEY FEES FOR PRO SE FOIA PLAINTIFFS

The primary consideration in deciding whether pro se plaintiffs should be denied attorney fees must be the effectuation of the policy underlying FOIA. In enacting the FOIA, Congress created a disclosure statute which depended on suits by private litigants for enforcement. When private enforcement proved ineffective, measures were adopted to curb government abuse of the Act by removing the chief barriers to individual litigation. What constituted a violation of the Act was defined with greater precision; punitive measures against intentional misconduct were created, and attorney fees became available. Indeed, these measures have been so successful in encouraging the pursuit of FOIA rights that courts now fear plaintiff abuse. Specifically, some courts are afraid, in the case of pro se plaintiffs, that fee awards under the FOIA will give rise to a "flood" of burdensome litigation and undeserved "windfall" awards. Inexplicably, plaintiff abuse does not appear to be a problem when the plaintiff is represented by a lawyer. It is ironic, but in categorically refusing to award attorney fees to pro se litigants, courts are refusing to apply a statutory provision aimed at encouraging FOIA suits to a class of plaintiffs on whom the provision is having the desired effect. The public benefit is real and


63 See note 4 supra.

64 See note 33 and accompanying text supra.


66 See id. § 552(a)(4)(E).

67 See, e.g., Crooker v. Department of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980); Hannon v. Security Nat'l Bank, 537 F.2d 327, 329 n.1 (9th Cir. 1976).


their legal activity deserving of compensation.\textsuperscript{70}

Allowing pro se FOIA litigants to recover attorney fees need not result in windfall recoveries and other abuses. Stringent criteria must be satisfied to justify an award of attorney fees to the FOIA plaintiff who substantially prevails.\textsuperscript{71} The complainant must demonstrate an absence of commercial incentive, an appropriate interest in the information sought, unreasonable government non-compliance, and vindication of a public interest.\textsuperscript{72} By properly applying these factors, courts have the wherewithal to control potential abuse by pro se plaintiffs without shielding the government from the payment of a fee award in a proper case.\textsuperscript{73} For example, a "jailhouse lawyer" who generates a stream of FOIA litigation may be found ineligible for a fee award because of the commercial incentive for prosecuting his claims\textsuperscript{74}—specifically, the generation of fee income.\textsuperscript{75} Although the "commercial incentive" factor is usually applied to a businessman seeking information to be used for an economic gain,\textsuperscript{76} it is relevant in the pro se context as well. When the FOIA is used to generate personal income or to acquire information which is not of public interest, the enforcement of disclosure rights becomes incidental to securing personal benefit and the incentive of a fee award becomes superfluous.\textsuperscript{77}

Similarly, the other fee award criteria will act to qualify the

\textsuperscript{70} "Many of the landmark prisoner rights cases were commenced by prisoners pro se." Bar Recommendations, supra note 71, at 114 n.13; see, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963). It is submitted that pro se litigants should not be denied fee awards, regardless of whether they forego any income in prosecuting claims. Whether a pro se claimant is a prisoner or unemployed is irrelevant to a determination of whether he is eligible for an award. If a suit promotes the disclosure policy of the Act, economic status alone should not preclude an award of attorney fees. If economic status is determinative of a litigant's eligibility for a fee award, some inequities would result. For example, a lawyer who comes out of retirement to pursue a FOIA claim would be ineligible because he did not forego other income.

\textsuperscript{71} See notes 6 & 7 supra.
\textsuperscript{72} See note 7 supra.
\textsuperscript{73} Marschner v. Department of State, 410 F. Supp. 196, 201 (D. Conn. 1979).
\textsuperscript{74} See note 7 supra.
\textsuperscript{75} See, e.g., Polynesian Cultural Center, Inc., v. NLRB, 600 F.2d 1327, 1330 (9th Cir. 1979). The intentions of the Act do not include financing private actions where there is already sufficient impetus to proceed. Blue v. Bureau of Prisons, 570 F.2d 529, 534 (5th Cir. 1978).
right to recover attorney fees. The courts are eminently capable of balancing the four factors and arriving at a decision which reflects the equities of the individual case. The application of these factors will serve to determine whether attorney fees are appropriate and will ensure that the interests of the FOIA will be served without denying awards to deserving plaintiffs.

CONCLUSION

The FOIA presents a unique situation requiring responsive judicial interpretation: no overt wrong has been committed against the FOIA plaintiff and no damage award is available to attract counsel. Without assertive public enforcement, a silent erosion of Congressional policy may ensue. It is submitted that awards of

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78 See Pope v. United States, 424 F. Supp. 962, 965-66 (S.D. Tex. 1977). In Pope, the plaintiff, although obtaining much of the information sought, was held not to have substantially prevailed. Furthermore, the government's withholding was deemed proper, there was no public benefit, and the plaintiff's interest was commercial and personal. Id. at 966; accord, Fenster v. Brown, [1980] Gov't DISCLOSURE (P-H) ¶ 79,148 (D.C. Cir. Dec. 18, 1979).

79 The application of the four factors for determining the appropriateness of an award of fees requires sensitivity to the issues at hand. S. Rep. No. 854, 93d Cong., 2d Sess. 19 (1974). In Shermco Indus., Inc. v. Secretary of the United States Air Force, 452 F. Supp. 306, 326 (N.D. Tex. 1978), a fee award was granted despite a commercial interest due to the unreasonable withholding by the defendant. Id. In contrast, the government had valid reason for refusing the disclosure of the material requested in Flower v. FBI, 448 F. Supp. 567, 574 (W.D. Tex. 1978). Attorney's fees were awarded, however, because of the strong public benefit. Id.


82 Cf. Knight v. Auciello, 453 F.2d 852, 853 (1st Cir. 1972) (plaintiff's financial inability to litigate may foster deliberate noncompliance with the civil rights laws). In Knight, the district court had refused to award attorney's fees in a civil rights case, but the First Circuit reversed and granted the award. Although not a FOIA case, the Knight court stated incisively:

The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication, as the case at bar illustrates. If a defendant may feel that the cost of litigation, and, particularly, that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing.

453 F.2d at 853 (emphasis added).
attorney fees to pro se FOIA litigants will further the FOIA’s goal of an informed electorate by encouraging agency compliance.

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