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ATTORNEY FEES, FREEDOM OF INFORMATION, AND PRO SE LITIGANTS: PER SE PROHIBITIONS FRUSTRATE POLICIES

In 1974 Congress amended¹ the Freedom of Information Act (FOIA)² to enhance the ability of citizens to avail themselves of the benefits and protections of the Act.³ Among other objectives, Congress intended the amendments to "facilitate freer and more expeditious public access to government information" and "to encourage more faithful compliance with the terms and objectives of the FOIA."⁴ As a means of ensuring that agencies do not withhold information unjustifiably, one provision⁵ permits courts to "assess reasonable attorney fees and other litigation costs reasonably incurred"⁶ by parties who seek information and then prevail in litigation challenging an agency's failure to disclose.

Courts have struggled to interpret this provision. The cases agree on the plaintiffs that qualify as prevailing parties⁷ and the

1. P.L. 93-502, 88 Stat. 1561 (1974). The Freedom of Information Act (FOIA), as originally enacted, had no provision for attorney fees. Because all FOIA suits were civil suits against federal agencies or officials, the section in title 28 governing attorney fees, see 28 U.S.C. 2412(a) (1976), as amended by P.L. 96-481, 94 Stat. 2327 (1980), precluded attorney fees.

2. Congress enacted the FOIA in 1966, P.L. 89-487, 80 Stat. 250 (1966) (current version at 5 U.S.C. §§ 552-552b (1982)). The FOIA was amended in 1974, see P.L. 93-502, 88 Stat. 1561 (1974), and in 1976, see P.L. 94-409, 90 Stat. 1241 (1976).

3. A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies The needs of the electorate have outpaced the laws which guarantee public access to the facts in Government.

H.R. No. 1497, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2418-29.

4. S. Rep. No. 854, 93d Cong., 2d Sess. 1 (1974). In addition, the amendments were designed "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." *Id.*

5. 5 U.S.C. § 552(a)(4)(E) (1982).

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

7. See, e.g., *Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509 (2d Cir. 1976) (prosecution must have been reasonably necessary and action must have had substantial causative effect on disclosure of information); *Kaye v. Burns*, 411 F. Supp. 897

authority is clear on the general standards for determining the prevailing parties that should receive fee awards.⁸ Confusion reigns, however, when courts analyze the appropriateness of awarding attorney fees to pro se plaintiffs.⁹

Courts also disagree when the pro se plaintiff is an attorney. For several years the United States Court of Appeals for the District of Columbia Circuit has awarded attorney fees to attorney¹⁰ and nonattorney pro se litigants.¹¹ A recent decision by the United States Court of Appeals for the Fifth Circuit, *Cazalas v. United States Department of Justice*,¹² denied attorney fees to nonattorney pro se litigants but approved recovery by attorneys who represent themselves. One month later, the United States Court of Appeals for the Sixth Circuit, in *Falcone v. IRS*,¹³ reaffirmed its prohibition against attorney fee awards to nonattorney pro se plaintiffs and extended this rule to pro se attorneys.

The original bill¹⁴ introduced in the Senate to amend the FOIA and authorize courts to assess attorney fees listed four factors courts should consider in determining the appropriateness of a fee award: (1) the benefit to the public deriving from the plaintiff's claim; (2) the commercial benefit to the complainant; (3) the na-

(S.D.N.Y. 1976) (plaintiff prevailed when document was produced during pending action); *Goldstein v. Levi*, 415 F. Supp. 303 (D.D.C. 1976) (plaintiff prevailed who previously had been unsuccessful in obtaining information, but agency complied after court action filed).

8. See *infra* notes 14-18 and accompanying text; see also *infra* notes 36-66.

9. The United States Courts of Appeals for the First, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have denied attorney fees under the FOIA to pro se plaintiffs. *Crooker v. United States Dep't of Justice*, 632 F.2d 916 (1st Cir. 1980); *Barrett v. Bureau of Customs*, 651 F.2d 1087 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *Falcone v. IRS*, 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1689 (1984); *Wolfel v. United States*, 711 F.2d 66 (6th Cir. 1983); *DeBold v. Stimson*, 735 F.2d 1037 (7th Cir. 1984); *Burke v. United States Dep't of Justice*, 559 F.2d 1182 (10th Cir. 1977); *Clarkson v. IRS*, 678 F.2d 1368 (11th Cir. 1982). The United States Court of Appeals for the Second Circuit would award attorney fees when the pro se litigant could establish that prosecuting the claim diverted time from income-producing activity. See *Crooker v. United States Dep't of the Treasury*, 634 F.2d 48 (2d Cir. 1980). The United States Court of Appeals for the District of Columbia Circuit would award attorney fees to all otherwise eligible pro se litigants. See *Cox v. United States Dep't of Justice*, 601 F.2d 1 (D.C. Cir. 1979); *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977).

10. See, e.g., *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977).

11. See, e.g., *Cox v. United States Dep't of Justice*, 601 F.2d 1 (D.C. Cir. 1979).

12. 709 F.2d 1051 (5th Cir. 1983).

13. 714 F.2d 646, *cert. denied*, 104 S. Ct. 1689 (1984).

14. S. 2543, 93d Cong., 2d Sess. (1974).

ture of the complainant's interest in the federal records sought; and (4) whether the agency had a reasonable basis in law for withholding the records sought.¹⁵ Congress did not incorporate these criteria in the final version of the FOIA amendment,¹⁶ but the criteria indicate that Congress intended to relieve persons who are motivated by factors other than pure self-interest. Congress assumed that plaintiffs seeking information for commercial or pecuniary reasons would have sufficient motivation to proceed without the benefit of a fee award.¹⁷ The United States Court of Appeals for the Fifth Circuit has adopted these criteria.¹⁸

Congress amended the FOIA to vindicate the important congressional policy¹⁹ underlying the original FOIA: allowing citizens easier access to government information. Analyzing *Cazalas* and *Falcone* against the background of the FOIA's legislative history and the development of attorney fees awards under both the FOIA and other statutes reveals that a per se rule against attorney fees under the FOIA for all pro se litigants frustrates this congressional policy.²⁰

DEVELOPMENT OF ATTORNEY FEE AWARDS UNDER THE FOIA

American law generally does not allow recovery of attorney fees²¹

15. S. Rep. No. 854, 93d Cong., 2d Sess. (1974).

16. Conference Report No. 93-1200, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS, 6285, 6288.

The Senate amendment . . . added certain criteria for consideration by the court in making [attorney fee] awards . . . By eliminating these criteria, the conferees do not intend to . . . preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria. Instead, the conferees believe that because the existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria may be too delimiting and is unnecessary.

Id.

17. See S. Rep. No. 854, 93d Cong., 2d Sess. (1974).

18. See *Blue v. Bureau of Prisons*, 570 F.2d 529 (5th Cir. 1978).

19. In *Newman v. Piggie Park Enter.*, 390 U.S. 400 (1968), the United States Supreme Court announced that plaintiffs could recover attorney fees when their actions vindicated an important congressional policy. *Id.* at 402; see *infra* notes 178-86 and accompanying text.

20. See also Note, *Fee Awards for Pro Se Attorney and Nonattorney Plaintiffs Under the Freedom of Information Act*, 52 *FORD. L. REV.* 374 (1983).

21. The rule was enunciated in *Arcambe v. Wiseman*, 3 U.S. (3 Dall.) 306 (1976). See generally Note, *Attorney Fee Awards in the Federal Courts*, 56 *ST. JOHNS L. REV.* 277 (1982). See also S. SPEISER, *ATTORNEYS FEES* § 12.3, at 463-64 & n.26 (1972).

from opposing parties unless a contract or statute authorizes the award.²² Courts have developed three exceptions to the rule.²³ First, the common-benefit theory allows a plaintiff whose action created a benefit for others to recover attorney fees absent an identifiable financial recovery resulting from the litigation.²⁴ Second, the bad-faith exception allows courts to base a fee award on a frivolous or malicious plaintiff's claim or on the party's improper conduct during the litigation. Awards under this exception are punitive.²⁵ Third, the private-attorney-general theory permits plaintiffs to recover attorney fees when their "actions vindicate an important congressional policy."²⁶ The United States Supreme Court narrowed this doctrine in *Alyeska Pipeline Service Co. v. Wilderness Society*,²⁷ ruling that federal courts must determine conditions for awarding attorney fees based on specific congressional authorization.²⁸ The FOIA attorney fees award provision is an example of this authorization.

Courts' power to award attorney fees under the FOIA is purely discretionary.²⁹ Plaintiffs must request the awards, and the amendment establishes no presumption in the plaintiff's favor.³⁰ In considering whether to grant an attorney fees award under the FOIA, the court must first consider whether the plaintiff "substantially

22. *Fleishman Distillers Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

23. *Blue v. Bureau of Prisons*, 570 F.2d 529 (5th Cir. 1978); Note, *Theories of Recovering Attorney Fees: Exceptions to the American Rule*, 47 Mo. K.C.L. REV. 566 (1979); Note, *supra* note 21.

24. *E.g.*, *Hall v. Cole*, 412 U.S. 1 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939).

25. See Note, *supra* note 21, at 281 n.14; see also Comment, *Nemeroff v. Abelson, Bad Faith and Awards of Attorneys' Fees*, 128 U. PA. L. REV. 468 (1979); Comment, *Attorney's Fees and Federal Bad Faith Exception*, 29 HAST. L.J. 319 (1977).

26. *Newman v. Piggie Park Enter.*, 390 U.S. 400, 402 (1968).

27. 421 U.S. 240 (1975).

28. *Id.* at 247; see *Blue v. Bureau of Prisons*, 570 F.2d 529 (5th Cir. 1978); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 709 (D.C. Cir. 1977); Note, *Awarding Attorneys Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HAST. L.J. 733 (1973).

29. *Cox v. United States Dep't of Justice*, 601 F.2d 1 (D.C. Cir. 1979); see S. Rep. No. 854, 93d Cong., 2d Sess. (1974); Note, *supra* note 21, at 320-35.

30. *Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979); *Maxwell Broadcasting Corp. v. FBI*, 490 F. Supp. 254 (N.D. Tex. 1980); *Richard v. IRS*, 519 F. Supp. 924 (N.D. Ill. 1979).

prevailed.”³¹ Courts have applied a flexible standard, not even requiring the plaintiff actually to have prevailed on the merits.³² Most courts require only that the litigation result in agency disclosure either by court order or by the agency tendering the information before the close of litigation.³³ The United States Court of Appeals for the Second Circuit defined the minimum standard in *Vermont Low Income Advocacy Council v. Usery*:³⁴ the action must have been reasonably “necessary and [have] had a substantial causative effect on the delivery of the information.”³⁵

After a court determines that a plaintiff substantially prevailed, it must analyze the character and purpose of the plaintiff’s information request. Most courts have adopted as guidelines the four criteria³⁶ that the Senate recommended in its report.³⁷ The first of these criteria requires that the public derive some benefit from the plaintiff’s suit. Courts have defined public benefit in various ways. In *Aviation Data Service v. FAA*,³⁸ the United States Court of Appeals for the Tenth Circuit stated that the disclosure must help the general public make informed judgments about governmental operations.³⁹ Applying a less rigorous standard, the United States Court of Appeals for the District of Columbia Circuit in *Cuneo v. Rumsfeld*⁴⁰ required merely that successful FOIA plaintiffs render “substantial service . . . to the public at large by securing for it the benefits assumed to flow from public disclosure of government information.”⁴¹ Courts that follow the criteria in the Senate Report

31. See Note, *supra* note 21, at 292.

32. See, e.g., *Goldstein v. Levi*, 415 F. Supp. 303 (D.D.C. 1976) (within short time of filing court action, plaintiff obtained documents he had tried unsuccessfully to obtain for three years); *Florence v. United States Dep’t of Defense*, 415 F. Supp. 156 (D.D.C. 1976) (agency produced documents while action pending); *Kaye v. Burns*, 411 F. Supp. 897 (S.D.N.Y. 1976). But see *Lovell v. Alderete*, 630 F.2d 428 (5th Cir. 1980) (mere fact that information disclosed after action filed insufficient to establish that plaintiff substantially prevailed).

33. See, e.g., *Lovell v. Alderete*, 630 F.2d 428 (5th Cir. 1980); *Public Law Educ. Instit. v. United States Dep’t of Justice*, 556 F. Supp. 476 (D.D.C. 1983); *Werner-Continental, Inc. v. Farkas*, 478 F. Supp. 815 (S.D. Ohio 1979).

34. 546 F.2d 509 (2d Cir. 1976).

35. *Id.* at 513.

36. See *supra* notes 14-18 and accompanying text.

37. S. Rep. No. 854, 93d Cong., 2d Sess. (1974).

38. 687 F.2d 1319 (10th Cir. 1982).

39. *Id.* at 1323.

40. 553 F.2d 1360 (D.C. Cir. 1977).

41. *Id.* at 1367.

generally apply some form of the more stringent *Data Aviation* test.⁴²

The second and third guidelines focus on the plaintiff's motive for requesting information. Courts can ascertain readily whether a plaintiff sought information for self-serving commercial reasons.⁴³ For example, the United States District Court for the Southern District of New York in *Cliff v. IRS*⁴⁴ found that a tax attorney seeking records from the Internal Revenue Service had an "overwhelmingly commercial interest."⁴⁵ The third guideline, the nature of the plaintiff's interest in the records sought, relates closely to the commercial interest question.⁴⁶ In *Westinghouse Electric Corp. v. NLRB*,⁴⁷ the United States District Court for the Western District of Pennsylvania denied an attorney fees award because the plaintiff obtained information potentially useful in other litigation. In *Sabalos v. Regan*,⁴⁸ the plaintiffs sought records in defending against a tax audit assessment. The United States District Court for the Eastern District of Virginia held that the plaintiffs' self-interest precluded an attorney fees award.⁴⁹ From the reference in the Senate Report to press and public interest organizations,⁵⁰ the United States Court of Appeals for the Fifth Circuit inferred that the degree of dissemination and public impact of the information is relevant to the plaintiff's interest in the records.⁵¹

Under the final guideline, courts evaluate whether the agency had any reasonable basis in law for withholding requested informa-

42. See, e.g., *Lovell v. Alderete*, 630 F.2d 428 (5th Cir. 1980) (disclosure will not add to fund of knowledge citizens use when making vital political choices); *Sabalos v. Regan*, 520 F. Supp. 1069 (E.D. Va. 1981) (plaintiffs had no intent to disseminate information to public).

43. See *Clarkson v. IRS*, 678 F.2d 1368 (11th Cir. 1982); *Cultural Center, Inc. v. NLRB*, 600 F.2d 1327 (9th Cir. 1979).

44. 529 F. Supp. 11 (S.D.N.Y. 1981).

45. *Id.* at 17.

46. See *Cazalas v. United States Dep't of Justice*, 709 F.2d 1051, 1054 (5th Cir. 1983).

47. 497 F. Supp. 82 (W.D. Pa. 1980).

48. 520 F. Supp. 1069 (E.D. Va. 1981).

49. The court also ruled that the IRS had a reasonable basis in law for withholding the records the Sabalos' sought. See also *Aviation Data Serv. v. FAA*, 687 F.2d 1319 (10th Cir. 1982); *Crooker v. United States Dep't of Justice*, 632 F.2d 916 (1st Cir. 1980) (prisoner's self-interest); *Crooker v. United States Dep't of Treasury*, 634 F.2d 48 (2d Cir. 1980) (same); *Luzaich v. United States*, 435 F. Supp. 31 (D. Minn. 1977) (taxpayer's self-interest).

50. See S. Rep. No. 854, 93d Cong., 2d Sess. (1974).

51. *Blue v. Bureau of Prisons*, 570 F.2d 529, 533 (5th Cir. 1978).

tion. In *Sabalos*, the Internal Revenue Service (IRS) withheld memoranda under an FOIA exception to mandatory disclosure.⁵² The court found that the IRS acted reasonably when it waited for another court to decide whether the exemption applied to similar memoranda before complying with the plaintiffs' request.⁵³

In conjunction with the criteria of the Senate Report, courts consider another factor in determining whether to award attorney fees: whether the plaintiff proceeded pro se. Presently, ten federal circuit courts have ruled that pro se litigants may not recover attorney fees under the FOIA or analogous statutes.⁵⁴ Courts construing the phrase "reasonable attorney fees and other litigation costs reasonably incurred"⁵⁵ under the FOIA's attorney fees provision have focused primarily on the "attorney fees" component of that phrase. This narrow focus has led the courts to reason that Congress intended to encourage plaintiffs to seek legal assistance rather than to reimburse litigants who have incurred no attorney fees.⁵⁶

The United States Courts of Appeals for the Second and Seventh Circuits apparently gave independent significance to the phrase "other litigation costs" in reviewing the attorney fees provision. In *Crooker v. United States Department of Justice*⁵⁷ the Sec-

52. "This section does not apply to matters that are: (2) related solely to the internal personnel rules and practices of an agency. . . (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (E) disclose investigative techniques and procedures . . ." 5 U.S.C. § 552(b)(2), (b)(7)(E) (1982).

53. 520 F. Supp. at 1073.

54. See *Crooker v. United States Dep't of Justice*, 632 F.2d 916 (1st Cir. 1980); *Owens-El v. Robinson*, 694 F.2d 941 (3d Cir. 1982); *Pitts v. Vaughn*, 679 F.2d 311 (3d Cir. 1982); *Cunningham v. FBI*, 664 F.2d 383 (3d Cir. 1981); *White v. Arlen Realty and Dev. Corp.*, 614 F.2d 387 (4th Cir.), cert. denied, 447 U.S. 923 (1980) (Truth-in-Lending Act); *Barrett v. Bureau of Customs*, 651 F.2d 1087 (5th Cir. 1981), cert. denied, 455 U.S. 950 (1982); *Wolfel v. United States*, 711 F.2d 66 (6th Cir. 1983); *DeBold v. Stimson*, 735 F.2d 1037 (7th Cir. 1984); *Redding v. Fairman*, 717 F.2d 1105 (7th Cir. 1983); *Davis v. Parratt*, 608 F.2d 717 (8th Cir. 1979); *Hannon v. Security Nat'l Bank*, 537 F.2d 327 (9th Cir. 1976); *Burke v. United States Dep't of Justice*, 559 F.2d 1182 (10th Cir. 1976); *Clarkson v. IRS*, 678 F.2d 1368 (11th Cir. 1982).

55. See *supra* note 6 for the full text of attorney fees provision.

56. See, e.g., *DeBold v. Stimson*, 735 F.2d 1037 (7th Cir. 1984); *Wolfel v. United States*, 711 F.2d 66 (6th Cir. 1983); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089-90 (5th Cir. 1981), cert. denied, 455 U.S. 950 (1982).

57. 634 F.2d 48 (2d Cir. 1980).

ond Circuit denied a prisoner an attorney fees award because he proceeded pro se. The court stated, however, that a plaintiff who proved that pursuing legal action diverted time from income-producing activity could recover litigation costs.⁵⁸ The Seventh Circuit denied a pro se litigant an "attorney fee" in *DeBold v. Stimson*,⁵⁹ yet it would reimburse a pro se litigant costs that he reasonably incurred.⁶⁰ The District of Columbia Circuit also recognized congressional authorization to award attorney fees to pro se litigants in *Cox v. United States Department of Justice*.⁶¹ Unlike the Second and Seventh Circuits, the District of Columbia Circuit did not require the plaintiff to demonstrate a loss of income to recover attorney fees.

Three federal circuit courts have considered whether an attorney pro se litigant may recover attorneys fees. In 1977, the District of Columbia Circuit authorized awards to attorneys in *Cuneo v. Rumsfeld*.⁶² The United States Courts of Appeals for the Fifth and Sixth Circuits, however, reached conflicting results. The Fifth Circuit, which denied attorney fees to nonlawyer pro se litigants in *Barrett v. Bureau of Customs*,⁶³ ruled in *Cazalas v. United States Department of Justice*⁶⁴ that an attorney representing himself may recover litigation costs. In *Falcone v. IRS*,⁶⁵ however, the Sixth Circuit held that no pro se litigant may recover an attorney fees award.⁶⁶

58. *Id.* at 49.

59. 735 F.2d 1037 (7th Cir. 1984).

60. *Id.* at 1043. The Seventh Circuit's reasoning is confusing because the court cites *Crooker v. United States Dep't of Justice*, 632 F.2d 916 (1st Cir. 1980), as support for reimbursing litigation costs, yet denies expenses for time and effort expended.

61. 601 F.2d 1 (D.C. Cir. 1979).

62. 553 F.2d 1360 (D.C. Cir. 1977).

63. 651 F.2d 1087 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982).

64. 709 F.2d 1051 (5th Cir. 1983).

65. 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1689 (1984).

66. The Sixth Circuit applied the reasoning it used for denying a fee award to a nonattorney pro se litigant in *Wolfel v. United States*, 711 F.2d 66 (6th Cir. 1983), to the attorney pro se litigant in *Falcone*. In *DeBold v. Stimson*, 735 F.2d 1037 (7th Cir. 1984), the court denied attorney fees to a pro se litigant. Noting *Falcone* and *Cazalas*, the court expressed no opinion on the issue whether an attorney who proceeds pro se could recover an attorney fee. *Id.* at 1043 n.4.

THE CASES

Cazalas v. United States Department of Justice

In *Cazalas*,⁶⁷ an Assistant United States Attorney requested from the Justice Department (Justice), under the FOIA and the Privacy Act, information relating to employment discrimination she allegedly suffered because of her sex.⁶⁸ The United States Attorney for the Eastern District of Louisiana later dismissed *Cazalas*.⁶⁹ Because Justice did not comply with her request in a timely manner, *Cazalas* filed for a show cause order.⁷⁰ Justice eventually provided the records that she sought, but the district court ruled that *Cazalas* had not "substantially prevailed" and therefore denied her an attorney fees award.

The Fifth Circuit reversed and remanded her case to determine whether *Cazalas* could recover a fee award under the standards of the Senate Report.⁷¹ The Fifth Circuit had adopted those standards in *Blue v. Bureau of Prisons*⁷² and *Lovell v. Alderete*.⁷³ On remand, the United States District Court for the Eastern District of Louisiana held that *Cazalas*' claim was inconsistent with those standards. Accordingly, the court denied her an attorney fees award⁷⁴ and *Cazalas* appealed.

The court of appeals first considered the district court's ruling regarding the criteria in the Senate Report, beginning with the public benefit of disclosing the records.⁷⁵ In rejecting the claim that *Cazalas* sought the records as a substitute for discovery in her discrimination suit,⁷⁶ the court acknowledged *Cazalas*' strong personal interest in acquiring the records but emphasized the stronger

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

68. *Id.* at 1052.

69. *Cazalas* also filed complaints with the Equal Employment Opportunity Commission and initiated a federal court action seeking reinstatement. These claims were not before the court on this appeal. *Id.*

70. *Id.*

71. See *supra* notes 14-18 and accompanying text.

72. 570 F.2d 529 (5th Cir. 1979).

73. 630 F.2d 428 (5th Cir. 1980); see *Cazalas v. United States Dep't of Justice*, 660 F.2d 612 (5th Cir. 1981).

74. 709 F.2d at 1052.

75. See *id.* at 1053.

76. See *id.*

public interest in knowing that the Department of Justice sometimes may proceed unjustly.⁷⁷ Internal decisions based on impermissible factors such as sex may reflect a policy allowing lax prosecution of those who violate civil rights laws.⁷⁸ Thus, the public ultimately benefited from the disclosure.⁷⁹

The court considered together Cazalas' potential commercial benefit and her interest in the records sought, the second and third Senate Report criteria.⁸⁰ The court recognized that Cazalas had a strong interest in reinstatement and back pay and, thus, disclosure of the records could produce a pecuniary benefit. Despite finding a potential for financial gain resulting from the court's remedy, the court reasoned that Cazalas' potential reinstatement would not provide the kind of commercial benefit that Congress expressly declined to protect.⁸¹ Nor did the receipt of some monetary benefit diminish the broader public benefit served by production of the records.⁸² Based on the Senate Report,⁸³ the court reasoned further that the government's recalcitrance in complying with Cazalas' request weighted in favor of granting an attorney fees award despite her financial incentive for seeking the records.⁸⁴ Thus, the court implicitly applied the bad-faith exception developed at common law.

Finally, the court rejected the argument that Justice properly withheld the documents under an FOIA exemption that applies to "inter-agency or intra-agency memorand[a] or letters which would not be available to a party other than an agency in litigation with the agency."⁸⁵ The court found that the documents were discoverable in private litigation because they pertained to investigative facts rather than the consultative policy-making processes that

77. *See id.*

78. *Id.* at 1053-54.

79. *Id.* at 1054.

80. *See id.*

81. *See id.*

82. *Id.*

83. *See id.* The court relied on a passage from Senate Report No. 93-854 that indicated government recalcitrance can be a mitigating factor in favor of the plaintiff. *See* S. Rep. No. 854, 93d Cong., 2d Sess. (1974).

84. *See* 709 F.2d at 1055.

85. *See id.* (citing 5 U.S.C. § 552(b)(5) (1982)).

Congress intended the exemption to protect.⁸⁶ Justice, therefore, had no colorable basis in law for withholding the records.⁸⁷

After deciding that Cazalas had met the standards for recovering an attorney fees award, the court examined Cazalas' status as an attorney proceeding pro se, a question of first impression in the Fifth Circuit. Before responding to Justice's arguments against an attorney fees award, the court briefly traced the developments in other circuits⁸⁸ and found them unpersuasive. Because the District of Columbia Circuit had awarded attorney fees both to attorneys and to nonattorneys proceeding pro se, the Fifth Circuit could not apply the District of Columbia Circuit's analysis without overruling its denial of attorney fees to nonattorney pro se plaintiffs in *Barrett v. Bureau of Customs*.⁸⁹ The Fifth Circuit considered a split between the Fourth and Ninth Circuits similarly unhelpful.⁹⁰ The Fourth Circuit had declined to award attorney fees to an attorney proceeding pro se in a Truth-in-Lending Act case,⁹¹ but the Ninth Circuit had granted attorney fees to a pro se attorney defendant under the Civil Rights Attorneys Fees Awards Act.⁹²

The Justice Department presented four arguments for denying Cazalas an attorney fees award. It first contended that Cazalas incurred no out-of-pocket expenses to deter her from pursuing the FOIA action and, therefore, that an attorney fees award would serve to punish the government.⁹³ In response, the court maintained that Cazalas had shown the ample costs that she incurred in forgoing work and expending personal energy. The court reasoned that these are precisely the types of expenses that could deter a less determined litigant.⁹⁴ To Justice's assertion that an attorney fees award would constitute punishment, the court again implicitly applied the bad-faith exception to the general rule against attorney

86. 709 F.2d at 1055.

87. *Id.*

88. *See id.* at 1055-56.

89. 651 F.2d 1087 (5th Cir. 1981); *see infra* notes 138-45 and accompanying text.

90. 709 F.2d at 1056.

91. *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387 (4th Cir.), *cert. denied*, 447 U.S. 923 (1980).

92. *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980).

93. 709 F.2d at 1056.

94. *Id.*

fees awards,⁹⁵ responding that any punitive aspect of the award existed not to give Cazalas a windfall, but rather to reprimand the government for failing to comply with its own laws.⁹⁶

Justice contended further that Congress intended the statute to encourage consultation with objective attorneys who would counsel against needless litigation. Justice argued that pro se attorneys might lack objectivity.⁹⁷ Finding little evidence in the legislative history of the FOIA amendment to support this claim, the court inferred from the general theme of the Senate Report that Congress enacted the attorney fees provision to ensure vigorous advocacy.⁹⁸ The court stressed that Cazalas provided for herself the determined representation Congress intended to make available to FOIA litigants.⁹⁹

The court rejected Justice's warning that attorneys would abuse the statute by generating fees for themselves. The court reasoned that when a party makes a justified request for information the government responds quickly and no lawsuit arises. When the government has a colorable basis in law for denying the request, courts applying the criteria would not award attorney fees.¹⁰⁰ No evidence suggested that Cazalas intended merely to generate a fee. Cazalas did not know that the Department would offer such resistance to her FOIA request. Further, she was employed and lacked any incentive to generate a fee.¹⁰¹

The Department finally argued that because the court had denied attorney fees awards based on lost income to nonattorney pro se litigants, the court should not allow awards to attorneys for self-representation.¹⁰² The court noted two distinctions between attorney and nonattorney pro se litigants. First, Congress sought to encourage legal representation, which attorney pro se litigants provide. Second, courts can value relatively simply a pro se attorney's expenses because the work the attorney loses is similar to the work

95. See *supra* notes 21-25 and accompanying text.

96. 709 F.2d at 1056.

97. See *id.*

98. See *id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. See *id.* at 1057.

involved in the prosecution of his or her claim.¹⁰³

Having rejected Justice's arguments, the court posited three policies underlying fee awards, and explained how awards to attorney pro se litigants further those policies.¹⁰⁴ First, the award encourages private individuals to overcome the barriers agencies have erected to circumvent the FOIA. Attorneys seeking information from the government face these same barriers.¹⁰⁵ Second, the provision deters the government from opposing justifiable requests,¹⁰⁶ and, third, it deters the government from unreasonably opposing such requests.¹⁰⁷ The court reasoned that attorneys proceeding pro se further these goals.¹⁰⁸ Thus, the court remanded the case to determine an appropriate amount for Cazalas' attorney fees award.¹⁰⁹

Falcone v. IRS

In *Falcone v. IRS*,¹¹⁰ the plaintiff, a tax attorney, obtained through a suit in the United States District Court for the Eastern District of Michigan¹¹¹ certain documents from the Internal Revenue Service (IRS).¹¹² He then petitioned the court¹¹³ to award him attorney fees under the FOIA.¹¹⁴ The district court observed that Falcone substantially prevailed in the FOIA suit; nevertheless, it denied an attorney fees award because the IRS acted reasonably in withholding the requested documents.¹¹⁵

The Sixth Circuit did not decide whether the IRS reasonably withheld the documents because its decision in *Wolfel v. United States*¹¹⁶ required the court to consider first whether Falcone's pro se status precluded an attorney fees award. Taking an approach

103. *Id.*

104. *See id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 1058.

110. 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1689 (1984).

111. *See Falcone v. IRS*, 479 F. Supp. 985 (E.D. Mich. 1979).

112. 714 F.2d at 646.

113. 535 F. Supp. 1313 (E.D. Mich. 1982).

114. 714 F.2d at 646.

115. *Id.* at 647.

116. 711 F.2d 66 (6th Cir. 1983).

similar to that of the Fifth Circuit in *Cazalas*, the court surveyed decisions in other circuits that had denied attorney fees to nonlawyer pro se litigants and considered the appropriateness of allowing pro se attorney litigants to recover fees.¹¹⁷ The Sixth Circuit, however, arrived at a different conclusion from that of the Fifth Circuit in *Cazalas*. Without question, the Sixth Circuit rejected the District of Columbia Circuit's reasoning in *Cuneo v. Rumsfeld*¹¹⁸ and *Cox v. United States Department of Justice*,¹¹⁹ both of which awarded fees to pro se attorneys and nonattorneys.¹²⁰ Because *Wolfel* had denied attorney fees to nonattorney pro se litigants,¹²¹ the court's task in *Falcone* was to decide the narrower issue whether to treat attorney pro se litigants differently.¹²²

The court of appeals affirmed the district court's denial and advanced three arguments against awarding fees to pro se attorneys in FOIA suits. First, the court reasserted the position it had adopted in *Wolfel* that Congress intended section 552(a)(4)(E) to relieve the burden of legal costs that plaintiffs incur in FOIA litigation.¹²³ Litigants who incur no legal expenses do not assume that burden and, therefore, attorney fees awards to pro se litigants are inappropriate.¹²⁴

The court's second reason for denying *Falcone* an attorney fees award also turned on its perception of congressional intent. Citing the Fifth Circuit's decision in *Barrett v. Bureau of Customs*,¹²⁵ the Sixth Circuit stated that Congress intended section 552(a)(4)(E) to encourage plaintiffs to seek legal advice so as to avoid unnecessary litigation.¹²⁶ Quoting favorably from the Fourth Circuit's opinion in *White v. Arlen Realty & Development Corp.*,¹²⁷ the court reasoned that pro se attorneys will not have the "detached and ob-

117. See 714 F.2d at 647.

118. 553 F.2d 1360 (D.C. Cir. 1977).

119. 601 F.2d 1 (D.C. Cir. 1979).

120. *Falcone*, 714 F.2d at 647.

121. 711 F.2d 66 (6th Cir. 1983).

122. 714 F.2d at 647.

123. *Id.*

124. *Id.*

125. 651 F.2d 1087, 1089, 1090 (5th Cir. 1981).

126. 714 F.2d at 647.

127. 614 F.2d 387 (4th Cir.), cert. denied, 447 U.S. 923 (1980).

jective perspective' "128 necessary to fulfill the aims of the FOIA.¹²⁹

The potential for abuse by attorneys generating fees gave rise to the court's third reason for denying fee awards generally to pro se plaintiffs and especially to attorneys proceeding pro se.¹³⁰ Noting the Second Circuit's dicta in *Crooker v. United States Department of Treasury*,¹³¹ which suggested that pro se plaintiffs should recover expenses on a showing that the litigation diverted them from income-producing activity,¹³² the Sixth Circuit recognized that such a rule might deter attorneys from filing FOIA claims solely to generate fees.¹³³ Nevertheless, the court rejected the Second Circuit's suggested rule, asserting that it not only would create difficult problems of proof, which the Sixth Circuit failed to enumerate, but also failed to override the Sixth Circuit's other reasons for denying fee awards to pro se litigants.¹³⁴ The Sixth Circuit concluded that "[b]oth a client and an attorney are necessary ingredients for an award of fees in a[n] FOIA case."¹³⁵

CRITICISM OF THE CASES

Cazalas v. United States Department of Justice

The Fifth Circuit's decision allowing pro se attorneys to recover litigation costs under the FOIA attorney fees provision effectively implements the underlying policies of the provision. The law should offer attorneys the same benefits that it provides to other citizens.¹³⁶ Focusing on the spirit of the FOIA and its amendments, the court essentially adopted a balancing approach. The court found, therefore, that the important congressional policy of facilitating access to government information overrode the significance of Cazalas' pro se status. The court failed to offer convincing reasons, however, for distinguishing attorney pro se litigants from

128. 714 F.2d at 647 (quoting 614 F.2d at 388).

129. 714 F.2d at 647.

130. See *id.* at 648.

131. See *id.* at 648 (citing 634 F.2d 48 (2d Cir. 1980)).

132. See 714 F.2d at 648 (citing 634 F.2d at 49).

133. 714 F.2d at 648.

134. *Id.*

135. *Id.*

136. Note, *Administrative Law: Attorneys Fees Under the FOIA: Commercial Interests and In Propria Persona Appearances*, 24 WAYNE L. REV. 1043, 1060 (1978).

other pro se litigants.¹³⁷

In *Cazalas*, the Fifth Circuit implicitly overruled its holding in *Barrett v. Bureau of Customs*¹³⁸ by legitimizing the punitive effects of awarding attorney fees to pro se plaintiffs and by giving effect to the phrase "other litigation costs" in the attorney fees provision. In *Barrett*, the court stated that "to award an attorney's fee where no fee was incurred constitutes a penalty for non-compliance."¹³⁹ Responding to the appellees' argument in *Cazalas*, however, that an attorney fees award would punish the government, the court declared that "the government should be reprimanded for unreasonably failing to comply with its own governing laws."¹⁴⁰ This progressive approach furthers a major purpose of the FOIA amendments: to encourage the government's faithful compliance with the FOIA's terms and objectives.¹⁴¹

In *Cazalas*, the Fifth Circuit also construed more precisely than in *Barrett* the language of the attorney fees provision. Focusing on the attorney fees element of the phrase "reasonable attorney fees and other litigation costs reasonably incurred," the court in *Barrett* had interpreted the phrase to mean "reasonable attorney fees reasonably incurred."¹⁴² Based on this interpretation, the court inferred that Congress added the words "reasonably incurred" to prohibit attorney fees awards to pro se plaintiffs.¹⁴³ Arguably, though, the phrase "reasonably incurred" modifies the phrase "attorney fees" as well as the phrase "other litigation costs."¹⁴⁴ This construction supports the presumption that Congress intended

137. In *Duncan v. Poythress*, 572 F. Supp. 776 (N.D. Ga. 1983), the court denied an attorney fees award under the Civil Rights Attorneys Fee Awards Act, 42 U.S.C. § 1988 (1982), to an attorney who proceeded pro se. The court noted that "the *Cazalas* court's attempt to distinguish between the two classes of pro se litigants is not wholly convincing." 572 F. Supp. at 780.

138. 651 F.2d 1087 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982).

139. *Id.* at 1090.

140. 709 F.2d at 1056.

141. See S. Rep. No. 854, 93d Cong., 2d Sess. 1 (1974).

142. 651 F.2d at 1089.

143. *Id.*

144. In *Holly v. Acree*, 72 F.R.D. 115 (D.D.C. 1976), *aff'd*, 569 F.2d 160 (D.C. Cir. 1979), the court reasoned that because the attorney fees provision refers to permissible attorney fees as "reasonable attorney fees," Congress could not have intended to have the phrase "reasonably incurred" apply to "reasonable attorney fees" as well. Thus, the words "reasonably incurred" apply only to "other litigation costs." *Id.* at 116.

courts to follow the criteria enumerated in the Senate Report and adopted by the Fifth Circuit in *Blue v. Bureau of Prisons*¹⁴⁵ to determine whether a plaintiff reasonably incurred attorney fees and other litigation costs.¹⁴⁶

The Fifth Circuit's finding that Cazalas incurred litigation costs by forgoing work and expending personal energy implies that the court has broadened its previously narrow focus on the attorney fees element of the FOIA's attorney fees award provision. Expressly overruling *Barrett* and eliminating the artificial distinction between attorney and nonattorney pro se plaintiffs would have better implemented the policies underlying the FOIA and its attorney fees provision. The Fifth Circuit, however, relied on the weaker reasoning that Congress's intent to provide legal representation requires courts to distinguish between attorney and nonattorney pro se plaintiffs when awarding attorney fees.¹⁴⁷ The amendment's phrase "other litigation costs reasonably incurred,"¹⁴⁸ to which the Fifth Circuit gave effect in *Cazalas*, implies that Congress anticipated that FOIA plaintiffs would not incur litigation costs solely by seeking legal advice. Indeed, in a nation that so strongly promotes self-help,¹⁴⁹ Congress should encourage citizens to rely on any available resource to pursue FOIA claims. Furthermore, requiring plaintiffs to retain attorneys as a condition for recovering attorney fees contradicts Congress's express purpose to facilitate public access to government information.¹⁵⁰ The Fifth Circuit's conclusion that legal representation in all FOIA cases requires an attorney frustrates an important FOIA policy and does not justify the distinction between attorney and nonattorney pro se litigants.

145. 570 F.2d 529 (5th Cir. 1978).

146. The court in *Barrett* offered a poor example of an unreasonably incurred fee: "incurring legal fees by filing suit when the agency showed its intention to comply but was a little late." 651 F.2d at 1089. No court would award an attorney's fee in this situation because the plaintiff would not have "substantially prevailed." See *supra* notes 31-35 and accompanying text.

147. 709 F.2d at 1057; accord *DeBold v. Stimson*, 735 F.2d 1037 (7th Cir. 1984).

148. 5 U.S.C. § 552(a)(4)(E) (1982).

149. See *Faretta v. California*, 422 U.S. 806, 826 (1976) ("The [American] colonists brought with them an appreciation of the virtue of self-reliance. . . ."). See generally J. NAISBITT, *MEGATRENDS* 131-157 (1982).

150. See S. Rep. No. 854, 93d Cong., 2d Sess. 1 (1974); Note, *supra* note 21, at 387-88.

The Fifth Circuit also concluded speciously that the relative simplicity of measuring the work that an attorney forgoes to prosecute an FOIA claim justifies reimbursing attorney, but not other, pro se litigants for lost income. Attorneys would have to document their claims and, as with other pro se litigants, submit them as evidence. The majority of employed persons in the United States earn salaries or an hourly wage¹⁵¹ and could document their lost income just as easily.¹⁵²

The Second Circuit's suggestion in *Cox v. Department of Treasury*¹⁵³ that pro se litigants should recover attorney fees upon a showing of lost income demonstrates the unfairness of distinguishing between attorney and nonattorney pro se litigants when awarding litigation costs. The Second Circuit provides a more equitable approach because it considers whether the plaintiff actually suffered a pecuniary loss and reimburses any loss that it finds. Although this approach potentially could discriminate against pro se plaintiffs who earn less money than other pro se plaintiffs, and thus could confer a greater benefit on higher paid individuals, courts could eliminate substantially such inequities. For example, courts could limit fee awards to an amount an attorney reasonably would have charged. Courts could rely also on the phrase "reasonably incurred" to prevent disproportionately large awards to high-salaried plaintiffs. Ultimately, the important policies that the attorney fees provision promotes must prevail over the desirability of achieving absolute parity in the amounts of attorney fees awards.¹⁵⁴

In contrast to the Second Circuit's approach, the Fifth Circuit focused on the type of work forgone, implicitly valuing one type of work over all others and automatically excluding nonattorney pro se plaintiffs from the class of individuals that Congress sought to protect. The criteria of the Senate Report show that Congress did

151. In 1982, 99,526,000 civilians were employed. Of these workers, 89,967,000 earned hourly wages or salaries. United States Dept. of Labor, Bureau of Labor Statistics, 107 MONTHLY LABOR REVIEW 90 (Jan. 1984).

152. For a discussion of "opportunity cost" and its valuation, see Note, *Attorney Fees for Pro Se Plaintiffs Under the Freedom of Information and Privacy Acts*, 63 B.U.L. REV. 443 (1983).

153. 634 F.2d 48 (2d Cir. 1980).

154. Accord Note, *supra* note 21, at 395.

not intend the FOIA attorney fees provision to produce such an arbitrary and discriminatory result. Attorney fee awards to nonattorney as well as attorney pro se plaintiffs promote equally the policies served by the attorney fees provision.

Falcone v. IRS

Following its recent decision in *Wolfel v. United States*¹⁵⁵ and decisions in other circuits,¹⁵⁶ the Sixth Circuit in *Falcone* focused primarily on legal costs¹⁵⁷ and the characteristics of legal representation¹⁵⁸ that it presumed to be proper. This analysis shows little sensitivity to the FOIA's broader policies. In *Wolfel*, the Sixth Circuit held that pro se plaintiffs do not bear the specific financial burden that Congress intended to relieve because they do not incur legal fees.¹⁵⁹ *Falcone* simply extended that reasoning to pro se attorney plaintiffs.¹⁶⁰ Thus, in an approach similar to *Barrett*, *Falcone* effectively ignored the phrase "other litigation costs" in construing the attorney fees award provision.

The Sixth Circuit's narrow interpretation of legal costs assumes that FOIA plaintiffs generate litigation costs only by consulting an attorney. Because the court emphasized legal costs, it concluded erroneously that pro se FOIA litigants incur no burdens that should merit congressional relief. As the Fifth Circuit noted in *Cazalas*, forgoing work and expending personal energy substantially burden the plaintiff¹⁶¹ and may deter the plaintiff from pursuing a valid FOIA claim. The Sixth Circuit's narrow focus on legal costs, an approach the Fifth Circuit has abandoned, fails to consider the objective of the attorney fees provision—to encourage legitimate FOIA claims. Accordingly, the Sixth Circuit's approach contradicts a corollary goal of the amendment—to relieve plaintiffs from the financial burden of litigation.

The Sixth Circuit's second objection¹⁶² to awarding attorney fees

155. 711 F.2d 66 (6th Cir. 1983).

156. See 714 F.2d at 647.

157. See *id.*

158. See *id.*

159. 711 F.2d at 68.

160. 714 F.2d at 647.

161. 709 F.2d at 1056.

162. See 714 F.2d at 647.

to attorney pro se plaintiffs focused not only on the Fifth Circuit's reasoning in *Barrett* that Congress intended to prevent needless FOIA litigation by encouraging potential FOIA plaintiffs to seek legal advice,¹⁶³ but also on the United States Court of Appeals for the Fourth Circuit's conclusion in *White v. Arlen*¹⁶⁴ that Congress intended to encourage detached and objective legal representation.¹⁶⁵ Despite the Fifth Circuit's arguably incorrect statutory construction in *Barrett*,¹⁶⁶ the Sixth Circuit rationally could rely on the Fifth Circuit's interpretation of the FOIA provision. The Fourth Circuit's interpretation of the Truth-in-Lending Act attorney fee provision in *White*, however, does not rationally support the Sixth Circuit's distinction between attorneys who represent others and attorneys who represent themselves.

In *White*, an attorney sought attorney fees under the Truth-in-Lending Act (TILA)¹⁶⁷ attorney fees provision. TILA cases differ significantly from FOIA cases because the former always involve monetary damages and usually involve matters surrounding the conduct of both parties.¹⁶⁸ An attorney proceeding pro se in a TILA action always has pecuniary interests and therefore is less detached and objective than an attorney seeking information from the government. Because of the nature of TILA actions, Congress placed greater emphasis on objective legal representation in enacting the TILA attorney fees provision, and the Fourth Circuit correctly recognized that emphasis.¹⁶⁹

163. See 651 F.2d at 1089-90.

164. 614 F.2d 387 (4th Cir.), cert. denied, 447 U.S. 923 (1980).

165. See *id.* at 388.

166. See *supra* notes 145-47 and accompanying text.

167. 15 U.S.C. §§ 1601-1665 (1982).

168. See, e.g., *Manning v. Princeton Consumer Discount Co.*, 533 F.2d 102 (3d Cir.), cert. denied, 429 U.S. 865, reh'g denied, 429 U.S. 933 (1976) (no disclosure of commission arrangement between seller and lender); *Millhollin v. Ford Motor Credit Co.*, 531 F. Supp. 379 (D. Ore. 1981) (actual deception not a prerequisite to finding violation; borrowers who might have been misled by disclosures protected); *United Missouri Bank of Kansas City v. Robinson*, ___ Kan. ___, 638 P.2d 372 (1981) (TILA claim as counterclaim to lender's action on debt); *Thrift Funds of Baton Rouge, Inc. v. Jones*, 274 So. 2d 150 (La.), cert. denied, 414 U.S. 820 (1973) (lender's action did not constitute fraudulent or careless attempt to misinform debtor).

169. See 614 F.2d at 388. Inexperience and lack of objectivity caused the plaintiff-attorney in *White* to present a very poor case. He lost on the merits in the district court and subsequently hired counsel for his successful appeal. *Id.*

Concededly, the policy of encouraging legitimate FOIA claims envisions effective legal representation, and to be effective, representation must be objective.¹⁷⁰ The policies underlying the FOIA attorney fees provision, however, embrace other important considerations, including that of deterring government agency violations and protecting the public interest in open government. Therefore, the Sixth Circuit's application of the congressional policy underlying the TILA in the context of FOIA litigation ignores the different policies underlying the two acts.

The Sixth Circuit also exaggerated the problems of proof in evaluating a pro se plaintiff's litigation costs.¹⁷¹ Courts have vast experience in determining damage awards. Further, the Second Circuit in *Crooker v. United States Department of Treasury*¹⁷² and the Fifth Circuit in *Cazalas*¹⁷³ have approved attorney fees awards to pro se litigants based on adequate proof of expenses incurred. Apparently, the Sixth Circuit dismissed this procedure so readily in *Falcone* because it primarily based its decision on other grounds.¹⁷⁴

CONGRESSIONAL INTENT AND THE FOIA: A FRAMEWORK FOR ANALYSIS

Although the Sixth Circuit in *Falcone* reached an improper result by misapplying the Fourth Circuit's interpretation of the policies underlying the Truth-in-Lending Act, courts often apply appropriately the reasoning in decisions construing similar statutes.¹⁷⁵ The Civil Rights Attorneys Fee Awards Act of 1976 (Awards Act)¹⁷⁶ authorizes "a reasonable attorney's fee as part of

170. One writer argues that lawyers working for a contingency fee lack objectivity. See Note, *supra* note 152, at 470 n.165.

171. See generally Note, *supra* note 152. One author suggests that courts could use the criteria of the Senate Report as factors to determine appropriate awards to pro se litigants. Note, *supra* note 21, at 395-97.

172. 634 F.2d 48 (2d Cir. 1980).

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

174. See 714 F.2d at 648.

175. See, e.g., *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (applying legislative history of title II attorney fees provision to title VII case); *Franks v. Bowman Trans. Co.*, 424 U.S. 747 (1976) (relying on construction of National Labor Relations Act provisions to construe title VII provision); *Lovell v. Snow*, 637 F.2d 170 (1st Cir. 1981) (applying reasoning of FOIA attorney fees provision analysis to Civil Rights Attorney Fees Awards Act).

176. 42 U.S.C. § 1988 (1982).

the costs."¹⁷⁷ The reasoning of decisions in suits brought under the Awards Act supports an approach allowing pro se FOIA litigants to recover fees.

In *Newman v. Piggie Park Enterprises*,¹⁷⁸ the United States Supreme Court stated that civil rights plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render the award unjust."¹⁷⁹ Reaffirmed in *Northcross v. Board of Education Memphis City Schools*,¹⁸⁰ this statement became known as the Newman-Northcross rule.¹⁸¹ Two congressional reports on the Awards Act make clear that Congress intended the Newman-Northcross Rule to apply to the Awards Act.¹⁸² The House Report¹⁸³ stated that "existing judicial standards"¹⁸⁴ should guide the courts, and the Senate Report¹⁸⁵ quoted the rule from *Newman*.¹⁸⁶

The language of the Awards Act¹⁸⁷ limiting awards to attorney fees indicates that Congress recognized the complexity of prosecuting civil rights claims and the corresponding need for legal representation. A pro se plaintiff's potential for delaying the courts rationally suffices as a "special circumstance" that precludes an attorney fees award. Indeed, a plaintiff's pro se status appears to be one of the few special circumstances that will preclude an award under the Awards Act.¹⁸⁸ Courts have held that neither the ability

177. "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. §§ 1681-1686 (1982)], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d-2000d-6 (1982)], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982) (as amended Public Law 96-481, title II § 205(c), Oct. 21, 1980, 94 Stat. 2330).

178. 390 U.S. 400 (1968).

179. *Id.* at 402.

180. 412 U.S. 427 (1973).

181. *Zarcone v. Perry*, 581 F.2d 1039, 1042 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

182. *See Note, supra* note 21.

183. H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976).

184. *Id.* at 6.

185. S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, 5908, 5910, 5912.

186. *Id.* at 5910 (quoting 390 U.S. at 402).

187. *See supra* note 177.

188. *See, e.g., Cofield v. City of Atlanta*, 648 F.2d 986 (5th Cir. 1981) (plaintiff's pro se status precludes an award); *Gore v. Turner*, 563 F.2d 159, 163-64 (5th Cir. 1977) (attorney-client relationship required); *Duncan v. Poythress*, 572 F. Supp. 776 (N.D. Ga. 1983) (no

to pay¹⁸⁹ nor the fact that the plaintiff's attorney worked on a pro bono basis¹⁹⁰ precludes an award under the Awards Act. The Act's clear limitation of awards to attorney fees thus balances the affirmative command of the Newman-Northcross Rule.

In contrast to the Awards Act, the FOIA attorney fees provision allows awards for "other litigation costs reasonably incurred."¹⁹¹ Courts apply the criteria of the Senate Report to limit the award rather than to award attorney fees under all but "special circumstances."¹⁹² The FOIA's expansive language indicates that Congress anticipated a greater number of potential FOIA claimants incurring a wider variety of litigation costs. By suggesting criteria in the Senate Report, Congress intended to guide the courts; by excluding these criteria in the statute, Congress expressed its reluctance to limit the court's discretion.¹⁹³ The absence from the Senate criteria of pro se status as a limiting factor, in tandem with the statute's expansive language, precludes the conclusion that Congress intended to prohibit awards to pro se FOIA plaintiffs.

In *Newman*, the Supreme Court established a liberal rule for awarding attorney fees based on its reasoning that courts deciding civil rights cases award primarily injunctive relief and that the plaintiff's personal gain is subsidiary. In *Albemarle v. Moody*,¹⁹⁴ the Court expanded this concept to award fees when the plaintiff recovers retroactive pay in addition to injunctive relief. To better implement the policies underlying the FOIA attorney fees provision, courts should complement the criteria of the Senate Report with the reasoning of *Newman*, *Northcross*, and *Albemarle*. FOIA claims provide solely injunctive relief. Although pecuniary gain

reason to distinguish attorney from nonattorney pro se plaintiffs; pro se status precludes award).

189. See, e.g., *International Soc'y for Krishna Consciousness v. Collins*, 609 F.2d (5th Cir. 1980); *Brown v. Continental Realty*, 592 F.2d 891 (5th Cir. 1979); *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978); see also Note, *supra* note 21, at 326 n.227.

190. See, e.g., *Oldham v. Ehrlich*, 617 F.2d 163 (8th Cir. 1980); *Palmigiano v. Garrahy*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); see also Note, *supra* note 21, at 327 n.229.

191. 5 U.S.C. § 552(a)(4)(E) (1982).

192. See S. Rep. No. 854, 93d Cong., 2d Sess. (1974).

193. See H.R. Rep. No. 876, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6267-85.

194. 422 U.S. 405 (1975).

may result from such relief, as in *Cazalas*,¹⁹⁵ *Albemarle* does not preclude an attorney fees award if the benefit the litigant experienced was secondary to the public benefit of encouraging disclosure of information.

Courts can prevent abuse of *Newman*'s liberal rule by adhering strictly to the criteria of the Senate Report.¹⁹⁶ The Fifth Circuit in *Blue v. Bureau of Prisons*¹⁹⁷ established a strict standard for determining whether the public will benefit from a plaintiff's claim. It recommended that courts consider the likely degree of dissemination that would result from disclosure and the concomitant public impact.¹⁹⁸ This standard would deter information requests designed to generate fees.

Plaintiffs who satisfy the public-benefit test still face the commercial benefit and "nature of the interest" tests. Courts have demonstrated amply an ability to recognize commercial benefit¹⁹⁹ and self-interest²⁰⁰ and to weigh these against the public benefit. Even the District of Columbia Circuit, which found a sufficient public benefit in "enhanc[ing] the public interest by bringing the government into compliance with law,"²⁰¹ remanded the plaintiff's appeal to determine the nature of his interest in the records sought.²⁰² Nevertheless, even when a plaintiff meets these criteria, a court still may deny an attorney fees award if it finds that the government withheld the records with a colorable basis in law.²⁰³

CONCLUSION

By enacting the original FOIA, Congress intended "to establish a general philosophy of full agency disclosure"²⁰⁴ and to close "loop-

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

196. See Note, *Pro Se Litigants' Eligibility for Attorneys Fees Under the FOIA*: Crooker v. United States Department of Justice, 55 ST. JOHN'S L. REV. 520 (1981).

197. 570 F.2d 529 (5th Cir. 1978).

198. See *id.* at 533.

199. See *supra* notes 43-45 and accompanying text.

200. See *supra* notes 46-52 and accompanying text.

201. 553 F.2d 1360, 1366 (D.C. Cir. 1977); see *supra* notes 44-48 and accompanying text.

202. *Cuneo v. Romsfeld*, 553 F.2d 1360, 1363 (D.C. Cir. 1977). Cuneo claimed that a government manual's unavailability severely impaired his ability to assist his clients effectively during contract negotiations. *Id.*

203. 520 F. Supp. 1069 (E.D. Va. 1981).

204. S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

holes which allow agencies to deny legitimate information to the public.”²⁰⁵ By recognizing that this philosophy applies with equal force to pro se and represented parties, courts will better implement the policies Congress intended the attorney fees provision to promote.

Congress amended the FOIA not only to remove obstacles blocking the public’s access to government information,²⁰⁶ but also “to strengthen the citizens’ remedy against agencies and officials who violate the Act.”²⁰⁷ Congress drew no lines discriminating among citizens or denying rights and remedies to those who do not retain attorneys. Absent a clear expression of a congressional policy to deny pro se litigants an opportunity to recover an attorney fees award, courts should not impose arbitrary prohibitions against such awards.

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205. *Id.*

206. S. Rep. No. 854, 93d Cong., 2d Sess. 1 (1974).

207. *Id.*