

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION, )  
                        )  
Plaintiff,           )  
                        )  
v.                    )     No. 12 CV-00850 (EGS)  
                        )  
FEDERAL TRADE COMMISSION, )  
                        )  
Defendant.           )  
\_\_\_\_\_  
                        )

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant, the Federal Trade Commission (“FTC”), respectfully moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment in favor of Defendant on the grounds that no genuine issue as to any material fact exists and Defendant is entitled to judgment as a matter of law. In support of this motion, the Court is referred to the *Vaughn* Declarations of Dione Jackson Stearns and Nathaniel Fairbanks Gray, the exhibits thereto, Defendant’s Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, and Defendant’s Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment. A proposed order consistent with the relief requested herein is also attached.

Dated: September 28, 2012

Respectfully submitted,

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\_\_\_\_\_  
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**DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant, the Federal Trade Commission (“FTC”), respectfully moves for summary judgment in this case, which arises under the Freedom of Information Act (“FOIA”). Plaintiff Cause of Action (“COA”), formerly known as the Freedom Through Justice Foundation,<sup>1</sup> submitted three separate requests under the FOIA for various records related to the publishing of the FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising, which are publicly available. The FTC released 279 pages of responsive documents. Plaintiff has not challenged the FTC’s application of Exemptions 5 and 6 of the FOIA to withhold certain information from release, so the only issues for purposes of this motion are the FTC’s denial of a fee waiver to Plaintiff and the adequacy of the FTC’s responses to Plaintiff’s three FOIA requests. Even if Plaintiff’s correspondence with the FTC could be read as challenging the FTC’s withholdings, however, the attached declarations explain the basis for denying Plaintiff a fee waiver as well as the basis for all withholdings and establish that the denial of a fee waiver to Plaintiff and the withholding of certain records were well founded. Therefore, no genuine issues

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<sup>1</sup> For ease of reference, Defendant will refer to Plaintiff as COA throughout this brief.

of material fact remain and Defendant is entitled to judgment as a matter of law. A statement of material facts and a proposed order are also attached hereto.

### **BACKGROUND**

The FOIA establishes a fee structure for various categories of requestors: commercial use requestors, educational institutions, noncommercial scientific institutions, representatives of the news media, and “other requestors” that do not fit into the aforementioned categories. 5 U.S.C. § 552 (a)(4)(A)(ii). Under the FOIA (and the Commission’s Rules of Practice), a “representative of the news media” means any person “actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.” The term “news” means “information that is about current events or that would be of current interest to the public.” 16 C.F.R. § 4.8 (b)(2).

FOIA fees may be waived entirely “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552 (a)(4)(A)(iii). To qualify for a fee waiver under the public interest exception, the requester cannot merely assert that the information is in the public interest; rather, the requester must demonstrate in the initial request for a fee waiver that the requested information would significantly enlighten the public and that the requestor has both the intent and the ability to disseminate the requested information to the public. Failure to do so is a sufficient basis for denying a fee waiver request. *See, e.g., Ogelsby v. Dep’t of the Army*, 920 F.2d 57 (D.C. Cir. 1990); *Larson v. CIA*, 843 F.2d 1481, 1483, n. 5 (D.C. Cir. 1988).

All FOIA requests submitted to the FTC are processed electronically through FOIAxpress, which is an internal server-based application that “is capable of tracking and reporting workflow, statistics, and correspondence, as well as generating fee calculations and invoices.” *See* Declaration of Dione Jackson Stearns (“Stearns Decl”), attached hereto as Exhibit 1, ¶ 5. The FOIAxpress software allows the FTC to store, retrieve, redact, and print documents for delivery to FOIA requestors. *Id.* When the FTC receives a FOIA request, it is immediately scanned or downloaded into FOIAxpress and then reviewed by the FOIA Unit. *Id.* The FOIAxpress system electronically maintains FOIA records from 2004 to the present. *See* Declaration of Nathaniel Fairbanks Gray (“Gray Decl”), attached hereto as Exhibit 2, ¶¶ 14, 20.

At issue in this litigation is the FTC’s responses to three requests for access to records submitted by COA under the FOIA: FOIA Request No. 2011-01431, FOIA Request No. 2012-00227, and FOIA Request No. 2012-00687. *See* Gray Decl ¶ 1. Mr. Gray coordinates the FTC’s responses to approximately 340 FOIA requests per year, and coordinated the Agency’s response to all three of the requests at issue in this litigation. *Id.* ¶¶ 3, 8, 16, 19, 20, 23. Dione Stearns, the Assistant General Counsel for Information and Legal Support, oversees the Agency’s responses to FOIA requests to ensure that release and withholding determinations are in accordance with the provisions of the FOIA and the Privacy Act. *See* Stearns Decl ¶ 1. Ms. Stearns is also familiar with the procedures followed by the FTC in responding to each of Plaintiff’s three FOIA requests. *Id.* ¶ 3. The FTC will address each of Plaintiff’s FOIA requests in turn.

**A. FOIA REQUEST NO. 2011-01431**

On September 6, 2011, the FTC received a FOIA request dated August 30, 2011 on behalf of the Freedom Through Justice Foundation (now COA), seeking access to four categories of records: (1) “All records relating to drafting, formulation, and revision of the FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising (‘the Guides’)\”, (2) “All records concerning the results of investigations into conduct by bloggers or social media authors that allegedly violated the Guides”, (3) “All records concerning the results of investigations into conduct by companies that related to alleged violations of the Guides by bloggers or social media authors”, and (4) “Copies of other requests for information made by outside groups through FOIA during the last two years regarding revisions to the Guides.” Gray Decl ¶ 5.

Mr. Gray determined that the FTC’s Bureau of Consumer Protection (“BCP”) generally and, in particular, the BCP’s Division of Advertising Practices and Office of the Director, which oversees the Division of Advertising Practices, were the offices most likely to be in possession of responsive records because the BCP was responsible for publishing the Guides and “conducts investigations, sues companies and people who violate the law [on protecting consumers from unfair, deceptive, or fraudulent practices in the marketplace], develops rules to protect consumers, and educates consumers and businesses about their rights and responsibilities.” *Id.* ¶¶ 5-6. Moreover, the BCP’s Division of Advertising Practices “is responsible for addressing unfair or deceptive advertising and marketing practices that raise health and safety concerns, as well as those that cause economic injury.” *Id.*

On September 14, 2011, COA agreed to limit its requests to all records relating to drafting, formulation, and revision of the FTC’s Guides from January 1, 2009 to September 6, 2011 (when the FTC received COA’s FOIA request). Gray Decl ¶ 9; Stearns Decl ¶ 7. On

September 15, 2011, the BCP’s Division of Advertising Practices provided Mr. Gray with all records responsive to COA’s FOIA request as narrowed on September 14, 2011. Gray Decl ¶ 10. On September 26, 2011, COA requested a fee waiver as a representative of the news media. *Id.* ¶ 12. On October 3, 2011, the BCP’s Office of the Director informed Mr. Gray that it did not locate any records responsive to COA’s FOIA request. *Id.* ¶ 13.

On October 7, 2011, the FTC denied COA’s request for a fee waiver because COA had failed to provide adequate information about its dissemination plans, such as providing any specific information about the distinct work in which COA intended to engage and for “failure to prove that disclosure of the requested records to Plaintiff’s counsel would likely contribute significantly to the public understanding of the activities and operations of government.” Stearns Decl ¶ 9. That same day, the FTC released in full 100 pages of responsive records, which COA was entitled to receive free of charge under the FTC’s rules of practice. 16 C.F.R. § 4.8(b)(6). Gray Decl ¶ 14, 15.

On October 28, 2011, COA appealed the denial of a fee waiver and asked that, in the event the FTC denied its appeal, it treat the appeal letter as a new FOIA request. Gray Decl ¶ 16, Stearns Decl ¶ 10. COA dropped its claim that it was entitled to be treated as a “representative of the news media..” *Id.* at n. 2.

On November 29, 2011, the FTC affirmed the denial of COA’s fee waiver request via letter to COA. Specifically, the letter reiterated that the FTC’s initial denial on October 7 “informed Plaintiff that his request for a fee waiver was denied because he failed to demonstrate his ability to disseminate information to the general public.” Stearns Decl ¶ 11. The FTC noted that “a previous review of Plaintiff’s website, which appeared offline and ‘Under Construction,’

and other news media's references to the organization, did not show sufficient evidence regarding plans to disseminate the requested information." The letter also advised COA that "a vast amount of information relating to the Guides, as well as its effect on social media authors, was publicly available, such that the documents requested in Plaintiff's FOIA request would not contribute significantly to the public understanding of the FTC's operations." *Id.* Lastly, the November 29 letter notified COA that the FTC would begin processing its request for two categories of records as a new FOIA request and assigned this new request FOIA Request No. 2012-00227. *Id.*; Gray Decl ¶ 17.

#### **B. FOIA REQUEST NO. 2012-00227**

COA's second FOIA request sought two categories of records: (1) "All FOIA requests in which the FTC granted a fee waiver under the public interest exception from January 1, 2009 to the present", and (2) "All documents referring or relating to the process in which the FTC determined the FOIA requests identified in #1 above, were within the fee waiver exception." Gray Decl ¶ 16; Stearns Decl ¶ 10.

On December 12, 2011, COA requested a waiver of both search and duplication fees under the public interest exception and as a representative of the news media. Gray Decl ¶ 19; Stearns Decl ¶ 13. That same day, Mr. Gray searched the FTC's FOIAxpress system for requests in which fee waivers were listed as "granted" between January 1, 2009 and November 29, 2011 (the date the FTC accepted COA's request for processing) and located 113 pages of responsive records in PDF and Wordperfect Document (WPD) format. Gray Decl ¶¶ 14, 20. Moreover, an additional 43 pages in PDF and WPD format were located for improperly coded fee waiver requests that had been listed as "granted" in FOIAxpress. *Id.* ¶ 21.

By letter dated January 6, 2012, the FTC denied COA's fee waiver request for "failure to prove that disclosure of the requested records will be likely to contribute significantly to the public understanding of the activities and operations of government." Stearns Decl ¶ 15. However, the FTC determined that COA qualified as an "Other (General Public)" requester and, therefore, released 100 pages of responsive records to COA free of charge. The FTC also informed COA that certain records or portions of records were being withheld under Exemptions 5 and 6 of the FOIA. Gray Decl ¶ 22; Stearns Decl ¶ 15.

On January 27, 2012, COA appealed the FTC's fee waiver denial, but did not challenge any of the FTC's withholdings under FOIA Exemptions 5 and 6. COA also requested that, in the event its appeal was denied, the FTC treat its appeal as a new FOIA request seeking three categories of records. Gray Decl ¶ 23; Stearns Decl ¶ 16. On February 27, 2012, the FTC denied COA's appeal of the fee waiver denial, concluding that COA had "failed to provide any meaningful level of detail regarding your organization's dissemination efforts or ability" and that COA's "second FOIA request was made primarily in the organization's own commercial interest, rather than in the interest of the public." Stearns Decl ¶ 17.

On March 19, 2012, the FTC acknowledged receipt of COA's third FOIA request on January 27, 2012, and assigned it No. 2012-00687. Stearns Decl ¶¶ 18, 19.

### C. FOIA REQUEST NO. 2012-00687

Pursuant to COA's request, the FTC treated its January 27, 2012, fee waiver appeal letter as a new FOIA request seeking three categories of records: (1) "All records relating to the drafting, formulation, and revision of the Guides Concerning the Use of Endorsements and Testimonials in Advertising concerning social media authors or bloggers between January 1,

2009 and September 6, 2011”, (2) “All documents, including e-mail communications, referring or relating to the FTC Orders, decisions, memoranda, interpretations, instructions, statement of policy, or guidelines to staff for the purposes of evaluating fee waiver requests under the public interest exception”, and (3) “All documents including e-mail communications, referring or relating to the process by which FTC determined that Cause of Action was not entitled to a fee waiver for either its August 30, 2011 FOIA request or October 28, 2011 FOIA request.” Gray Decl ¶ 23. COA did not request a fee waiver in connection with its third FOIA request. Stearns Decl ¶ 18.

The FTC’s March 19, 2012 letter informed COA that it would not address category #1 of FOIA Request NO. 2012-00687 because it was a duplicate of COA’s previous FOIA Request No. 2011-01431. Gray Decl ¶ 24; Stearns Decl ¶ 18. Regarding the second category of requested records, because Mr. Gray processed COA’s August 30, 2011 and October 28, 2011 FOIA requests, he searched his “desktop, Microsoft Outlook calendar and emails, FOIAxpress, FOIA folders, and the FTC’s internal hard drives and networks” using the terms “2011-01431,” “2012-00227,” “COA,” “Cause of Action,” “Freedom Through Justice Foundation,” “Fee Waiver,” “FOIA Guide,” and “Public Interest Exception” to locate responsive records. The search yielded 95 pages of responsive records. Gray Decl ¶ 24. The March 19, 2012 letter notified COA that of the 95 pages of responsive records, 16 pages were being withheld in full under Exemption 5 of the FOIA, and the remaining documents were being released to COA free of charge. Gray Decl ¶ 26; Stearns Decl ¶ 18. “In addition, the letter informed Plaintiff that the ‘statements of policy or guidelines’ records concerning fee waiver determinations are on the

FTC's public record, and that the FTC's FOIA/PA handbook was also publicly available at:  
<http://www.ftc.gov/foia/readingroom.shtm>.

On April 4, 2012, COA appealed the FTC's withholding of sixteen responsive pages. The appeal letter also sought a *Vaughn* index, requested a fee waiver, and also demanded that "the FTC state with particularity whether the requested documents are in its possession by providing answers to interrogatories." Stearns Decl ¶ 19.

By letter dated May 7, 2012, the FTC denied COA's appeal of its third FOIA request. In doing so, the FTC explained that (1) the FTC is not required to provide a *Vaughn* index during the administrative process, (2) the FTC has no obligation to provide answers to contention interrogatories in response to a FOIA request, and (3) "Plaintiff's fee waiver request was moot because there were no fees associated with the processing of Request Number 2012-00687."

Stearns Decl ¶ 20.

### **LEGAL STANDARDS**

Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56◎. A material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment must demonstrate an absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has met its burden, the non-movant "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

FOIA cases like this one are typically and appropriately decided on motions for summary judgment. *See Truesdale v. Dep’t of Justice*, No. 03-1332, 2005 WL 3294004, at \*3 (D.D.C. Dec. 5, 2005); *Wheeler v. Dep’t of Justice*, 403 F. Supp. 2d 1, 5-8 (D.D.C. 2005). A defendant is entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, that it has conducted an adequate search for responsive records and that each responsive record that it has located either has been produced to the plaintiff or is exempt from disclosure. *See Weisberg v. Dep’t of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). To meet its burden, a defendant may rely upon reasonably detailed and non-conclusory declarations. *See McGehee v. C.I.A.*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Wheeler*, 403 F. Supp. 2d at 6; *Russell v. F.B.I.*, No. 03-0611, 2004 WL 5574164, at \*2 (D.D.C. Jan. 9, 2004). Such declarations (singularly or collectively) are referred to as a *Vaughn* declaration, *see Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert denied*, 415 U.S. 977 (1974), and are entitled to a presumption of good faith. *Harrison v. Federal Bureau of Prisons*, 2010 WL 374529 at \*3 (D.D.C. Feb. 3, 2010). Here, the FTC has submitted two *Vaughn* declarations to explain and justify its actions in connection with the three FOIA requests that COA submitted to it in 2011 and 2012. *See* Exhs 1 and 2.

## ARGUMENT

**I. The FTC Properly Denied COA a Fee Waiver in Connection with Its FOIA Requests Because COA Failed to Demonstrate an Intention or Ability to Disseminate the Information it Sought Publicly and Failed to Show that the Records it Sought Would Contribute Significantly to Public Understanding of the FTC’s Operations.**

FOIA fees may be waived entirely “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”

5 U.S.C. § 552 (a)(4)(A)(iii). To qualify for a fee waiver under the public interest exception, COA must demonstrate in the initial request for a fee waiver that the requested information would significantly enlighten the public and that has both the intent and the ability to disseminate the requested information to the public. Failure to do so is a sufficient basis for denying a fee waiver request. *See, e.g., Ogelsby v. Dep’t of the Army*, 920 F.2d 57 (D.C. Cir. 1990); *Larson v. CIA*, 843 F.2d 1481, 1483, n. 5 (D.C. Cir. 1988); Stearns Decl ¶¶ 28-31.

On September 26, 2011, COA requested a fee waiver as a representative of the news media in connection with FOIA Request No. 2011-01431. *Id.* ¶¶ 11, 12. Under the FOIA, a “representative of the news media” means any person “actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.” The term “news” means “information that is about current events or that would be of current interest to the public.” 16 C.F.R. § 4.8(b)(2). The FTC denied COA’s request for a fee waiver because COA failed to demonstrate an ability to disseminate information to the general public.” Stearns Decl ¶ 9. The FTC noted that “a previous review of Plaintiff’s website, which appeared offline and ‘Under Construction,’ and other news media’s references to the organization, did not show sufficient evidence regarding plans to disseminate the requested information.” The letter also advised COA that “a vast amount of information relating to the Guides, as well as its effect on social media authors, was publicly available, such that the documents requested in Plaintiff’s FOIA request would not contribute significantly to the public understanding of the FTC’s operations.”

*Id.*

The FTC also denied COA’s request for a waiver of both search and duplication fees under the public interest exception and as a representative of the news media in connection with

FOIA Request No. 2012-00227. Gray Decl ¶ 19; Stearns Decl ¶¶ 13, 15. The FTC denied COA's fee waiver request because COA had "failed to provide any meaningful level of detail regarding your organization's dissemination efforts or ability" and because COA's "second FOIA request was made primarily in the organization's own commercial interest, rather than in the interest of the public." Stearns Decl ¶ 17.

Lastly, COA did not request a fee waiver in connection with FOIA Request No. 2012-00687. Stearns Decl ¶ 18. Even if COA did request a fee waiver, however, its request was moot because there were *no fees* associated with the processing of this request. Stearns Decl ¶ 20.

In sum, the FTC properly denied COA's request for a fee waiver in connection with its FOIA requests because disclosure of information related to the Guides, which are publicly available, is not likely to contribute significantly to public understanding of the operations or activities of the FTC. 5 U.S.C. § 552 (a)(4)(A)(iii). Moreover, at the time COA submitted its FOIA requests, it failed to demonstrate the intent and the ability to disseminate the requested information to the public. *See Oglesby*, 920 F.2d at 57; *Larson*, 843 F.2d at 1483.

## **II. The FTC Conducted a Reasonable Search for Records.**

In responding to a FOIA request, an agency must conduct a reasonable search for responsive records. *Oglesby v. U.S. Dept. of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Cleary, Gottlieb, Steen & Hamilton v. Dept. of Health, et al.*, 844 F. Supp. 770, 776 (D.D.C. 1993); *Weisberg v. DOJ*, 705 F.2d 1344, 1352 (D.C. Cir. 1983). An agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. *Oglesby*, 920 F.2d at 68. A search is not inadequate merely because it failed to "uncover[] every document extant," *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197,

1201 (D.C. Cir. 1991); a search is inadequate only if the agency fails to “show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents,” *Oglesby*, 920 F.2d at 68. In addition, an agency’s search for responsive documents need only be reasonable, it need not be perfect. *See Kaminsky Nat’l Aeronautics & Space Administration*, 2010 WL 276184 at \*5-\*6 (E.D.N.Y. Jan. 19, 2010) (citations omitted). Consistent with the reasonableness standard, the adequacy of the search is “dependent upon the circumstances of the case.” *Truitt v. Dep’t of CIA*, 897 F.2d 540, 542 (D.C. Cir. 1990).

In this case, the FTC searched the system of records reasonably likely to contain documents responsive to FOIA Request No. 2011-01431 – the Bureau of Consumer Protection (“BCP”)’s Division of Advertising Practices and Office of the Director. On September 14, 2011, COA agreed to limit its request to all records relating to drafting, formulation, and revision of the FTC’s Guides from January 1, 2009 to September 6, 2011. Gray Decl ¶ 9; Stearns Decl ¶ 7. Mr. Gray determined that the Division of Advertising Practices and Office of the Director, which oversees the Division of Advertising Practices, were the offices most likely to be in possession of responsive records because the BCP was responsible for publishing the Guides and “conducts investigations, sues companies and people who violate the law [on protecting consumers from unfair, deceptive, or fraudulent practices in the marketplace], develops rules to protect consumers, and educates consumers and businesses about their rights and responsibilities.” Gray Decl. ¶¶ 5-6. Moreover, the BCP’s Division of Advertising Practices “is responsible for addressing unfair or deceptive advertising and marketing practices that raise health and safety concerns, as well as those that cause economic injury.” *Id.* Pursuant to that search, the FTC released 100 pages in full to COA free of charge. Because the Division of Advertising Practices

was reasonably likely to be in possession of all records related to the Guides, the FTC’s search was reasonably calculated to uncover all relevant documents. *See Weisberg*, 705 F.2d at 1352; *Safecard Servs.*, 926 F.2d at 1201. The BCP’s Office of the Director informed Mr. Gray that it did not locate any records responsive to COA’s FOIA request. *Id.* ¶ 13.

COA’s second FOIA request, No. 2012-0027, sought two categories of records: (1) “All FOIA requests in which the FTC granted a fee waiver under the public interest exception from January 1, 2009 to the present”, and (2) “All documents referring or relating to the process in which the FTC determined the FOIA requests identified in #1 above, were within the fee waiver exception.” Gray Decl ¶ 16; Stearns Decl ¶ 10. On December 12, 2011, Mr. Gray searched the FTC’s FOIAxpress system for requests in which fee waivers were listed as “granted” between January 1, 2009 and November 29, 2011 (the date the FTC accepted COA’s request for processing) and located 113 pages of responsive records in PDF and WPD format. Gray Decl ¶¶ 14, 20. Moreover, an additional 43 pages in PDF and WPD format were located for improperly coded fee waiver requests that had been listed as “granted” in FOIAxpress. *Id.* ¶ 21. FOIAxpress maintains all FOIA records from 2004 to the present (Gray Decl ¶¶ 14, 20) and, therefore, a search of that system was reasonably likely to uncover all FOIA requests in which the FTC granted a fee waiver from January 1, 2009 to the present. *Safecard Servs.*, 926 F.2d at 1201.

COA’s FOIA Request No. 2012-00687 sought three categories of records: (1) “All records relating to the drafting, formulation, and revision of the Guides Concerning the Use of Endorsements and Testimonials in Advertising concerning social media authors or bloggers between January 1, 2009 and September 6, 2011”, (2) “All documents, including e-mail

communications, referring or relating to the FTC Orders, decisions, memoranda, interpretations, instructions, statement of policy, or guidelines to staff for the purposes of evaluating fee waiver requests under the public interest exception”, and (3) “All documents including e-mail communications, referring or relating to the process by which FTC determined that Cause of Action was not entitled to a fee waiver for either its August 30, 2011 FOIA request or October 28, 2011 FOIA request.” Gray Decl ¶ 23.

The FTC did not address category #1 of FOIA Request NO. 2012-00687 because it was a duplicate of COA’s previous FOIA Request No. 2011-01431. Gray Decl ¶ 24; Stearns Decl ¶ 18. Regarding the second category of requested records, because Mr. Gray processed COA’s August 30, 2011 and October 28, 2011 FOIA requests, he searched his “desktop, Microsoft Outlook calendar and emails, FOIAxpress, FOIA folders, and the FTC’s internal hard drives and networks” using the terms “2011-01431,” “2012-00227,” “COA,” “Cause of Action,” “Freedom Through Justice Foundation,” “Fee Waiver,” “FOIA Guide,” and “Public Interest Exception” to locate responsive records. The search yielded 95 pages of responsive records (Gray Decl ¶ 24), 16 pages of which were withheld in full under Exemption 5 of the FOIA, and the remaining documents were being released to COA free of charge. Gray Decl ¶¶ 24-26; Stearns Decl ¶ 18. The search terms used and the systems searched were reasonably likely to uncover all relevant documents because Mr. Gray processed COA’s previous FOIA requests and selected search terms directly from those requests. Therefore, the FTC’s search methods were well conceived and adequate to satisfy the FTC’s obligations under the FOIA.

**III. The FTC's Withholding of 16 Pages of Responsive Records Under Exemptions 5 and 6 Was Proper.**

As an initial matter, COA never contested the FTC's application of Exemptions 5 and 6 with respect to its second FOIA request, Number 2012-00227. Therefore, the FTC's invocation of these exemptions should be treated as proper because COA has failed to exhaust its administrative remedies. As the D.C. Circuit held in *Dettmann v. U.S. Dep't of Justice*, 802 F.2d 1472, 1476-77 (D.C. Cir. 1986):

It goes without saying that exhaustion of administrative remedies is required in FoIA cases. As this court has recently had occasion to state in the clearest of language, '[e]xhaustion of such [administrative] remedies is required under the Freedom of Information Act before a party can seek judicial review.' *Stebbins v. Nationwide Mutual Insurance Co.*, 757 F.2d 364 (D.C. Cir. 1984) . . . . It is likewise clear that a plaintiff may have exhausted administrative remedies with respect to one aspect of a FOIA request-and thus properly seek judicial review regarding that request-and yet not have exhausted her remedies with respect to another aspect of a FOIA request . . . . That, in our view, is precisely what occurred here. In the course of the years of communications back and forth between requester and agency, Dettmann made no attempt to present for administrative review any objections she may have had to the FBI's handling of 'see' reference documents. If exhaustion of remedies is to have meaning, it surely must bar review of the claim advanced here.

Even if the Court determines that COA did challenge the FTC's application of Exemptions 5 and 6, however, the application of these exemptions was proper.

Exemption 5 shields from disclosure records that would be protected by privileges in litigation, and here the FTC claims the deliberative process and attorney work product privileges would apply to the information contained within the withheld documents. Stearns Decl ¶ 33. For the deliberative process privilege to apply, the information must be both deliberative and pre-decisional. For information to be deliberative, "it must 'reflect the personal opinions of the

writer rather than the policy of [agency].”” *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To be pre-decisional, information must precede an agency decision which the FTC identifies, and the information must have been used in the decision-making process. *Id.*; see also *Baker & Hostetler LLP v. Dep’t of Commerce*, 473 F.3d 312, 181 (D.C. Cir. 2006) (“As a general matter, notes taken by government officials often fall within the deliberative process privilege.”).

The FTC asserted Exemption 5 to withhold internal memoranda reflecting staff analyses, opinions and recommendations. Stearns Decl ¶¶ 33-34. These memoranda contain detailed discussions and recommendations from a subordinate to their supervisor regarding the processing of COA’s FOIA requests, which it makes it more likely to be predecisional. *Id.* Moreover, they reflect the personal opinions of the subordinate, rather than the official policy of the FTC. *Morely*, 508 F.3d at 1127. They are also deliberative because they represent the give and take between employees at the FTC over how to process COA’s FOIA requests, and disclosure of these records would “jeopardize the candid and comprehensive discussions that are essential for efficient and effective agency decision-making.” Stearns Decl ¶ 34. The deliberative process privilege, therefore, applies to the records withheld by the FTC.

In addition, the FTC applied the work product privilege in withholding documents that were prepared by, or at the direction of, an attorney and made in anticipation of litigation. Stearns Decl ¶ 33. The FTC, therefore, properly applied Exemption 5 of the FOIA to the information it withheld.

Exemption 6 protects information about individuals in “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal

privacy.” 5 U.S.C. § 552(b)(6). The exemption is meant “to protect individuals from a wide range of embarrassing disclosures,” pertaining to the intimate details of their lives. *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974). The Supreme Court has declared that the phrase “personnel and medical files” is to be interpreted broadly, and that all information that “applies to a particular individual” qualifies for consideration under this exemption. *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). “The exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual.” *Id.* See also *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 198 (D.C. Cir. 2006) (“We have also read the statute to exempt not just files, but also bits of personal information, such as names and addresses, the release of which would ‘create[ ] a palpable threat to privacy.’”) (citation omitted).

Here, the FTC applied Exemption 6 to withhold portions of records that included a third party individual’s name, home address, and telephone number. Stearns Decl ¶ 37.

Once it has been established that the information at issue constitutes covered material equivalent to “personnel and medical files,” the Court is to balance the privacy interests against the public interest in disclosure. The FOIA public interest in disclosure refers to “open[ing] agency action to the light of public scrutiny,” *Oguaju v. United States*, 288 F.3d 448, 450 (D.C. Cir. 2002), and “it does not include helping an individual obtain information for his personal use.” *Id.* (quoting *Mays v. DEA*, 234 F.3d 1324, 1327 (D.C. Cir. 2000)), vacated by *Oguaju v. United States Marshals Service*, 541 U.S. 970 (2004), judgment reinstated by *Oguaju v. United States*, 378 F.3d 1115 (D.C. Cir. 2004), modified 386 F.3d 273 (D.C. Cir. 2004). The courts have consistently concluded that a request made for purely commercial purposes does not further

a public interest. “FOIA was not intended to require release of otherwise private information to one who intends to use it solely for personal gain.” *See Minnis v. USDA*, 737 F.2d 784, 787 (9th Cir.1984); *O’Kane v. United States Customs Service*, 169 F.3d 1308, 1310 (11th Cir. 1999) (requester sought disclosure of names and addresses of persons subject to Customs seizures in order to solicit them for his law practice); *Professional Programs Group v. Dep’t of Commerce*, 29 F.3d 1349, 1354 (9th Cir. 1994) (seeking to obtain list of persons registered to take patent bar in order to offer test-prep service); *Multnomah County Med. Society v. Scott*, 825 F.2d 1410, 1413 (9th Cir. 1987); *Aronson v. HUD*, 822 F.2d 182, 185-86 (1st Cir. 1987) (“commercial interest does not warrant disclosure of otherwise private information”); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 137 (3d Cir. 1974). Cf. *Multi Ag Media LLC v. USDA*, 515 F.3d 1224 (D.C. Cir. 2008) (involving commercial information which is generally considered not to raise privacy concerns).

The burden of establishing that disclosure would benefit the public interest falls on the requester. *See Carter v. United States Department of Commerce*, 830 F.2d 388, 391 nn.8 & 13 (D.C. Cir. 1987). Here, the FTC applied Exemption 6 by removing names and other personal identifying information from withheld records. Stearns Decl. ¶¶ 36-37. Moreover, Plaintiff appears to seek the requested records for its commercial use. As such, no public purpose is apparent.

#### **IV. The FTC Complied with its Segregability Obligations Because the Information it Withheld Was Inextricably Intertwined With the Basis for Withholding it.**

The Court of Appeals for the District of Columbia Circuit has held that a District Court considering a FOIA action has “an affirmative duty to consider the segregability issue *sua sponte*.” *Trans-Pacific Policing Agreement v. United States Customs Service*, 177 F.3d 1022,

1028 (D.C. Cir. 1999). The FOIA requires that, if a record contains information that is exempt from disclosure, any “reasonably segregable” information must be disclosed after deletion of the exempt information unless the non-exempt portions are “inextricably intertwined with exempt portions.” 5 U.S.C. § 552(b); *Mead Data Cent., Inc. v. U.S. Dept. of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

In order to demonstrate that all reasonably segregable material has been released, the FTC must provide a “detailed justification” for why certain information was withheld, rather than “conclusory statements.” *Mead Data*, 566 F.2d at 261. The FTC is not, however, required “to provide such a detailed justification” that the exempt material would effectively be disclosed. *Id.* All that is required is that the government show “with ‘reasonable specificity’” why a document cannot be further segregated. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996). Moreover, the FTC is not required to “commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content.” *Mead Data*, 566 F.2d at 261, n.55.

Here, the FTC conducted a segregability review of each responsive document and determined that no reasonably segregable information exists because the withheld information was inextricably intertwined with the basis for withholding it. *See Stearns Decl ¶ 38*. Therefore, the FTC properly withheld 16 pages in their entirety. *Id.*

### **CONCLUSION**

For the foregoing reasons, the FTC asks the Court to grant its motion, enter judgment in its favor, and dismiss Plaintiff’s Complaint with prejudice.

Dated: September 28, 2012

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION, )  
                      )  
Plaintiff,         )  
                      )  
v.                   )      No. 12 CV-00850 (EGS)  
                      )  
FEDERAL TRADE COMMISSION, )  
                      )  
Defendant.         )  
\_\_\_\_\_)

**DEFENDANT'S STATEMENT OF MATERIAL FACTS  
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Defendant, the Federal Trade Commission (“FTC”), respectfully provides the following statement of material facts, pursuant to Local Civil Rules 7(h) and 56.1, in support of its motion for summary judgment in this case, which arises under the Freedom of Information Act (“FOIA”).

1. Under the FOIA, a “representative of the news media” means any person “actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.” The term “news” means “information that is about current events or that would be of current interest to the public.” 16 C.F.R. § 4.8 (b)(2). FOIA fees may be waived entirely “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552 (a)(4)(A)(iii).

2. To qualify for a fee waiver under the public interest exception, a FOIA requester cannot merely assert that the information is in the public interest; rather, the requester must demonstrate in the initial request for a fee waiver that the requested information would significantly enlighten the public and that the requestor has both the intent and the ability to disseminate the requested information to the public. Failure to do so is a sufficient basis for denying a fee waiver request. *See, e.g., Ogelsby v. Dep’t of the Army*, 920 F.2d 57 (D.C. Cir. 1990); *Larson v. CIA*, 843 F.2d 1481, 1483, n. 5 (D.C. Cir. 1988); Declaration of Dione Jackson Stearns (“Stearns Decl”) ¶¶ 28-31, attached hereto as Exhibit 1.
3. All FOIA requests submitted to the FTC are processed electronically through FOIAxpress, which is an internal server-based application that “is capable of tracking and reporting workflow, statistics, and correspondence, as well as generating fee calculations and invoices.” *See* Declaration of Dione Jackson Stearns (“Stearns Decl”) ¶ 5. The FOIAxpress software allows the FTC to store, retrieve, redact, and print documents for delivery to FOIA requestors. *Id.*
4. When the FTC receives a FOIA request, it is immediately scanned or downloaded into FOIAxpress and then reviewed by the FOIA Unit. *Id.* The FOIAxpress system electronically maintains FOIA records from 2004 to the present. *See* Declaration of Nathaniel Fairbanks Gray (“Gray Decl”) ¶¶ 14, 20.
5. At issue in this litigation is the FTC’s response to three requests for access to records submitted by COA under the FOIA: FOIA Request No. 2011-01431, FOIA Request No. 2012-00227, and FOIA Request No. 2012-00687. *See*

Declaration of Nathaniel Fairbanks Gray (“Gray Decl”) ¶ 1, attached hereto as Exhibit 2; Declaration of Dione Jackson Stearns (“Stearns Decl”) ¶ 3.

**FOIA REQUEST NO. 2011-01431**

6. On September 6, 2011, the FTC received a FOIA request dated August 30, 2011 on behalf of the Freedom Through Justice Foundation (now COA), seeking access to four categories of records: (1) “All records relating to drafting, formulation, and revision of the FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising (‘the Guides’)\”, (2) “All records concerning the results of investigations into conduct by bloggers or social media authors that allegedly violated the Guides”, (3) “All records concerning the results of investigations into conduct by companies that related to alleged violations of the Guides by bloggers or social media authors”, and (4) “Copies of any other requests for information made by outside groups through FOIA during the last two years regarding revisions to the Guides.” Gray Decl ¶ 5.
7. Mr. Gray determined that the FTC’s Bureau of Consumer Protection (“BCP”) generally and, in particular, the BCP’s Division of Advertising Practices and Office of the Director, which oversees the Division of Advertising Practices, were the offices most likely to be in possession of responsive records because the BCP was responsible for publishing the Guides and “conducts investigations, sues companies and people who violate the law [on protecting consumers from unfair, deceptive, or fraudulent practices in the marketplace], develops rules to protect consumers, and educates consumers and businesses about their rights and

responsibilities.” *Id.* ¶¶ 6-7. Moreover, the BCP’s Division of Advertising Practices “is responsible for addressing unfair or deceptive advertising and marketing practices that raise health and safety concerns, as well as those that cause economic injury.” *Id.*

8. On September 14, 2011, COA agreed to limit its requests to all records relating to drafting, formulation, and revision of the FTC’s Guides from January 1, 2009 to September 6, 2011 (when the FTC received COA’s FOIA request). Gray Decl ¶ 9; Stearns Decl ¶ 7.
9. On September 15, 2011, the BCP’s Division of Advertising Practices provided Mr. Gray with all records responsive to COA’s FOIA request as narrowed on September 14, 2011. Gray Decl ¶ 10.
10. On September 26, 2011, COA requested a fee waiver as a representative of the news media. *Id.* ¶ 12.
11. On October 3, 2011, the BCP’s Office of the Director informed Mr. Gray that it did not locate any records responsive to COA’s FOIA request. *Id.* ¶ 13.
12. On October 7, 2011, the FTC denied COA’s request for a fee waiver because COA had failed to provide adequate information about its dissemination plans, such as providing any specific information about the distinct work in which COA intended to engage and for “failure to prove that disclosure of the requested records to Plaintiff’s counsel would likely contribute significantly to the public understanding of the activities and operations of government.” Stearns Decl ¶ 9.

That same day, the FTC released in full 100 pages of responsive records, which COA was entitled to receive free of charge under the FTC's rules of practice. 16 C.F.R. § 4.8(b)(6). Gray Decl ¶ 14.

13. On October 28, 2011, COA appealed the denial of a fee waiver and asked that, in the event the FTC denied its appeal, that it treat the appeal letter as a new FOIA request. Gray Decl ¶ 16; Stearns Decl ¶ 10. COA dropped its claim that it was entitled to be treated as a “representative of the news media.” *Id.* at n. 2.
14. On November 29, 2011, the FTC affirmed the denial of COA’s fee waiver request via letter to COA. Specifically, the letter reiterated that the FTC’s initial denial on October 7 “informed Plaintiff that his request for a fee waiver was denied because he failed to demonstrate his ability to disseminate information to the general public.” Stearns Decl ¶ 11. The FTC noted that “a previous review of Plaintiff’s website, which appeared offline and ‘Under Construction,’ and other news media’s references to the organization, did not show sufficient evidence regarding plans to disseminate the requested information.” The letter also advised COA that “a vast amount of information relating to the Guides, as well as its effect on social media authors, was publicly available, such that the documents requested in Plaintiff’s FOIA request would not contribute significantly to the public understanding of the FTC’s operations.” *Id.* Lastly, the November 29 letter notified COA that the FTC would begin processing its request for two categories of records as a new FOIA request and assigned this new request FOIA Request No. 2012-00227. *Id.*; Gray Decl ¶ 17.

**FOIA REQUEST NO. 2012-00227**

15. COA's second FOIA request sought two categories of records: (1) "All FOIA requests in which the FTC granted a fee waiver under the public interest exception from January 1, 2009 to the present", and (2) "All documents referring or relating to the process in which the FTC determined the FOIA requests identified in #1 above, were within the fee waiver exception." Gray Decl ¶ 16; Stearns Decl ¶ 10.
16. On December 12, 2011, COA requested a waiver of both search and duplication fees under the public interest exception and as a representative of the news media. Gray Decl ¶ 19; Stearns Decl ¶ 13. That same day, Mr. Gray searched the FTC's FOIAxpress system for requests in which fee waivers were listed as "granted" between January 1, 2009 and November 29, 2011 (the date the FTC accepted COA's request for processing) and located 113 pages of responsive records in PDF and Wordperfect Document (WPD) format. Gray Decl ¶¶ 14, 20. Moreover, an additional 43 pages in PDF and WPD format were located for improperly coded fee waiver requests that had been listed as "granted" in FOIAxpress. *Id.* ¶ 21.
17. By letter dated January 6, 2012, the FTC denied COA's fee waiver request for "failure to prove that disclosure of the requested records will be likely to contribute significantly to the public understanding of the activities and operations of government." Stearns Decl ¶ 15. However, the FTC determined that COA qualified as an "Other (General Public)" requester and, therefore,

released 100 pages of responsive records to COA free of charge. The FTC also informed COA that certain records or portions of records were being withheld under Exemptions 5 and 6 of the FOIA. Gray Decl ¶ 22; Stearns Decl ¶ 15.

18. On January 27, 2012, COA appealed the FTC's fee waiver denial, but did not challenge any of the FTC's withholdings under FOIA Exemptions 5 and 6. COA also requested that, in the event its appeal was denied, the FTC treat its appeal as a new FOIA request seeking three categories of records. Gray Decl ¶ 23; Stearns Decl ¶ 16.
19. On February 27, 2012, the FTC denied COA's appeal of the fee waiver denial, concluding that COA had "failed to provide any meaningful level of detail regarding your organization's dissemination efforts or ability" and that COA's "second FOIA request was made primarily in the organization's own commercial interest, rather than in the interest of the public." Stearns Decl ¶ 17.
20. On March 19, 2012, the FTC acknowledged receipt of COA's third FOIA request on January 27, 2012, and assigned it No. 2012-00687. Stearns Decl ¶ 18.

#### **FOIA REQUEST NO. 2012-00687**

21. Pursuant to COA's request, the FTC treated its January 27, 2012, fee waiver appeal letter as a new FOIA request seeking three categories of records: (1) "All records relating to the drafting, formulation, and revision of the Guides Concerning the Use of Endorsements and Testimonials in Advertising concerning social media authors or bloggers between January 1, 2009 and September 6,

2011”, (2) “All documents, including e-mail communications, referring or relating to the FTC Orders, decisions, memoranda, interpretations, instructions, statement of policy, or guidelines to staff for the purposes of evaluating fee waiver requests under the public interest exception”, and (3) “All documents including e-mail communications, referring or relating to the process by which FTC determined that Cause of Action was not entitled to a fee waiver for either its August 30, 2011 FOIA request or October 28, 2011 FOIA request.” Gray Decl ¶ 23.

22. COA did not request a fee waiver in connection with its third FOIA request. Stearns Decl ¶ 18.
23. The FTC’s March 19, 2012 letter informed COA that it would not address category #1 of FOIA Request NO. 2012-00687 because it was a duplicate of COA’s previous FOIA Request No. 2011-01431. Gray Decl ¶ 24; Stearns Decl ¶ 18.
24. Regarding the second category of requested records, because Mr. Gray processed COA’s August 30, 2011 and October 28, 2011 FOIA requests, he searched his “desktop, Microsoft Outlook calendar and emails, FOIAxpress, FOIA folders, and the FTC’s internal hard drives and networks” using the terms “2011-01431,” “2012-00227,” “COA,” “Cause of Action,” “Freedom Through Justice Foundation,” “Fee Waiver,” “FOIA Guide,” and “Public Interest Exception” to locate responsive records. The search yielded 95 pages of responsive records. Gray Decl ¶ 24 n.2.

25. The March 19, 2012 letter notified COA that of the 95 pages of responsive records, 16 pages were being withheld in full under Exemption 5 of the FOIA, and the remaining documents were being released to COA free of charge. Gray Decl ¶ 26; Stearns Decl ¶ 18. In addition, the letter informed Plaintiff that the ‘statements of policy or guidelines’ records concerning fee waiver determinations are on the FTC’s public record, and that the FTC’s FOIA/PA handbook was also publicly available at: <http://www.ftc.gov/foia/readingroom.shtm>.
26. On April 4, 2012, COA appealed the FTC’s withholding of sixteen responsive pages. The appeal letter also sought a *Vaughn* index, requested a fee waiver, and also demanded that “the FTC state with particularity whether the requested documents are in its possession by providing answers to interrogatories.” Stearns Decl ¶ 19.
27. By letter dated May 7, 2012, the FTC denied COA’s appeal of its third FOIA request. In doing so, the FTC explained that (1) the FTC is not required to provide a *Vaughn* index during the administrative process, (2) the FTC has no obligation to provide answers to contention interrogatories in response to a FOIA request, and (3) “Plaintiff’s fee waiver request was moot because there were no fees associated with the processing of Request Number 2012-00687.” Stearns Decl. ¶ 20.
28. The FTC considered the possibility of segregating the documents requested, and determined that the information withheld could not be reasonably segregated. *See id.* ¶ 38.

Dated: September 28, 2012

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