UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION, Plaintiff, v. FEDERAL TRADE COMMISSION, Defendant.	)	Civil Action No. 1:12-cv-00850-EGS

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Plaintiff Cause of Action ("COA") initially sought documents under the Freedom of Information Act ("FOIA") relating to the effect on social media authors of a publication by Defendant Federal Trade Commission ("FTC") regarding advertising practices. As that FOIA request proceeded through the administrative process (and gave rise to two additional FOIA requests), however, it became apparent that the primary purpose of COA's efforts was to secure a fee waiver under the public interest exception to the FOIA, or a fee reduction as a "representative of the news media," possibly so that COA could establish a precedent of having fees waived, or at least reduced, in this and future FOIA requests submitted by COA.[1] In this litigation, COA continues to seek a fee waiver or reduction, as well as the release of a limited

[1] COA's first request through FOIA (as narrowed) concerned records related to, *inter alia*, the FTC's investigations of conduct by social media authors that allegedly violated the Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "Guides"), 16 C.F.R. § 255.0 - 255.5, between January 1, 2009 and September 6, 2011. Its second request related to, *inter alia*, prior grants by the FTC of fee waivers under the FOIA public interest exception, and its third request concerned, *inter alia*, FTC guidelines to staff regarding evaluating fee waiver requests under the public interest exception. The FTC designated these three FOIA requests as Nos. 2011-01431, 2012-00227, and 2012-00687, respectively.

number of documents withheld by the FTC under FOIA, based on its purported *current* abilities to disseminate information to the public and *current* description of a "distinct work" it claims it can create from the released materials. Under the FOIA, however, both the agency and the Court are bound by the administrative record before them *at the time of the FOIA requests at issue*; the *post hoc* contentions of counsel carry no weight whatsoever. With this standard in mind, the FTC's denial of a fee waiver (or fee reduction) to COA, release of 279 pages of documents in response to COA's narrowed FOIA requests, and withholding of a small number of documents under Exemptions 5 and 6 of the FOIA, was entirely proper.

More specifically, in its Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Motion"), ECF No. 11, the FTC relied solely upon the administrative record to demonstrate that it is entitled to summary judgment because there are no genuine issues of material fact, and that it has fully complied with its legal obligations in responding to the document and fee waiver requests submitted by COA. As shown below, COA's *post hoc* attempt to re-characterize the record is without merit and fails to defeat summary judgment in favor of the FTC. *See* Memorandum of Points and Authorities in Support of its Opposition to Defendant's Motion for Summary Judgment, ECF No. 15 ("Opp'n"). The Court, therefore, should grant summary judgment to the FTC and dismiss COA's complaint with prejudice.

I. THE FTC PROPERLY DENIED PLAINTIFF'S FEE WAIVER REQUESTS

A. The FTC properly denied COA's fee waiver requests for FOIA Request No. 2011-01431 (First Request)

1. The FTC properly denied COA's public interest fee waiver request.

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); *see also* 16 C.F.R. § 4.8(e)(2) (FTC's regulation implementing standards for assessing applicability of public interest fee waivers). At all times, the requester bears the burden of demonstrating that the requirements for a fee waiver are satisfied. *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988). In order to meet the fee waiver requirements, a plaintiff must demonstrate an actual *ability*, not merely an *intent*, to disseminate information and the information "must concern identifiable operations or activities of the federal government," and not just information that is "already in the public domain." *See Monroe-Bey v. FBI*, Civ. No. 11-1915 (RMC), 2012 WL 4017229 at *3-*4 (D.D.C. Sept. 13, 2012). In cases requesting a FOIA fee waiver request, the Court must "determine the matter de novo," and its "review of the matter shall be limited to the record before the agency." 5 U.S.C. § 552(a)(4)(A)(vii). Public interest groups like COA do not presumptively qualify for a fee waiver and "must still satisfy the statutory standard to obtain a fee waiver." *Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1177-78 (10th Cir. 2005) (internal quotations omitted).

In its initial FOIA request 2011–1431 dated August 30, 2011, COA (as its predecessor organization, Freedom Through Justice Foundation) requested a public interest fee waiver, Exhibits attached to Declaration of Dione Jackson Stearns ("SJ Ex.") A, which was denied by the FTC's FOIA Unit on September 22, 2011. Motion, ECF No. 11, Exh. D; Stearns Dec. ¶¶ 6-7. COA renewed this request on September 26, 2011, SJ Ex. E, which was denied by the FTC's FOIA Unit on October 7, 2011. *Id.* Ex. F; Stearns Decl ¶¶ 8-9. On October 28, 2011, COA appealed the denial of the public interest fee waiver request, SJ Ex. G, which was denied by the FTC's General Counsel on November 29, 2011. *Id.* Ex. H; Stearns Decl. ¶¶ 10-11. COA then

requested reconsideration of the FTC's denial of its appeal on December 12, 2011, SJ Ex. K, which the FTC's General Counsel denied on December 20, 2011. *Id.* Ex. L; Stearns Decl. ¶ 14. COA also requested further reconsideration of the agency's denial of its appeal of its fee waiver request on January 27, 2012, SJ Ex. N, which the FTC's General Counsel denied on February 27, 2012. *Id.* Ex. O; Stearns Decl. ¶¶ 16-17.

The FTC provided COA numerous opportunities over several months to satisfy its burden of demonstrating that the requirements for a fee waiver were satisfied, but COA failed to demonstrate that disclosure of the requested records would be "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii). Instead, at each turn, COA provided either no explanation at all or repeated conclusory arguments in support of its fee waiver request. Moreover, COA failed to demonstrate an ability, as opposed to merely stating its intent, to disseminate the requested information to the general public or to provide any specific information about the future distinct work it intended to produce from disclosure of the requested materials. *See, e.g.,* SJ Exs. A at 2, E at 1-2, G at 2-3, K, N.[2] The FTC properly concluded that COA had failed to meet its burden of showing it qualified for a public interest fee waiver. A FOIA requester must provide specific details, not conclusory allegations, of its intent and ability to disseminate the requested information to the general public to enable the agency to make an informed decision as to whether the fee waiver is appropriate. *See, e.g., Judicial Watch, Inc. v. Rossoti,* 326 F.3d 1309, 1312 (D.C. Cir. 2003);

[2] COA's suggestion that the FTC was somehow at fault for not requesting additional information about COA's fee request, Opp'n, ECF No. 15, 28-29, is entirely misplaced. COA submitted – and the FTC considered – no less than *five* separate submissions to justify its fee waiver request for its first FOIA request. *See* SJ Exs. A, E, G, K, and N.

Larson, 843 F.2d at 1483 (fee waiver request properly denied where requester lacked ability to disseminate information because, *inter alia*, he failed to show contacts "with any major newspaper companies."); *Judicial Watch, Inc. v. U.S. Dept. Of Justice*, 122 F. Supp. 2d 13, 19 (D.D.C. 2000) ("requester who does not give specifics regarding a method of disseminating requested information will not meet this factor, even if the requester has the ability to disseminate information.") (citations omitted). COA's attempt to distinguish *Larson*, Opp'n, ECF No. 15,. at 27-28, is misplaced. *Larson* discussed the proper standard for fee waiver tests and held that an inability to disseminate information to the public is a valid basis to deny a fee waiver request. *See Larson*, 843 F.2d at 1482-83. Additionally, *Larson* held that judicial review of fee waiver denials is limited to the administrative record. *Id. Larson*, therefore, is directly applicable to this case. Indeed, COA relies on *Larson* in support of its argument that it satisfied the fee waiver requirements. Opp'n, ECF No. 15,. at 29.

Although COA now argues that it had the *ability* as well as the *intent* to disseminate the requested information to the general public through its website or its purported "extensive external media contacts," Opp'n, ECF No. 15, at 27, a review of the administrative record at the time of COA's request reveals just the opposite. For example, the agency determined that its prior review of the plaintiff's website, as well as information COA provided to establish its purported media contacts, failed to support its assertion that it had the ability to adequately disseminate information from its FOIA request to the general public, and failed to identify any distinct work it intended to produce from the FTC's response to its requests. *See* SJ Exs. H, L; Stearns Decl. ¶¶ 11, 14; *see also Judicial Watch*, 122 F. Supp. 2d at 19 (refusing to grant fee waiver where requester failed to specify particular media contacts or "any particular work

product for which it requests the information.").

Indeed, the FTC noted that at least as of November 2011 when COA's fee waiver request was pending, COA's website was not even functioning, "appear[ing] to be offline and 'Under Construction.'" SJ Ex. H at 1 n.2; Stearns Decl. ¶ 11. While COA now attempts to refute this statement, *see* Opp'n, ECF No. 15, 20-21 (citing Epstein Decl. ¶¶ 9-10), it concedes that it lacked a functioning website for at least part of its existence. Opp'n, ECF No. 15, at 5, 21. Further, the Epstein declaration (like the Connelly declaration and its exhibit) cannot be considered by the court as they were not before the agency when it made its FOIA and fee waiver request decisions. This Court must review only the administrative record that existed before the agency, 5 U.S.C. § 552(a)(4)(A)(vii), which is limited to the initial FOIA request, the agency's response, and any subsequent materials related to the administrative appeal, and excludes information provided by a requester in post-administrative judicial proceedings. *Larson*, 843 F.2d at 1483; *Schoenman v. FBI*, 604 F. Supp.2d 174, 188 (D.D.C. 2009) (*citing, inter alia, Forest Guardians*, 416 F.3d at 1177). Indeed, COA's attempt to minimize the significance of its nonfunctioning website by challenging the statement in the Stearns Declaration, Opp'n, ECF No. 15, at 20-21, fails as COA does not challenge the authenticity of General Counsel Tom's letter (SJ Ex. H) or its admission into the administrative record. COA never provided evidence to the FTC that its website was in fact functioning at time of its FOIA request.

In fact, COA's website remained offline and nonfunctioning through at least December 2011. *See* Supplemental Declaration of Dione Jackson Stearns ("Stearns Supp. Decl.") ¶ 6, attached hereto as Exhibit A. COA also failed to provide a meaningful list of significant media

contacts that showed that it could convey its work to a wide audience; nor did it provide an organizational newsletter or substantiation about the newsletter's intended audience. COA simply did not satisfy its burden of showing it could "contribute significantly the public understanding of the operations or activities" of the FTC based on its unsupported assertions of its dissemination abilities.[3]

The FTC also noted the large amount of information concerning the effect of the Guides on social medial authors (the subject of COA's narrowed FOIA request) that was already publicly available. Stearns Decl. ¶ 11; SJ Ex. H (*citing, e.g.*, FTC, The FTC's Revised Endorsement Guides: What People Are Asking (2010), http://business.ftc.gov/documents/bus71-ftcs-revised-endorsement-guides-what-people-are-asking.pdf.). COA mischaracterizes the breadth of its first FOIA request, Opp'n, ECF No. 15, at 30, which was narrowed to records from January 1, 2009 through September 6, 2011 regarding "changes to the Guides concerning social media authors." SJ Ex. C. Contrary to COA's argument, Opp'n, ECF No. 15,. at 30, there was (and is) a large body of publicly-available information available regarding the revised Guides and its impact on advertising practices, including those affecting social media authors. In

[3] COA asserts that other organizations granted fee waivers made requests that were more conclusory and less substantiated than COA's requests which might show agency "favoritism." Opp'n, ECF No. 15,. at 9-10, 32 and n.15. Each FOIA fee waiver request, however, is made upon the particular facts of the request and a court should not compare wholly separate matters when assessing fee waiver denials. *Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1383 (D.C. Cir. 1989) (requires "case-by-case" analysis); *Judicial Watch, Inc., v. U.S. Dep't of Justice*, No. Civ. 99-2315, 2000 WL 33724693, at *5 (D.D.C. 2000) (finding "simply irrelevant" even comparison to same requester's previous efforts to obtain information and noting that fee waiver analysis must focus on the "particular disclosure" at issue). COA makes no attempt to compare its dissemination abilities (at the time of its FOIA request) with those of the other cited organizations, such as which organizations were more established, had greater media contacts, or had more developed and visited websites.

addition to the revised Guides themselves (*available at* http://ftc.gov/os/2009/10/091005revisedendorsementguides.pdf), and the "What People Are Asking" document, other publicly-available documents include, for example, the FTC's Federal Register Notice for the revised Guides (*available at* http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf), and staff commentaries and closing letters from relevant investigations (*see e.g.*, http://business.ftc.gov/blog/2011/12/using-social-media-your-marketing-staff-closing-letter-worth-read). The extensive amount of publicly available information related to the Plaintiff's FOIA request supports the FTC's view that a fee waiver request was inappropriate because the requested documents would not "significantly increase" the public's understanding of the FTC's operations or activities as compared to the level of understanding that existed prior to the documents' disclosure. *See Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1126-27 (D.C. Cir. 2004) (upholding denial of "blanket fee waiver" where requester failed to counter government's showing that requested information "was already in the public domain").

Finally, COA misconstrues statements made by the FTC in its Revised Guides to justify its fee waiver request and create doubt about the FTC's response to its FOIA request. Opp'n, ECF No. 15,. at 30-31. In fact, while the FTC acknowledged that it was not specifically "monitoring bloggers," it stated its intention to investigate any alleged wrongdoing caused by deceptive advertising (including those involving social media authors) by evaluating each situation "case by case." Similarly, the FTC's statement in the Revised Guides that it is "a good idea" for a person to disclose their affiliation with their employer when they tout their company's products simply reflects prudent advice to avoid potential liability for deceptive

advertising. At bottom, COA's concerns about the impact of the Revised Guides on social media authors may have prompted it to make its FOIA request, but do not justify a public interest fee waiver where – despite multiple opportunities – COA failed to demonstrate that it had the ability to convey to the public information that could contribute meaningfully to an understanding of such issues.

2. COA failed to exhaust its administrative remedies as to its fee reduction request as a "representative of the news media," which, in any event, had no merit

The FTC also properly denied COA's alternative request for a fee reduction for its FOIA request as a "representative of the news media" under 5 U.S.C. § 552 (a)(4)(A)(ii). FOIA sets out three user fee categories (with different charges) based on whether the requested records are for: (1) a "commercial use," (2) not for a "commercial use, and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research, or a representative of the news media," and (3) any other request. 5 U.S.C. § 552(a)(4)(A)(ii); 16 C.F.R. § 4.8(b). FOIA defines "a representative of the news media" as "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552 (a)(4)(A)(ii); *see also* 16 C.F.R. § 4.8 (b)(2) (FTC regulations further refine term to mean "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." *Id.* The requester has the burden of showing it qualifies as a news media representative. *Judicial Watch*, 185 F. Supp. 2d at 60.

As an initial matter, COA failed to exhaust its administrative remedies with respect to its request to be classified as a news media representative. Despite conclusory assertions to the contrary, Opp'n, ECF No. 15, at 5, 37-38, COA did not administratively appeal the initial agency denial of its fee reduction request and thus cannot raise this challenge now. SJ Ex. G, Ex. H at 1 n.1; Stearns Decl. ¶¶ 10-11 and n. 2; *see Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 61-62 (1990) (FOIA requires administrative exhaustion of remedies before seeking judicial relief); *Hildalgo v. FBI*, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003) (exhaustion is required if "the purposes of exhaustion" and the "particular administrative scheme" support such a bar).[4]

In any event, were this Court to address this issue, and for reasons similar to those supporting the agency's denial of COA's public interest fee waiver request, the FTC's initial determination that COA was not a "representative of the news media" was proper. COA simply failed to demonstrate at the time of its request that it had the ability to disseminate any "distinct work" to a wide audience using the results of its first FOIA request. *See supra* at 4-7. Indeed, in its initial request, COA described itself as "a 501(c)(3) nonprofit corporation that uses public policy and legal reform strategies to ensure greater transparency in government, protect taxpayer interests and promote social and economic freedoms," SJ Ex. A, and failed to characterize itself as a news media representative or even mention any journalistic activities in which it engaged.[5]

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[4] While COA now attempts to gloss over this omission by claiming that it asserted news media requester status for all three FOIA requests, Opp'n, ECF No. 15, at 37-38, it fails to point to any document actually evidencing this administrative appeal to the agency's General Counsel.

[5] While COA subsequently described itself as a "representative of the news media," *e.g.*, SJ Ex. E, the FTC concluded that COA continued to lack support for this reduced fee category status. *See Judicial Watch, Inc. v. DOJ*, No. 99-2315, 2000 WL 33724693, at *4 (D.D.C. Aug 17, 2000) (concluding that if requester's "vague intentions" to publish future reports "satisfied FOIA's requirements, any entity could transform itself into a 'representative of the news media'

Here, COA's admitted role was more as a government watchdog or public interest law firm that, at most, collected information as a middleman and made that information available to the public and to the media, which could then use the information as it deemed appropriate, and not as a "representative of the news media." *See Judicial Watch*, 185 F. Supp.2d at 59-60 (public interest law firm focusing on addressing government corruption not deemed a "representative of the news media."); *Judicial Watch, Inc.* v. *U.S. Department of Justice*, 122 F.2d 5, 12 (D.D.C. 2000) (public interest law firm that failed to "identify an article, report or book for which it planned to use the requested information" not a news media representative); *Judicial Watch*, 2000 WL 33724693, at *3-4 (public interest firm that made information available to reporters, faxing information to newspapers, and appearing on TV and radio insufficient for news media status). Contrary to COA's assertions, Opp'n, ECF No. 15, at 36, 37, 5 U.S.C. § 552(a)(4)(A)(iii) does not establish a "balancing test" for the news media representative category; rather, that provision relates to whether a fee waiver should be granted in the public interest. COA may be referring to the holding in *Nat'l Security Archive*, 880 F.2d at 1387, that an entity that otherwise qualifies as a "representative of the news media" (*e.g.*, newspaper) in certain circumstances may still be denied a fee reduction if the request at issue is actually for that entity's "commercial use" (*e.g.*, nonjournalistic activities) under 5 U.S.C. § 552(a)(4)(A)(ii)(I). This issue does not even come into play here because COA never qualified as a news media entity in the first place.

COA's present contention that it had the ability to disseminate the request results through "periodical-newsletters," a "high traffic website," social media cites, and its contacts with "high

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by including a single strategic sentence in its request.").

profile media publications," Opp'n, ECF No. 15, at 36-37, at best reflects a *post-hoc* gloss on its operational capabilities. A review of the administrative record before the agency at the time of the request, however, demonstrates that COA was a nascent organization that provided only conclusory assertions regarding its purported ability to disseminate the requested information (including inadequate major media contacts), failed to provide any details regarding a "distinct work" it intended to produce from the requested information, failed to provide evidence of an organizational newsletter, and operated a website that was not even functioning during at least a portion of the administrative proceedings. For instance, COA attaches as its "Exhibit 1" to its Opposition a purported list of media articles mentioning its activities. This exhibit, however, was never provided to the FTC during its consideration of COA's FOIA requests and thus cannot now be considered by the Court. *See Larson*, 843 F.2d at 1482-83. In any event, even if this document had any relevance, it merely shows that the vast majority of purported news articles involving COA appeared *after* the completion of all three FOIA administrative proceedings at issue here. The FTC, therefore, properly denied COA's request to be deemed a "representative of the news media."

B. The FTC properly denied COA's fee waiver requests for FOIA Request No. 2012–00227 (Second Request)

1. COA did not qualify for a public interest fee waiver

Contrary to COA's assertion, Opp'n, ECF No. 15, at 32, the FTC fully explained the basis for denying this request. On January 6, 2012, the FTC's FOIA staff initially denied COA's fee waiver request for failing to show that "disclosure of the requested records to you will 'be likely to contribute significantly to the public understanding of the activities and operations of government.'" SJ Ex. M; Stearns Decl ¶ 15. On February 27, 2012, the FTC's General Counsel

denied COA's appeal of that determination, stating that COA had "failed to provide any meaningful level of detail regarding" its "dissemination efforts or ability, aside from an ambiguous promise to share an analysis of the materials to the public in some form," including a failure to sufficiently describe the "distinct work" it planned to disseminate based on the results from its second request. The FTC also stated that COA's "second FOIA request was made primarily in the organizations's commercial interest, rather than in the interest of the public." SJ Ex. O; Stearns Decl. ¶ 17. The FTC concluded that COA's conclusory statements that at some unspecified time that it would "review . . . and disseminate [the] information to the public in a manner that will help the public to understand" how the government determines fee waiver applications failed to support COA's ability to disseminate the information. SJ Ex. O at 2.

A review of COA's purported means of disseminating the information at the time of its request fully support the FTC's conclusion that COA fell far short of satisfying the requirements for a fee waiver. For example, COA's website was nonfunctional and offline at the time of its request in December 2011. Stearns Supp. Decl. ¶ 6. Additionally, although COA referred at the time to a "newsletter" in which it intended to publicize the information it received from the FTC, it failed to provide the FTC a copy of, or any information about, the purported newsletter or its intended audience. Nor could the FTC glean such information from COA's recently functioning website even as of February 2012. SJ Ex. O at 2. Moreover, despite COA's conclusory claims about its "extensive" media contacts, it failed to provide any support that such contacts would in fact disseminate – or even had any interest in – information about the FTC's fee waiver determination process. *See Judicial Watch*, 122 F. Supp. 2d at 19; *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (refusing to grant waiver where requestor

"did not establish a firm intention to publish the information requested" and "fails to identify any plan for a book, report, or newspaper article for which it will use the requested information.").

In addition, despite COA's contention to the contrary, COA's recently functioning website even as of February 2012 did not contain the results of any of its FOIA requests, nor did it show any capability to adequately disseminate information to the general public. SJ Ex. O at 2; *see also Brown v. U.S. Patent and Trademark Office*, 226 F. Appx. 866, 868-69 (11th Cir. 2007) (determining that requestor's stated purpose of his website, its traffic, and attention it has received "do not establish that he . . . disseminates news to the public at large"). While COA now asserts that it intended to distribute its analysis of the responsive materials in a "report" that would have been posted on its website, Opp'n, ECF No. 15, at 32, it failed to provide any information about such a report at the time of its request.[6] COA also fails to explain how this purported report would have been likely to "contribute significantly to the public understanding of the activities and operations of government."

Finally, COA fails to rebut the FTC's conclusion that COA's second FOIA request was made primarily in its own private commercial interest to further its position in the first FOIA appeal and in any subsequent litigation against the government to obtain a fee waiver, and was not in the public interest. *See* SJ Ex. O at 2-3. COA expressly conditioned its second FOIA request on the denial of its first request, and used information obtained through the second request (*i.e.*, other FOIA requests in which the FTC had granted fee waivers under the public interest exception) both in requesting reconsideration of the first request and in this judicial

[6] Indeed, the exhibit referencing a "report" which COA relies upon to support its dissemination abilities, Opp'n, ECF No. 15, at 32 (citing Ex. 15 [SJ Ex. Q] at 6) was an April 4, 2012 letter regarding its *third*, not second, FOIA request.

challenge. *See* Complaint Ex.11. Courts have routinely held that FOIA should not be used as a substitute for discovery in a requester's private litigation, or administrative claims, against the government. *See, e.g., Ortloff v. Dep't of Justice,* No. 02-5170, 2002 WL 31777630, at *1 (D.C. Cir. 2002); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1287 (9th Cir. 1987); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 712 (D.C. Cir. 1977) (discussing in context of FOIA attorneys fees provision); *Kempthorne*, 589 F. Supp. 2d at 10 (request in "commercial interests" of requester); *Rozet v. Dep't of Housing and Urban Dev*., 59 F. Supp.2d 55, 57 (D.D.C. 1999) (same).[7] In sum, the FTC properly concluded that COA failed to qualify for a public interest fee waiver for its second FOIA request.

2. COA did not qualify as a "representative of the news media"

For similar reasons, the FTC properly determined that COA failed to show that it qualified for a fee reduction for its second FOIA request as a "representative of the news media." SJ Ex. O at 3; Stearns Decl. ¶ 17. Despite COA's *post hoc* claims regarding its purported ability to disseminate a finished work to the public through newsletters, its website, social media cites, and "high profile media publications" (the same argument it makes to assert its news media

[7] COA's challenge to this point lacks merit and the precedent it relies upon is distinguishable. *See* Opp'n, ECF No. 15 at 36, 37. For example, while *McClellan* and *Martinez v. Social Sec. Admin*., No. 07-cv-01553, 2008 U.S. Dist. LEXIS 21703 (D. Col. 2008), relying on *McClellan,* held that information sought in furtherance of a tort claim for compensation or retribution for the requester is not considered to involve a "commercial interest," here COA was not seeking materials in its second FOIA request to be made whole for tort damages, but to support its fee waiver claim for its first FOIA request that it reasonably anticipated would lead to litigation. Indeed, *McClellan* makes it clear that a requester seeking information merely to advance its private lawsuit or administrative claim against the government does not further the public understanding of government operations. 835 F.2d at 1287. Further, *Judicial Watch of Florida, Inc. v. U.S. Dep't of Justice*, No. 97-cv-2869, 1998 U.S. Dist. LEXIS 23441, at *10-*11 (D.D.C. 1998) simply held that, under the circumstances of that case, the public interest in the subject records was greater than the requester's commercial interest.

representative status for all of its FOIA requests, *see* Opp'n, ECF No. 15, at 36-38), the administrative record for COA's second request shows that COA failed to provide sufficient evidence of any "distinct work" it planned to create based upon the requested information or that it had the ability to distribute that work to a wide audience. *See* 5 U.S.C. § 552(a)(4)(A)(ii).

For example, despite several opportunities to do so, COA failed to specify how it would adequately publish news to the general public, never provided to the FTC evidence of its purported newsletter, and failed to operate a functioning website at the time of its request which, even when it began operation, did not show the results of or any "distinct work" generated from any of its FOIA requests. SJ Ex. O. Indeed, even if COA's website had been fully functioning at the time or if it had provided evidence that it published a newsletter, COA would not have automatically qualified as a news media entity. *See, e.g., Brown,* 226 F. App'x at 868 (concluding that requestor's "status as the publisher of a website does not make him a representative of the news media"); *Hall v. Central Intelligence Agency,* No. 04-00814 (HHK), 2005 WL 850379, at *6 (D.D.C. 2005) (entity that published research in newsletters and magazines was not a representative of the news media). As shown above, instead of a news media entity, COA more closely resembled a public interest law firm or a government watchdog group. *See Judicial Watch,* 122 F. Supp. 2d at 21. The FTC properly concluded, therefore, that COA did not qualify as a "representative of the news media" for its second FOIA request.

C. The FTC properly concluded that COA's fee waiver request for its FOIA Request No. 2012-00687 (Third Request) was moot

As noted previously, Motion, ECF No. 11, at 8-9, the FTC found 95 pages of materials responsive to COA's third FOIA request, but withheld 16 pages in full under FOIA Exemption 5,

5 U.S.C. § 552(b)(5).[8] The FTC provided the 79 disclosable pages to COA on March 19, 2012. SJ Ex. P; Stearns Decl. ¶ 18; Gray Decl. ¶¶ 24, 26. COA's current contention that it was entitled to a fee waiver for its third request, Opp'n, ECF No. 15 at 32-34, is without merit.

First, COA did not request such a fee waiver in its third FOIA request, Stearns Decl ¶ 16, SJ Ex. N, and does not point to such a request in its Opposition. Because COA did not properly raise this request at the outset, it did not exhaust its administrative remedies and may not raise this issue here. *Oglesby*, 920 F.2d at 61-62. Moreover, even if such a request had been properly made,[9] the FTC correctly determined that any such fee waiver request was moot as there were simply no fees associated with the processing of the third FOIA request. This was because there were fewer than 100 disclosable responsive documents and COA, as an "Other (General Public)" requester under 16 C.F.R. § 4.8(b)(3), was entitled to receive 100 pages of records free of charge. SJ Exs. P, R; Stearns Decl. ¶¶ 18, 20. Because COA's fee waiver request was both moot and untimely, the FTC did not address the request administratively. COA's assertion that the FTC should nonetheless have made a fee waiver determination anyway because a "revised search" might have resulted in producing more than 100 pages, Opp'n, ECF No. 15 at 33, fails where COA makes no showing that the FTC's search was inadequate or could have resulted in more than 100 pages and would have essentially resulted in a nonbinding advisory opinion. Contrary to COA's assertion, Opp'n, ECF No. 15,. at 32-33, there was no unfair "disparity"

[8] The FTC had initially indicated that it had located 92 pages of responsive records, SJ Ex. P at 1, but later determined that there were 95 pages of responsive materials. Stearns Decl. ¶ 18; Gray Decl. ¶¶ 24, 26 n.3.

[9] COA did assert in its subsequent April 4, 2012 appeal letter that it was entitled to a fee waiver for its third FOIA request under both the public interest exemption and as a representative of the news media. SJ Ex. Q; Stearns Decl. ¶ 19.

between the FTC's treatment of COA's third FOIA request and that of another FOIA requester whose request generated fewer than 100 responsive pages. The other requester did not seek a fee reduction based on the fee category – such as an "Other (General Public) requester" – under 16 C.F.R. § 4.8(b), but rather only sought and was granted a public interest fee waiver (which does not depend on the number of responsive pages). In contrast, COA was deemed an "Other (General Public) requester" under 16 C.F.R. § 4.8(b)(3), which permitted the release of 100 pages without charge. Because there were fewer than 100 nonprivileged responsive documents, COA was not charged a fee for this request, and there was no reason to reach the fee waiver issue. COA also erroneously asserts that the FTC "refused to provide" responsive materials or "ignore[d]" portions of COA's third request because one responsive document – the FTC's Freedom of Information Act & Privacy Act Handbook – was publicly available on the agency's website. Opp'n, ECF No. 15 at 34. In fact, the FTC produced all materials responsive to COA's third request that were not withheld under applicable FOIA exemptions.

COA's attempt to discredit the FTC's fee waiver analyses through comparisons to fee waivers granted by other agencies, in other cases, must also fail. Opp'n, ECF No. 15 at 13-14. Comparisons between different fee waiver requests (whether within the same agency or between agencies) are irrelevant as each request much be assessed on its own facts. *See supra* at 7 n.3; *Nat'l Sec. Archive*, 880 F.2d at 1383. Furthermore, while this Court may not consider the Connelly Declaration or exhibit that were not in the administrative record, *see supra*, it is worth noting that the percentage of fee waiver requests granted by the FTC for FY 2010 and FY 2011 (12.7%) is very similar to that for the Department of Justice (11.6%). *See* http://www.foia.gov/data.html (using public database to compare FOIA fee waiver results for

both agencies in past two fiscal years). The FTC, therefore, is by no means an outlier in this regard.

In sum, the FTC properly denied COA's requests for a public interest fee waiver for its first and second FOIA requests because COA failed to show that it had the ability to disseminate a future work that was "likely to contribute significantly to public understanding of the operations or activities" of the FTC. Similarly, the FTC properly denied COA's requests for a fee reduction as a "representative of the news media," because it failed to show that it had the ability to distribute a "distinct work" from the responsive records to a wide audience. Finally, COA did not raise a fee waiver request in its third request which was, in any event, moot.

II. THE FTC PROPERLY WITHHELD DOCUMENTS UNDER FOIA EXEMPTION FIVE

A. FOIA Request No. 2012-0227 (Second Request).

On January 6, 2012, the FTC provided 100 pages of material responsive to COA's second request, but withheld portions of eight documents under Exemptions 5 and 6 of the FOIA, 5 U.S.C. §§ 552(b)(5), (6). SJ Ex. M; Gray Decl ¶ 22; Stearns Decl ¶ 15. COA now argues that the FTC improperly withheld portions of those documents under Exemption 5. Opp'n, ECF No. 15 at 14-20, 38-44.[10]

First, COA failed to exhaust its administrative remedies as to this claim and thus should not be able to raise this challenge in this Court. *See Dettmann v. U.S. Dep't of Justice*, 802 F.2d 1472, 1476-77 (D.C. Cir. 1986) (as a general matter in the FOIA context, no judicial review of issue until exhaustion of administrative remedies); *Oglesby*, 920 F.2d at 61-62 (same). After the

[10] COA does not challenge the FTC's withholding of documents under FOIA Exemption 6. *See* Opp'n, ECF No. 15, at 14, 43 n.20.

FTC provided documents responsive to COA's second FOIA request, COA administratively appealed the FTC's denial of COA's fee waiver request, but did *not* appeal the FTC's withholdings under FOIA Exemptions 5 and 6. *See* SJ Ex. N; Gray Decl ¶ 23; Stearns Decl ¶ 16. While COA now argues to the contrary, Opp'n, ECF No. 15 at 14, 38 n.19, it implicitly concedes its failure to exhaust its remedies as it cites no document evidencing this administrative appeal. COA only cites to its April 4, 2012 letter (SJ Ex. Q; Complaint Ex. 15), in which it requested, *inter alia*, a *Vaughn* index for documents withheld from its *third* FOIA request, not its second request. *See* SJ Ex. Q at 2. Further, a *Vaughn* index request (which COA routinely made in many of its correspondences beginning with its first FOIA request) does not constitute an appeal or administrative challenge to the agency's initial assertion of particular withholdings under FOIA. Thus, COA's challenge must be rejected because it failed to exhaust its administrative remedies.

In any event, COA's argument would fail even were this Court to consider COA's challenge on the merits. As the FTC's supporting declarations and *Vaughn* index (SJ Ex. T) show, the FTC had a well-founded basis to withhold portions of documents 2, 3, 4, 5, 6, and 7 under Exemption 5 because these intra-agency memoranda reflected the personal thoughts, opinions, and analysis of FTC paralegals regarding the processing of the FOIA requests, including their recommendations to their supervisor, and were therefore predecisional and deliberative. SJ Ex. T at 1-6; Stearns Decl. ¶¶ 33-34; *see also Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (documents reflecting deliberative and predecisional "personal opinions" of subordinate staff to agency official protected under Exemption 5); *Mapother v U.S. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (same). These internal memoranda reflecting the

paralegals' thought processes and recommendations to their supervisor are the classic example of protected deliberative process materials. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Disclosure of the challenged materials would stifle the frank and candid internal discussions among FTC staff necessary for the agency's effective processing of its FOIA requests. *Id*.

COA argues that these memoranda lost their protected status, however, and became "postdecisional," simply because the paralegals' recommendations that the requester be granted a fee waiver were "adopted" by the agency official. Opp'n, ECF No. 15, at 42-43. This argument lacks merit. A predecisional document otherwise protected under the deliberative process privilege does not lose its protected status simply because it includes recommendations ultimately adopted by the agency. In this regard, COA's reliance on *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1985) is misplaced, as that case merely held that documents expressly incorporated by reference into nonexempt materials and that provide the reasons ultimately adopted by the agency lose their protected status. Here, unlike in *Sears*, the FTC's approval letter did not expressly incorporate or even mention the paralegals' memoranda, and the agency's final decision to grant the fee waiver request may have relied upon reasons different than those provided by the subordinate agency staff. *See, e.g., Renegotiation Bd. v. Grumman Aircraft Engin. Corp.*, 421 U.S. 168, 184-85 (1975) (refusing to release predecisional agency reports where no showing "that the reasoning in the report is adopted by the [agency] as its reasoning, even when it agrees with the conclusion of [the] report"); *Afshar v. Dept. of State*, 702 F.2d 1125, 1143 n.22 (D.C. Cir. 1983) (under circumstances of case, "only express adoption in a nonexempt memorandum explaining a final decision will serve to strip these memoranda of their

predecisional character . . . If the agency merely carried out the recommended decision without explaining its decision in writing, we could not be sure that the memoranda accurately reflected the decisionmaker's thinking."). The FTC's withholdings under the deliberative process privilege in Exemption 5, therefore, were proper.[11]

B. FOIA Request No. 2012-00687 (Third Request).

The FTC also properly withheld 16 pages (out of 95 pages) from five documents from its response to COA's third FOIA request under Exemption 5 of the FOIA. SJ Ex. P; Stearns Decl ¶ 18; Gray Decl ¶¶ 24, 26. The withheld materials consist of two screen shots taken by an FTC paralegal in December 2011(documents 9 and 10 on the *Vaughn* index),[12] and three intra-agency memoranda drafted by the paralegal and provided to his supervisor in September 2011 and December 2011 (documents 11, 12, and 13 on the *Vaughn* index).

First, COA failed to exhaust its administrative remedies to challenge the FTC's invocation of Exemption 5 because it did not administratively appeal the agency's initial withholding of these documents. Rather than challenge the FTC's withholdings, COA appealed, *inter alia*, ". . . the FTC's failure to appropriately respond to our request, including the FTC's failure to produce identifying information for each document withheld . . ." in a *Vaughn* index. SJ Ex. Q at 1. The FTC explained that it was not required to provide a *Vaughn* index in

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[11] COA's argument that the FTC failed to comply with its segregability obligations, Opp'n, ECF No. 15 at 38, is unfounded as all factual information for documents 2, 3, 4, 5, 6, and 7 that was segregable was released as part of the FTC's responses. SJ Ex. T at 1-6. Similarly, COA's assertion that an *in camera* review of these documents may be necessary, Opp'n, ECF No. 15 at 43, is without basis because the FTC's supporting declarations and *Vaughn* index adequately support the FTC's withholding determinations.

[12] The *Vaughn* index inadvertently dated these documents from December 2012 instead of December 2011.

administrative proceedings, and did not address the applicability of Exemption 5 because COA never raised the issue on appeal. SJ Ex. R. This Court should not now review COA's challenges to the FTC's withholdings under Exemption 5 because it never exhausted its administrative remedies in the first instance. *Dettmann*, 802 F.2d at 1476-77; *Oglesby*, 920 F.2d at 61-62.

In any event, if the Court were to address the merits of the COA's claim here, it should conclude that the FTC properly withheld these documents under both the deliberate process and attorney work-product privileges. *See* Motion, ECF No. 11, at 16-17; Stearns Decl. ¶¶ 33-34. The screen shots of COA's website (*Vaughn* index documents 9 and 10) were taken by an FTC paralegal in mid-December 2011 under the direction of an attorney and after General Counsel Tom's denial of COA's appeal of its first FOIA request on November 29, 2011, in which Mr. Tom expressly advised COA that it could seek judicial review of his decision. SJ Ex. H at 2. Thus, they clearly were taken in anticipation of possible litigation. *See FTC v. Grolier, Inc*., 462 U.S. 19 (1983).[13]

The challenged internal memoranda (*Vaughn* index documents 11, 12 and 13), prepared in September and December 2011, are protected under the deliberative process privilege in Exemption 5 because they consist of a subordinate employee's personal thoughts, opinions, and analysis, and his predecisional recommendations to his supervisor. SJ Ex. T at 9-11; Stearns Decl. ¶ 34. As such, Exemption 5 protects the confidentiality of these documents that are essential to the agency's effective processing of FOIA requests. *See Morley*, 508 F.3d at 1127; *Coastal States*, 617 F.2d at 866. COA suggests that the FTC improperly applied Exemption 5 to

[13] Regardless of whether the attorney work-product privilege applies, these documents should not be disclosed as COA failed to challenge the FTC's alternative basis for withholding the documents under the deliberative process privilege. *See* SJ Ex. T at 8-9.

these memoranda in part because the FTC failed to identify whether the FOIA and fee waiver requests were submitted by COA or by another party, or were prepared in anticipation of litigation with COA. Opp'n, ECF No. 15,. at 44. In fact, the FTC's supporting declaration stated that the attorney work-product privilege applied to protect materials "pertinent to Plaintiff's FOIA requests," and that the deliberative process privilege applied to protect "internal deliberations among government personnel . . . regarding the processing of Plaintiff's FOIA requests." Stearns Decl. ¶¶ 33-34.

These documents were also protected from disclosure under the attorney work-product privilege as they were prepared by the paralegal under the direction of an attorney and in anticipation of litigation. *See* SJ Ex. T at 9-11; Stearns Decl. ¶ 33. The nature of the requester (a public interest law firm that admittedly uses "legal reform strategies" and has extensive "public interest litigation experience," SJ Exs. A, E) and of the request (concerns about the FTC's alleged investigations of bloggers and social media authors that might have violated the revised Guides) supports invocation of the privilege here which attaches where there is a reasonable "anticipation of foreseeable litigation, even if no specific claim is contemplated." *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Certainly by December 2011, as noted above, the agency was contemplating the real likelihood of litigation with COA. The FTC properly invoked both the deliberative process and attorney work-product privileges to protect these five documents from disclosure.

Respectfully submitted,

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