NO ORAL ARGUMENT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5335

CAUSE OF ACTION, Appellant,

v.

FEDERAL TRADE COMMISSION, Appellee.

CORRECTED BRIEF FOR APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RONALD C. MACHEN JR.,
United States Attorney.

R. CRAIG LAWRENCE,
ALAN BURCH
Assistant United States Attorneys.

C.A. No. 12-0850

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

* Cases chiefly relied upon are marked with asterisks.

FEDERAL STATUTES

FEDERAL REGULATIONS

MISCELLANEOUS

GLOSSARY OF ABBREVIATIONS

A	Appendix page numbers
COA	Cause of Action, Plaintiff-Appellant in this case
DCNF	Daily Caller News Foundation, Amicus in this case
EPIC	Electronic Privacy Information Center, a litigant in a cited case
FOIA	Freedom of Information Act
FTC	Federal Trade Commission, Defendant-Appellee in this case
RC	The Reporters Committee for Freedom of the Press
SA	Corrected Addendum page numbers, attached to COA's Corrected Brief, filed May 6, 2013

STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Appellee, the Federal Trade Commission ("FTC"), agrees that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, and that the appeal was timely.

ISSUES PRESENTED

In the opinion of the FTC, this appeal presents the following issues:

(1) Whether the District Court correctly held that COA did not qualify for a fee reduction as a "representative of the news media" for its first and second FOIA requests, because it failed to establish that it would create a "distinct work" from the requested records or had an ability to distribute that work to a sufficiently large audience.

(2) Whether the District Court correctly held that COA did not qualify for a public interest fee waiver for its first and second FOIA requests, because it failed to establish an ability to disseminate that information to a reasonably broad segment of the public, and because the information sought would not contribute significantly to public understanding of the activities of the government.

(3) Whether the District Court correctly found the fee waiver issue in connection with COA's third FOIA request was moot because the FTC located fewer than 100 pages responsive to COA's request and, therefore, released all

non-exempt responsive records to COA free of charge.

COUNTER-STATEMENT OF THE CASE

This appeal involves three requests made by plaintiff COA for waivers of fees normally imposed on persons requesting records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.* Between August 2011 and February 2012, COA made three FOIA requests and, each time, requested both a public interest fee waiver and a fee reduction as a "representative of the news media," pursuant to 5 U.S.C. §§ 552(a)(4)(A)(ii), 552(a)(4)(A)(iii). The FTC denied fee waivers as to the first two FOIA requests and classified COA as an "[o]ther [noncommercial]" requester. A.028; A.050. As to the third, the Commission declined to act on the fee waiver request, because the non-exempt records that were responsive to the non-duplicative portion of that request amounted to fewer than 100 pages, and they were therefore provided without charge, in accordance with the FTC's Rules of Practice, 16 C.F.R. § 4.8(b)(3). The Commission denied COA's appeals of its various fee determinations. A.035-36; A.040; A.161-64; A.185-86.

On May 25, 2012, COA filed a complaint challenging both the FTC's failure to disclose certain requested information and the FTC's denial of COA's fee waiver and reduction requests for all three FOIA requests. A.007-19. The FTC moved for summary judgment, A.187-259, and, on August 19, 2013, the District

5 U.S.C. § 552(a)(4)(A)(ii)(; *see also* 16 C.F.R. § 4.8(b). Moreover, an agency may waive all fees or reduce fees associated with a FOIA request if a requester can show that "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).

II. COA's First FOIA Request (August 2011) (FOIA-2011-01431)

COA described itself as "a 501(c)(3), not-for-profit, educational organization," "that uses public policy and legal reform strategies to ensure greater transparency in government, protect taxpayer interests and promote social and economic freedoms." A.020-21; A.406. It was created on August 15, 2011. COA Brief at 6, 27; A.031. Fifteen days after COA was formed, and when it was still known as the "Freedom Through Justice Foundation," it submitted a FOIA request to the FTC seeking access to four categories of records related to the FTC's "Guides Concerning the Use of Endorsements and Testimonials in Advertising" – a publication that the FTC had revised in 2009 to include "social media and bloggers." A.020-21; A.222-23 ¶ 6; A.375.

COA subsequently agreed to narrow its FOIA request to the first category, which sought: "[a]ll records relating to the drafting, formulation, and revision of the [Guides]" from January 1, 2009 through September 6, 2011. A.020; A.024;

available, such that "it is unlikely that the documents produced pursuant to your FOIA request would contribute 'significantly' to the public understanding of the FTC's operations or activities . . . ." A.036.

COA sought reconsideration of the denial of its appeal by letter dated December 12, 2011. A.037-39; A.226 ¶ 14. Rather than offer any new information about its dissemination abilities, COA asserted that it had already met its burden of proof by identifying four news stories that COA did not author and by "not[ing] specifically that 'the [COA] website publicizes its findings . . . .'" A.038. It did not claim any other method of dissemination. On December 20, 2011, the FTC denied that reconsideration request, concluding that COA had again failed to "describe the future work that will result from the disclosure of the requested materials," or that it had the ability to convey that work to the general public. A.040; A.226 ¶ 14.

On January 27, 2012, COA submitted another request for reconsideration in support of its public interest fee waiver request and to be considered a "representative of the news media" for its first FOIA request (as well as for its second FOIA request, described below). A.152-60; A.227 ¶ 16. Regarding its dissemination abilities, COA simply stated that it would share the analysis of its request to the public through unspecified "memoranda, reports, or press releases," that it would "disseminate any documents it acquires from these requests" on its

website; that it would "disseminate information" through its "online newsletter and other publication activities," or through various media contacts that had supposedly published COA's work in the past. It also claimed it should receive a fee reduction as a representative of the news media because it had published information on Facebook and Twitter and through an email newsletter. A.154-55; A.158-59.

The FTC denied this reconsideration request on February 27, 2012. A.161-64. It specifically noted that COA had "failed to provide any meaningful level of detail regarding your organization's dissemination efforts or ability, aside from an ambiguous promise to share an analysis of the materials with the public in some form," or any details about the "distinct work" it intended to publish. A.161-62. Further, it noted that COA had provided "no information about the newsletter or its audience," and that its claims of media contacts were insufficient "in light of [COA's] failure to provide information regarding the possibility that such contacts would disseminate the requested information." A.162. Moreover, the FTC noted that COA's "website only contains the original FOIA requests with no information about the results of those requests." *Id.* With respect to its request for news media representative status, the FTC concluded that COA had failed to provide sufficient details about its ability to turn "raw materials into a distinct work," or its ability to "distribute[ ] that work to an audience," and that its

website did not provide sufficient evidence of such an ability. A.163 (citation omitted).

III. COA's Second FOIA Request (Nov. 2011) (FOIA-2012-00227)

While COA's initial appeal on its first FOIA request was pending, it submitted a second, conditional FOIA request. In a letter dated October 28, 2011, COA requested that – in the event the FTC denied its appeal for a public interest fee waiver for its first FOIA request – the FTC then release two categories of records: (1) all FOIA requests for which the FTC granted fee waivers under the public interest exception since January 1, 2009, and (2) documents referring or relating to the process in which the FTC determined such FOIA requests met the fee waiver criteria. A.031; A.224 ¶ 10; A.243-44 ¶ 16. The FTC denied COA's appeal of the fee waiver denial for its first FOIA request on November 29, 2011. A.035-36; A.224 ¶ 11; A.244 ¶ 17. By letter dated December 2, 2011, FTC's FOIA Unit acknowledged as of November 30, 2011, receipt of COA's second, conditional request (designated as FOIA Request no. 2012-00227) and sought a fee agreement to process this request. A.044; A.225 ¶ 12; A.244 ¶ 18.

On December 12, 2011, COA responded requesting both a public interest fee waiver and a fee reduction as a representative of the news media for this second request. A.045-49; A.225-26 ¶ 13; A.244 ¶ 19. It once again asserted without details that it would share with the public its analysis through unspecified

"memoranda, reports, or press releases," through its media contacts that had supposedly published its work in the past, its website, a recently created e-mail newsletter, and through Twitter and Facebook. A.046-48.

On January 6, 2012, the FTC denied COA's fee waiver requests for failure to prove "that disclosure of the requested records to [COA] will 'be likely [to] contribute significantly to the public understanding of the activities and operations of government." A.050-51; A.226 ¶ 15. The FTC provided 100 free pages of documents to COA as an "Other (General Public) requester" under 16 C.F.R. § 4.8(b), but withheld portions of them under FOIA Exemptions 5 and 6, 5 U.S.C. § 552(b)(5) and 5 U.S.C. § 552(b)(6). A.050; A.226 ¶ 15; A.245 ¶ 22.

On January 27, 2012, COA appealed the FTC's fee waiver and reduction denials (as described above), but did not challenge any of the FTC's withholdings under FOIA Exemptions 5 and 6. A.152-60; A.226-27 ¶ 16. The FTC denied the appeal in the February 27, 2012 letter described above (which also addressed COA's request for reconsideration of the denial of fee waivers for its first FOIA request). A.161-64. That letter noted that COA had still "failed to provide any meaningful level of detail regarding your organization's dissemination efforts or ability," and denied COA's "request for consideration as a 'representative of the news media'" under FOIA. *Id.*; A.227 ¶ 17. It also concluded that COA's

“second FOIA request was made primarily in the organization’s own commercial

The FTC responded on March 19, 2012, informing COA that it would not address the first category of its third request because it was duplicative of COA's first FOIA request. A.174 n.1; A.228 ¶ 18; A.245 ¶ 24. The FTC notified COA that it had located 92 pages of responsive records relating to the second and third parts of the request, of which 16 pages (consisting of three internal memoranda and two screen shots of COA's website) were exempt in full under FOIA Exemption 5, and thus it was releasing the remaining pages free of charge.[3] A.174; A.228 ¶ 18; A.231-32 ¶¶ 26-27; A.246 ¶ 26.

COA filed an April 4, 2012 appeal of the FTC's determination regarding its third FOIA request, challenging the FTC's withholdings, demanding a *Vaughn* index of withheld documents, seeking a fee waiver and/or reduction for the first time with respect to the third request, and demanding responses to contention interrogatories regarding whether the requested documents were in the possession of the FTC. A.176-84; A.228-29 ¶ 19. In support of its fee reduction request, COA claimed that it would disseminate information it received through its online newsletter, and use it to write two news articles that it would publish on its website and distribute to media sources and through its newsletters. A.184. COA

[3] The letter misstated the number of responsive pages; in fact, 95 pages of responsive materials had been located.

continued to fail to provide details about its dissemination capabilities, such as the number of subscribers to the newsletter or viewers to its website.

The FTC denied COA's appeal on May 7, 2012. A.185-86; A.229 ¶ 20. The FTC explained that it was not required to provide a *Vaughn* index during administrative proceedings, nor to respond to contention interrogatories in an administrative appeal, and that COA's fee waiver and/or reduction request was moot because there were no fees associated with this request. *Id.*

V. The District Court's Ruling

On August 19, 2013, the District Court granted the FTC's motion for summary judgment with respect to the fee issues now before this Court, while denying the motion with respect to the withholding of certain requested records. A.373-418. The District Court first held that the FTC properly denied COA's request for a public interest fee waiver for the first FOIA request because COA failed to show it had the ability to disseminate the requested information to a reasonably broad segment of the public—*i.e.*, it provided no details regarding the number of viewers of its website, and did not show that any of its media contacts would disseminate the information from this request. A.389-92.

The District Court next held that COA also was not entitled to a public interest fee waiver for its second FOIA request, for substantially the same reasons as the first request. A.392-94. The District Court also held that COA failed to

show that the requested information would significantly contribute to public understanding because the primary beneficiary of the requested information was not the public, but COA, which could use it in challenging the FTC fee waiver denials in its first request. A.394-96.

The District Court further held that COA's fee waiver request in connection with its third FOIA request was moot because no fees were assessed for it, because the FTC had provided fewer than 100 pages, at no cost. A.397-400.

The District Court next held that the FTC properly denied COA's request for a fee reduction as a representative of the news media for its first and second requests because COA had failed to provide sufficiently detailed information about any published work it planned to create or that it had the ability to disseminate any work from these requests to the public. The District Court also held that COA's activities were not organized especially around dissemination, but that it acted more like a middleman for dissemination to the media. A.400-06.

Turning to the limited FOIA exemption issues before it, the District Court held that COA failed to exhaust its administrative remedies in failing to appeal the FTC's withholdings in connection with its second FOIA request. A.407-09. Finally, the District Court held that the FTC properly withheld under FOIA Exemption 5 three internal memoranda in response to COA's third request but improperly withheld two screen shots of COA's website. A.409-17.

On September 12, 2013, the District Court issued a final judgment in this case in which it ordered the FTC to produce the two screenshots. A.419. The FTC did so, and does not appeal that ruling.

SUMMARY OF ARGUMENT

COA and its supporting *amici* attempt to frame this appeal as a broad referendum of the rights of newly formed social media organizations to access government records. However, nothing in the District Court's decision bars bloggers or other social media organizations from receiving fee waivers or reductions under FOIA if they satisfy the pertinent statutory standards. In criticizing the District Court's analysis, COA relies upon exactly the same precedents that the District Court relied upon in granting the FTC's motion for summary judgment.

COA failed to show that it was entitled to a fee reduction as a "representative of the news media," for either its first or second FOIA requests, because it provided insufficient details about any "distinct work" it intended to produce from the requested materials and made no showing that it could adequately distribute any such work to a sufficiently large segment of the public. As the administrative record shows, COA – a public interest law firm and self-described government watchdog organization – acted as a mere "middleman" making information available to the news media.

For similar reasons, COA failed to satisfy its burden of showing it was entitled a public interest fee waiver for its first and second requests. COA never

fee waiver request, *id.*, as well as the agency's determination whether the requester is a representative of the news media, *Brown v. U.S. Patent & Trademark Off.*, 226 Fed. App'x 866, 868 (11th Cir. 2007), based on the record before the agency. *See* 5 U.S.C. § 552(a)(4)(A)(vii)[4].

II. The District Court Correctly Held that COA Did Not Qualify as a Representative of the News Media for FOIA Requests One and Two.

A. A FOIA Requester Bears the Burden of Establishing That It Qualifies as a Representative of the News Media.

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 Nat'l Sec. Archive v. U.S. Dept. of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (articulating standard subsequently incorporated into FOIA). The statute also defines "news" to mean "information that is about current events or that would be of current interest to the public," and further provides that "as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through

---

[4] While there is some disagreement within the District Courts as to the standard of review regarding an agency's determination whether a requester is a representative of the news media, *compare Judicial Watch, Inc. v. U.S. Dep't of Justice*, 122 F. Supp. 2d 5, 11, 12 (D.D.C. 2000) (reviewed under the "arbitrary and capricious" standard); *with Judicial Watch, Inc. v. U.S. Dep't of Justice*, 185 F. Supp. 2d 54, 59 (D.D.C. 2002) (compiling cases and applying *de novo* review), the District Court's determination here should be affirmed under either standard.

telecommunications services), such alternative media shall be considered to be news-media entities. *Id.*

The case law is settled that the requester has the burden of showing that it qualified for a fee waiver, *see, e.g.*, *Rossotti*, 326 F.3d at 1311, and the Court should apply the same burden of proof for a fee reduction as a representative of the news media, because there is no basis in the statute to treat the two differently with respect to the burden of proof. *Accord* COA Brief at 15 (conceding burden of proof generally).

Before the 2007 amendments to the FOIA, this Court held that to be a "representative of the news media," the requester must show the intent and ability both to create a "distinct work" and to publish or otherwise disseminate that work to the public – passively making it available or acting as an "intermediary" with the media is insufficient. *See, e.g.*, *Nat'l Sec. Archive*, 880 F.2d at 1386-87 (requester acted as "publisher" by obtaining "raw materials" from FOIA requests and other sources to create "document sets"). The statutory text now mirrors that standard in subparagraph 552(a)(4)(A)(ii) ("uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience"), and the Court should apply the same standard from *Nat'l Security Archive*. In addition,

its ability to publish or broadcast news to the public. *See* 16 C.F.R. § 4.8(b)(2) (2012).[5]

As the Commission correctly determined, and the District Court below correctly confirmed, COA simply failed to carry its burden of establishing two prerequisites to "news media" status. It showed neither that it would use the information to create a distinct new work, nor that it had the ability to publish or otherwise disseminate any such work to a public audience. Even giving proper solicitude to emerging "alternative media" – which the Commission and the District Court did – failure to meet these core requirements precludes COA's request for favored treatment as a representative of the news media.

COA and its *amici* speculate that its fee waiver and reduction requests were denied as part of a plan to discourage requesters who, like COA, are likely to be critical of the agency. *E.g.*, COA Brief at 38-41; DCNF Brief at 19-25. The FTC's fee determinations, however, are both based solely on applying the governing standards to COA's submissions and are entitled to a presumption of regularity that COA failed to rebut. *Fed. Commc'ns Comm'n v. Schreiber*, 381 U.S. 279, 296 (1965). COA has adduced no evidence to rebut that presumption.

[5] *See also Elec. Privacy Info. Ctr. v. Dep't of Defense*, 241 F. Supp. 2d 5, 12-13 (D.D.C. 2003) (citing analogous Department of Defense rule).

COA also claims that it was discriminated against by the FTC as shown by other fee waiver requests it claims were more conclusory but that were granted by the FTC. COA Brief at 40 n.23. *Amicus* Daily Caller similarly complains that the FTC granted "left-leaning organizations" preferential treatment. DCNF Brief at 23-24. Neither COA nor *amicus* present any factual basis for these claims– such as any attempt to compare COA's dissemination abilities with those of other requesters. In any event, each FOIA fee waiver or reduction determination is necessarily made upon the particular facts of the request and requester, and a court should not compare unrelated matters when assessing such fee determinations. *See, e.g.*, *Nat'l Sec. Archive*, 880 F.2d at 1383 ("case-by-case" analysis required).

B. COA Failed to Satisfy its Burden of Showing a "Distinct Work" It Planned to Create from Either its First or Second Requests.

Contrary to COA's protestations, COA Brief at 23-30, the District Court correctly concluded that COA failed to show that it had "use[d] its editorial skills to turn the raw materials into a distinct work," as required by 5 U.S.C. § 552(a)(4)(A)(ii), for either its first or second requests. In *National Security Archive*, this Court found the requester to have satisfied this criteria where it "gathers information from a variety of sources, [and] exercises a significant degree of editorial discretion in deciding what documents to use and how to organize them" in order to create a distinct final product.

Court correctly held that COA failed to identify any distinct work it intended to publish from the requested information, but rather only relied on "unspecified" information posted on its website, social media sites, and in an email newsletter. A.402-03. The District Court's conclusion is consistent with decisions in this Circuit that a requester must provide non-conclusory support for its fee waiver or reduction claims. *E.g.*, *Rossotti*, 326 F.3d at 1312, 1314 (analyzing public interest exception). See also *National Security Archive*, in which this Court found sufficient that the requester "expressed a firm intention" to create a number of "document sets" on topics of current interest, including international relations and nuclear weapons policy, from the requested information. 880 F.2d at 1386.[6]

COA complains that it should not be required to "precisely outline" what it would produce until it receives the information. COA Brief at 27-29. The District Court, however, imposed no such a requirement; rather, it simply recognized that COA had failed to meet the basic statutory standard because it "did not indicate any distinct work it planned to create based on the requested information." A.402-03. The record confirms this conclusion, as to both COA's

[6] Accord *Judicial Watch,* 185 F. Supp. 2d at 59-60 (insufficient showing where requester made information available to reporters, posted information on its website, issued press releases, and conveyed information in radio and television appearances); *Judicial Watch,* 122 F. Supp. 2d at 12 (insufficient showing where requester failed to "identify an article, report, or book for which it planned to use the requested information").

first and second FOIA requests. COA failed to identify any distinct final product for its first request, despite multiple opportunities to do so. Instead, it simply parroted the statutory standard, generically asserted it would "provide the information to the public," or that its website "publicizes its findings," *E.g.*, A.026; A.030; A.038. It likewise provided only conclusory responses with respect to the "distinct work" it planned to produce from its second FOIA request, claiming simply that it would create unspecified "memoranda, reports, or press releases," or that it has in the past generically "report[ed] on [obtained] information, analyz[ed] relevant data, [and] evaluate[d] the newsworthiness of the material," *e.g.*, A.046; A.158, without providing any details of the editing or "distinct work" it planned to prepare from *this* request.

The District Court buttressed its conclusion by pointing to other factors that cut against any prospect that COA would use the requested materials to create a new and unique work, such as COA's failure to show that it would draw on "a range of sources," and that the newsletter it identified had commenced operations only a month before COA's second FOIA request. A.402. COA's criticisms of

serve as a conduit for information. And while COA asserts that it gathered information from multiple sources generally, COA Brief at 24-26, it made no showing that it sought information from sources other than its same FOIA requests in this instance. Furthermore, while COA also challenges the District Court's findings regarding the frequency of its newsletter, COA Brief at 27-28,[7] COA admits that it only began operating *two weeks* before its first FOIA request. COA Brief at 27. Indeed, COA never produced any evidence of its purported newsletter. In any event, COA never provided details of any final "distinct work" it intended to publish in the newsletter, but simply claimed that the newsletter generically "provides subscribers with . . . information the organization has received from government entities." *E.g.*, A.048.

COA also argues that "the relevant question" is "whether the requester publishes distinct works in general," not "a distinct work with the materials received in a given FOIA request." COA Brief at 29 n.16. It provides, however, no support for this proposition, which is directly contrary to the statutory language that the "distinct work" must necessarily be the result of the particular FOIA

[7] In its discussion of its newsletter, COA relies on new material that was not submitted to the Commission, *see* COA Brief at 28 (citing SA-116), is not part of the administrative record, and therefore, should not be considered here. *See* 5 U.S.C. § 552(a)(4)(A)(vii).

request at issue.*See*

turns on the requester's *own* publication activities, and cannot be satisfied by providing such information to others that might publish the information. 880 F.2d at 1386-87. In the present case, the District Court correctly held that COA's evidence showed that it lacked the ability to distribute its work itself, and instead acted as a middleman by making its information "available" to the media and the public. A.404-05.

Amicus Reporters Committee criticizes the District Court's distinction between *disseminating* information and making it *available* as an arbitrary "active/passive" distinction. RC Brief at 15. However, this is precisely the principled distinction this Court drew in *National Security Archive* to distinguish between a news media entity that proactively "publishes or disseminates information to the public" and one that does not. 880 F.2d at 1387. Further, while there will always be some line drawing as to the number of viewers to a website or subscribers to a newsletter that represent an adequate dissemination ability, *see* RC Brief at 15-16, here COA made *no showing* of such dissemination ability through any medium. Finally, Reporters Committee's assertion that FOIA only requires distribution to any size "audience" (even presumably one person), runs counter to holdings in *National Security Archive*, which relied on the requester's ability to distribute its document sets broadly to the public, 880 F.2d at

1387, and in *Rossotti*, which relied on the thousands of website viewers and newsletter and listserve subscribers, 326 F.3d at 1314.

COA challenges the District Court's statement that COA cannot simply borrow its media contacts' credentials to support its own claim as a representative of the news media, COA Brief at 33 (citing A.404-05), but in fact the record clearly shows that COA repeatedly relied upon its third party news media contacts throughout its first and second requests to assert its dissemination capabilities. *E.g.*, A.042 n.11; A.154 n.7. Indeed, *amicus* Daily Caller confirms COA's role as a middleman, not as a publisher. *See* DCNF Brief at 16 ("By their very nature, nonprofits are indispensable 'middleman' for dissemination. Organizations such as DCNF utilize for their own publications the investigative work of nonprofits.").

The District Court correctly concluded that none of COA's asserted dissemination methods distributed the information to a significantly broad audience. A.404-06. For example, COA claimed that it could distribute the requested information through its newsletter, website, social media sites (like Facebook and Twitter) and media contacts. However, those claims simply ignore its operational capabilities at the time of its FOIA requests. The administrative record shows that, at the time of its FOIA requests, COA was a newly formed organization that provided only vague, conclusory allegations about its future intent or ability to distribute the requested information, and often simply parroted

the statutory standard. *E.g.*, A.026; A.035. Indeed, COA concedes that it only "began operating on August 15, 2011, merely two weeks before it sent its first FOIA request to FTC on August 30, 2011," COA Brief at 27, and that its "publishing practices and methods of dissemination were nascent and developing." COA Brief at 45.

As the District Court correctly found, COA's newsletter "did not even exist until *after* it made its first FOIA request, and had only been published for a month when it filed its second request." A.404 (emphasis added). At no time did COA provide the FTC evidence of the newsletter's existence, the number of subscribers to the newsletter, or the frequency of its publication, and such information could not be discerned from its website. A.162. Further, while COA repeatedly relies upon its website for its dissemination capabilities, *e.g.*, A.048, the administrative record shows that COA's website was not even functioning during at least a portion of its first and second requests. A.035 at 1 n.2. The FTC recognized the inadequate dissemination capabilities of the website.[8]

[8] For example, COA cites to its January 27, 2012 appeal letter as an example of its website's dissemination abilities. COA Brief at 32 (citing A.167). However, while the letter claimed that the website "also includes links to thousands of pages of documents" COA had obtained through previous FOIA requests, the FTC found that COA had in fact linked any documents responsive to its previous FOIA requests on its website and that its website did not evince an independent basis to show COA's ability to distribute its work. A.162.

COA also claimed to have disseminated information through its social media sites such as Facebook and Twitter, *e.g.*, A.048, but it never provided information

characterize itself as a news media representative or even mention any journalistic activities in which it engaged. While COA subsequently described itself as a "representative of the news media" (after having its public interest fee waiver request denied), *e.g.*, A.026, such self-interested designations fall far short of satisfying the statutory criteria.

D. Purported Representatives of "Alternative" News Media Must Still Meet the Established Standards.

Contrary to COA and *amici*'s contention, the District Court demonstrated no lack of understanding of FOIA's application to "alternative media." Rather, it simply recognized that this Court's well-established standards regarding FOIA fee category determinations still apply in the context of "alternative media," and that COA failed to satisfy these standards. The Commission agrees with COA, COA Brief at 20, that Congress intended the term "representative of the news media" to evolve as new technologies develop to disseminate information to the public.[9] However, the statutory structure, history, and policy show that such media must still satisfy the statutory requirements to be deemed a "representative of the news media" – not that any entity that considers itself "alternative media" automatically qualifies.

[9] As recently amended, the FTC's FOIA fee and fee waiver regulations expressly recognize this. *See* Freedom of Information Act; Miscellaneous Rules, 79 Fed. Reg. 15,680-01 (Mar. 21, 2014) (to be codified at 16 C.F.R. pt. 4) (implementing 2007 FOIA amendments) (SA-015).

COA and *amici* argue that the FTC's regulation at the time of its FOIA requests was *ultra vires* because it did not include the statutory language that "alternative media shall be considered to be news-media entities." COA Brief at 17, 39 n.11; DCNF Brief at 28. This argument fails for two reasons. First, COA neither raised this argument below nor argued extraordinary circumstances in presenting it here in the first instance, and therefore this Court should refuse to hear it on appeal. *See, e.g., Hormel v. Helverling*, 312 U.S. 552, 556 (1941); *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n. 5 (D.C. Cir. 1992). Second, COA makes no showing that the lack of such express language in the regulations had any effect whatsoever on the Commission's fee waiver or fee reduction determinations – much less on the ruling of the District Court – which, as shown in text, comported entirely with the amended statute, and the governing standards in this Circuit.

COA and Reporters Committee argue that the District Court applied an outdated test that is contrary to the broadened news media fee reduction provision in the 2007 amendments to FOIA, particularly as applied to requesters who use internet-based media to disseminate information, and in support cite to various statements in the legislative history made by Sen. Leahy. COA Brief at 22-23;

RC Brief at 13.[10] That history confirms, however, that Congress intended the definition of "representative of the news media" in the OPEN Government Act to incorporate the existing judicially crafted standards for news media requesters. For example, congressional statements make clear that the 2007 amendments incorporated this Circuit's standard articulated in *National Security Archive*. *See* 153 Cong. Rec. S10,988 (daily ed. Aug. 3, 2007) (statement of Sen. Kyl. bill's co-sponsor, that "given that this construction of the term news media as used in FOIA has been in effect for 17 years, I do not think anyone can reasonably fear that codifying it will turn the world upside down."). Congress simply included "alternative media" in this definition to ensure that federal agencies would not "automatically exclude" internet-based forms of media that otherwise qualify when deciding whether to waive FOIA fees. *Id.* at S10,987 (statement of Sen. Leahy).

Indeed, Congress recognized the importance of "preserv[ing] commonsense limits on who can claim to be a journalist." *Id.* at S10,988 (statement of Sen. Kyl). As Senator Kyl explained, "[s]earch fees are one of the principle tools that agencies use to encourage requesters to clarify and sharpen their requests." *Id.* But "in the age of the internet, anyone can plausibly state that he 'intends' to

[10] COA and *amici* also assert that swift advances in technology, permitting nonprofits to disseminate effectively information to the public through the internet, warrant a presumption in favor of granting fee waivers or reductions to nonprofits. *See* COA Brief at 37 n. 21; DCNF Brief at 8, 17, 19. However, FOIA provides no such presumption.

distribution ability, as reflected in the administrative record, was a far cry from the sorts of documented showing of such capability that FOIA requires.

III. The District Court Correctly Held that COA did not Qualify for a Public Interest Fee Waiver for Requests One and Two.

A. A FOIA Requester Bears the Burden of Establishing That Its Request Will Further the Public Interest.

FOIA fees may be waived or reduced "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). This requirement consists of a public interest prong and a commercial interest prong. To satisfy the public interest prong, a requester must show that: (1) the information it seeks concerns the operations or activities of the government; (2) the disclosure is likely to contribute to an understanding of the operations or activities of the government; (3) the disclosure will contribute to an understanding of the subject by the public at large; and (4) the information will contribute significantly to such understanding. 16 C.F.R. § 4.8(e)(2); *see also Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (citing analogous DOJ public

interest fee waiver rule); *Rossotti*, 326 F.3d at 1312 (citing analogous IRS public interest fee waiver rule).

Amicus Daily Caller argues that the District Court improperly placed the burden of proof on COA. DCNF Brief at 2, 9-12. But COA concedes in this appeal, COA Brief at 15, and conceded below, A.286, *it* bears the burden of showing that it is entitled to a fee waiver. Moreover, the case law is clear that the burden of proof to satisfy the public interest fee waiver standard rests on the requester. *See, e.g.*, *Larson v. Cent. Intelligence Agency*, 843 F.2d 1481, 1483 (D.C. Cir. 1988); *Nat'l Treasury Emp. Union v. Griffin*, 811 F.2d 644, 647 (D.C. Cir. 1987); *Judicial Watch*, 365 F.3d at 1126. Daily Caller relies, DCNF Brief at 11, on the Ninth Circuit's decision in *Friends of the Coast Fork v. U.S. Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997), which held that "requesters bear the initial burden of satisfying the statutory and regulatory standards for a fee waiver," and then made the unremarkable conclusion that, if the requester makes that showing and the reasons the agency provided in the administrative record are inadequate, then a fee waiver is appropriate. As explained herein, COA failed to meet its burden for either its first or second FOIA requests, and the FTC fully explained its reasons for denial in the record.

The requester must also show that the information is not primarily in its commercial interest, which is shown by: (1) whether the requester has a

not presumptively qualify for a public interest fee waiver and "must still satisfy the statutory standard to obtain a fee waiver." *Forest Guardians v. Dep't of Interior*, 416 F.3d 1173, 1177-78 (10th Cir. 2005); *accord McClellan Ecol.*, 835 F.2d at 1284 (rejecting such a presumption, because the "[l]egislative history . . . makes plain that public interest groups must satisfy the statutory test . . ."); *McClain v. Dep't of Justice*, 13 F.3d 220, 221 (7th Cir.1993) ("Nonprofit status does not yield free access to facts").[13] While developments such as the internet and social media have doubtless enabled more entities to communicate with broader audiences, the

"likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); 16 C.F.R. § 4.8(e)(2). Instead, at each turn, COA provided either no explanation at all or repeated conclusory arguments in support of its fee waiver requests. Accordingly, the FTC appropriately determined that COA had failed to show any ability to disseminate the information to the public, whether through its website or its claimed media contacts. *See* A.035-36; A.040; A.224-25 ¶ 11. For example, COA failed to show that any of its media contacts would in fact disseminate – or even had any interest in – information about the FTC's Endorsement Guides or its fee waiver determination process.

Reviewing the Commission's determination *de novo*,[15] the District Court explained that COA failed, for its first request, the "third element of the public interest test because it has not demonstrated that the requested information would increase understanding of the *public at large*." A.389-90. Dispositively, COA

[15] *Amicus* Reporters Committee claims that the District Court erred by relying on the FTC's regulations regarding the public interest fee waiver and thus did not engage in a *de novo* review of the administrative record. RC Brief at 17-18. The District Court properly cited to the FTC's regulations as FOIA authorizes agencies to promulgate FOIA fee waiver and reduction regulations, 5 U.S.C. § 552(a)(4)(A)(i), and there is nothing in FOIA that required the agency to ignore its regulations in order to review the factual record before it. In any event, the District Court engaged in the required *de novo* review of the record, *see* A.384, applying the statutory criteria and governing judicial precedent in doing so. A.383.

failed to provide sufficient, "concrete" details establishing that it had the ability to convey the information to a reasonably broad segment of the public. *Id.* For similar reasons, the District Court found that COA failed the public interest test for its second request. A.393-94.

More specifically, the court noted that "[t]hroughout its voluminous correspondence with the FTC regarding its first FOIA request, it identified only two methods of dissemination, which it discussed only in footnotes: its website and articles published by news media that have relied upon COA's past work on other issues." A.390 (citing A.029-31; A.152-60). The court properly recognized, moreover, that COA failed to

> provide any estimate of the number of people likely to view its website, nor did it demonstrate other ways in which it would

did not to support its dissemination ability. A.394; A.162.[18] The District Court correctly concluded that COA failed to meet its burden of showing its intent and ability to disseminate the information to the public. A.394; *see also Rossotti*, 326 F.3d at 1314; *Brown v. U.S. Patent & Trademark Office*, 226 F. App'x. at 868-69 (determining that requester'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").[19]

C. COA's Request for a Public Interest Fee Waiver for its Second Request Fails for the Additional Reasons that It Would Not Significantly Contribute to Public Understanding and was in COA's Commercial Interests.

The District Court also found that COA failed to satisfy its burden for a public interest fee waiver for its second request for the additional reason that it failed the fourth element of the public interest prong because it did not show the requested information would *significantly* contribute to public understanding.

---

[18] COA's challenge to what it characterizes as the District Court's "dismissive conclusion" that COA's website was insufficient because it was a "passive repository," COA Brief at 55, falters not only because the District Court never made that characterization, but because COA never provided any details about the public reach or viewers to its website notwithstanding multiple opportunities to do so.

[19] COA's reliance on its April 4, 2012, appeal letter, A.176-84, claiming additional methods of dissemination, COA Brief at 54, not only is similarly conclusory but refers solely to COA's *third* FOIA request, not its first or second. As discussed above, even if COA's newsletters or social media sites are considered, COA failed to provide any details or support about the newsletters or the intended audience of any of these dissemination methods.

A.394-95. COA has not presented any argument to this Court against that conclusion. *See* COA Brief at 52-55 (addressing only the third element of the public interest fee waiver test).

Even if there were some public benefit to the request, it is clear that the primary beneficiary of the requested information was COA, not the public. *See* A.394-95 (citing *Nat'l Treasury Emp. Union*, 811 F.2d at 647-49). As the District Court concluded, COA expressly conditioned its second FOIA request on the denial of its first request, and used information obtained through the second request (*i.e.*, information about other FOIA requests in which the FTC had granted fee waivers under the public interest exception) "to better prepare itself for an appeal of its fee waiver denial of its first request." A.396. The District Court also noted that COA "never expressly indicated in this second request that it had plans to use the information to inform the public about the FTC's history of granting fee waivers," as compared to its first request in which it did express such an intent to inform the public. A.396 (citing A.029-31).

These same considerations also support a further basis for the Commission's denial of a public interest fee waiver for COA's second FOIA request – setting aside whether COA satisfied the four-part public interest prong of the fee waiver analysis, COA is disqualified from such a waiver because it made its second request primarily to further its own private commercial interest. 5 U.S.C. §

552(a)(4)(iii); 16 C.F.R. § 4.8(e)(2)(ii). As the Commission recognized in its denial letter (and argued below), the information sought in that request was plainly geared to furthering COA's efforts to secure a fee waiver for its first request, either through further administrative appeal, or in a court action. A.162-63 (citing *Research Air, Inc. v. Kempthorne*, 589 F. Supp. 2d 1, 10 (D.D.C. 2009)); A.200, A.357-58.[20] Although the District Court did not rule on this issue, it did state that "it would likely find COA's second request fails [the commercial interest prong] as well, because of its nexus with the lawsuit plaintiff filed against the agency." A.396 n.4 (citing *Rozet v Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 55, 57 (D.D.C. 1999)). This ground is fully supported in the record below, and is an alternative basis for affirmance on this point. *See, e.g., Amobi v. D.C. Dep't of Corrections,* __ F.3d__, 2014 WL 2895933, at *9 (D.C. Cir. June 27, 2014).

IV. The District Court Correctly Held that COA's Fee Waiver Request in Connection with its Third FOIA Request was Moot Because the FTC Located Fewer than 100 Pages of Responsive Records, and Released These Records to COA Free of Charge.

COA also asserts, without basis, that the District Court erred in concluding that the fee issues were moot for COA's third FOIA request. COA Brief at 43-51.

---

[20] As courts have routinely held, FOIA should not be used as a substitute for discovery in a requester's private litigation or administrative claims against the

Yet the District Court correctly found that there were no charges for COA's third request because the FTC located only 95 pages of responsive documents, of which sixteen were exempt and 79 were produced without charge. Because COA was entitled to 100 free pages under the FTC's rules as an "Other (General Public) requester," 16 C.F.R. § 4.8(b)(3), there were no charges assessed for these pages, so any fee waiver request was moot. A.397-400.

COA's arguments against mootness fail. It asserts that the FTC wrongly declined to reconsider its renewed request for records relating to the Guides (the first item in Request Three, A.159) on the grounds that it was duplicative of COA's first FOIA request, because (COA argues) its later request added the term "bloggers" to the original request for "social media authors." COA Brief at 44. As a result, COA argues, the FTC failed to review additional documents that would have increased the number of responsive documents to more than 100 to trigger the fee waiver analysis. *Id*.

This new argument lacks merit. Although COA now seeks to draw a categorical distinction between a request for records concerning "bloggers" and records concerning "social media authors," the FTC did not draw such a fine distinction in searching for records responsive to COA's first request. On the contrary, it conducted a search for all documents responsive to the request regarding its Endorsement Guides, regardless of whom the Guides affected. *See*

A.242 ¶¶ 9-10; A.229-30 ¶¶ 21-22.[21] Correspondence between COA and the FTC confirmed that COA's narrowed first request included information about the Enforcement Guides as applied to bloggers.

For these reasons, the District Court correctly found that COA's fee waiver request for its third request was moot because fewer than 100 pages were produced from the non-duplicative portion of the request. A.400.

CONCLUSION

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION