

# Federal Court Finds For-Profit Safety Blog Qualifies As “News Media” Under FOIA

By Cindy Gierhart

The U.S. District Court for the District of Columbia ruled last month that a blogger for a for-profit consumer safety company qualified for a Freedom of Information Act (FOIA) fee waiver as a “representative of the news media.” [\*Liberman v. U.S. Dep’t Transp.\*](#), No. 15-CV-1178 (D.D.C. Dec. 31, 2016).

## Background

Ellen Liberman writes for *The Safety Record*, a blog formed in 2004 that focuses on consumer safety news, regulatory affairs, and litigation. It is wholly owned and operated by Safety Research & Strategies (SRS), a company that conducts research and analysis on consumer issues for paying clients. The blog is not separately incorporated from SRS, and they do not have separate employees.

Under the federal FOIA, “when records are not sought for commercial use” and the requester is “a representative of the news media,” the requester may qualify for a fee waiver and pay only for document duplication costs and not the cost of searching and producing documents.

Liberman submitted a FOIA request for documents relating to testing of “smart key” technology by the National Highway Traffic Safety Administration (NHTSA). She requested a fee waiver and stated that the request was being made “solely for the purpose of publication and dissemination of the requested information via *The Safety Record*.” When the blog’s parent company, SRS, submits FOIA requests for its own research purposes, it does not request a fee waiver.

NHTSA denied Liberman’s fee-waiver request on the grounds that *The Safety Record* is “an arm of” SRS, and that together the entities “perform activities as a commercial research and advocacy organization, not as ... representative[s] of the news media.” Liberman appealed to NHTSA’s chief counsel, who upheld the denial, finding that *The Safety Record* was not a “representative of the news media” and that Liberman was seeking records for a commercial use. Following an opinion from the U.S. Court of Appeals for the D.C. Circuit (*Cause of Action v. FTC*, 799 F.3d 1108 (D.C. Cir. 2015)), NHTSA’s chief counsel revisited its opinion



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and again denied the fee waiver, this time resting solely on the grounds that Liberman sought to use the records for commercial use.

### District Court Decision

The District Court reversed, finding that Liberman was a representative of the news media and that she was not seeking records for commercial use. The Court emphasized that these two inquiries are separate, and that the same entity may qualify for a fee waiver in one request but not the next, depending on the purpose of each request. A newspaper, for example, will be entitled to a fee waiver when it requests records to further its reporting function but not when it seeks records for its internal corporate needs.

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.”

The Court dismissed the agency’s contention that *The Safety Record* is merely a marketing tool of SRS and “easily conclude[d]” that Liberman “clearly” is a representative of the news media. The statute plainly defines news as any “information that is about current events or that would be of current interest to the public,” regardless of whether it is “expressed in a commercial context,” the Court said.

The Court next found that her request was not aimed at a commercial purpose. The Court wrote, “news-dissemination activity is not a ‘commercial use,’ even when undertaken by a commercial entity.” The records requested were clearly meant for public dissemination via *The Safety Record*; therefore, the purpose of the request was not for commercial use.

The Court found that the inquiry rests in *how* the requested records will be used, and “the mere fact that such an entity may have a commercial interest in the information that it seeks does not automatically turn its request into one for commercial use.”

Finally, the Court rejected the agency’s assertion that Liberman must provide “more than conclusory allegations about the anticipated use for the requested information.” The Court held that her “plain statement of fact” that the request was being made “solely for the purpose of publication and dissemination of the requested information via *The Safety Record*” was sufficient to prove her purpose.

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