

January 4, 2013

VIA FAX (202) 326-2477

Freedom of Information Act Request
Office of General Counsel
Federal Trade Commission
600 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Re: Freedom of Information Act Request and Request for News Media Status

Dear FOIA Officer:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Federal Trade Commission (“FTC”).

As detailed below, EPIC seeks agency records concerning the FTC’s antitrust investigation into Google.

Factual Background

The Electronic Privacy Information Center (“EPIC”) is a public interest research center located in Washington, D.C. EPIC focuses on emerging privacy and civil liberties issues and is a leading consumer advocate before the FTC. EPIC has a particular interest in protecting consumer privacy, and has played a leading role in developing the authority of the FTC to address emerging privacy issues and to safeguard the privacy rights of consumers.¹

On June 23, 2011, the New York Times reported that the FTC had opened a civil antitrust investigation into whether Google engaged in anticompetitive behavior through its search and advertising businesses.² One day later, Google confirmed the existence of the investigation, writing in a regulatory filing that it had “received a subpoena and a notice of civil investigative

¹ See, e.g., Letter from EPIC Executive Director Marc Rotenberg to FTC Commissioner Christine Varney, EPIC (Dec. 14, 1995) (urging the FTC to investigate the misuse of personal information by the direct marketing industry), http://epic.org/privacy/intemet/ftc/ftc_letter.html; *DoubleClick, Inc.*, FTC File No. 071-0170 (2000) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/intemet/ftc/DCLK_complaint.pdf; *Microsoft Corporation*, FTC File No. 012 3240 (2002) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/consumer/MS_complaint.pdf; *Choicepoint, Inc.*, FTC File No. 052-3069 (2004) (Request for Investigation and for Other Relief), <http://epic.org/privacy/choicepoint/feraltr12.16.04.html>.

² Edward Wyatt & Miguel Helft, *F.T.C. Is Said Near a Move on Google*, N.Y. Times (Jun. 23, 2011), <https://www.nytimes.com/2011/06/24/technology/24ftc.html>.

demand from the U.S. Federal Trade Commission relating to a review by the FTC of Google's business practices, including search and advertising."³

On January 3, 2013, the Commission announced that it had concluded its investigation into Google's alleged anticompetitive conduct. The Commission reached a settlement with Google that would give competitors access to patents necessary to make smart phones, laptops, and other devices, and Google voluntarily agreed to stop borrowing others' content for use in its own services.⁴ However, with respect to allegations that Google used its search algorithms to eliminate competitive threats, the Commission concluded that there was insufficient evidence that Google used its search algorithms to harm competition rather than to improve its services.⁵

As the investigation developed, Google devoted substantial resources to lobbying Congress, the White House, and the relevant administrative agencies, hiring 12 lobbying firms and spending more than \$25 million.⁶ This lobbying gave rise to concerns that Google was improperly influencing the Commission's investigation. Some reports indicated that the White House was attempting to influence the outcome of the investigation so that it was more favorable to Google.⁷ In the wake of the investigation, some wondered what had happened to the 100-page memo that the Commission's staff had prepared advocating action against Google for manipulating its search results.⁸ Even Commissioner Rosch cited similar concerns in a concurring and dissenting statement, writing that "our 'settlement' with Google creates very bad precedent and may lead to the impression that well-heeled firms such as Google will receive special treatment at the Commission."⁹

Documents Requested

EPIC requests copies of the following agency records in possession of the FTC:

1. All communications including but not limited to e-mail, letters, analyses, talking points, and memos, between the White House and the FTC regarding the Commission's antitrust inquiry into Google.

³ Google, Inc., Current Report (Form 8-K) (Jun. 23, 2011), <https://www.sec.gov/Archives/edgar/data/1288776/000119312511172902/d8k.htm>.

⁴ Press Release, Federal Trade Commission, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2012), <http://ftc.gov/opa/2013/01/google.shtm>.

⁵ *Id.*

⁶ Tony Romm, *How Google Beat the Feds*, POLITICO (Jan. 3, 2013 5:20 PM EST), <http://www.politico.com/story/2013/01/how-google-beat-the-feds-85743.html>.

⁷ Paul Bedard, *Treasury Secretary Google?* THE EXAMINER (Dec. 4, 2012), <http://washingtonexaminer.com/treasury-secretary-google/article/2515054#.UMdZ8Xf4KSp>.

⁸ Frank Pasquale & Siva Vaidhyanathan, *Borking Antitrust: Google Secures Its Monopoly*, DISSENT (Jan. 4, 2013), <http://www.dissentmagazine.org/blog/borking-antitrust-google-secures-its-monopoly> ("The *New York Times* reported in October that the FTC staff had prepared a secret 100-page report advocating legal action against Google for manipulating search results to favor its own interests. Has the staff changed its mind completely in less than ninety days? Or have they been summarily overruled by political appointees?").

⁹ In the Matter of Google Inc., FTC File No. 111-0163 (2013) (Concurring and Dissenting Statement of Commissioner J. Thomas Rosch Regarding Google's Search Practices), *available at* <http://ftc.gov/os/2013/01/130103googlesearchroschstmt.pdf>.

Request for Expedited Processing and “News Media” Fee Status

This request warrants expedited processing because it is made by “a person primarily engaged in disseminating information . . .” and it pertains to a matter about which there is an “urgency to inform the public about an actual or alleged federal government activity.”¹⁰

EPIC is “primarily engaged in disseminating information.”¹¹

There is a particular urgency for the public to obtain information about the Commission’s investigation into Google’s search and advertising business. The closing of the Commission’s investigation has been followed intensely by the media, consumer organizations,¹² and rival technology companies.¹³ Given the interest generated by this case, the information sought by this FOIA request should be made available to the public as quickly as possible.

EPIC is a “representative of the news media” for fee waiver purposes.¹⁴ Based on our status as a “news media” requester, we are entitled to receive the requested record with only duplication fees assessed. Further, because disclosure of this information will “contribute significantly to public understanding of the operations or activities of the government,” any duplication fees should be waived.

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(A)(i) I will anticipate your determination on our request for expedited processing within twenty (20) business days.

Respectfully Submitted,

Ginger McCall,
EPIC Open Government Program Director
David Jacobs,
EPIC Consumer Protection Counsel
Electronic Privacy Information Center
1718 Connecticut Ave. NW Suite 200
Washington, DC 20009
202-483-1140 (tel)
202-483-1248 (fax)

¹⁰ 5 U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

¹¹ *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

¹² Press Release, Consumer Watchdog, FTC’s Settlement With Google Fails To End Key Abuse, Consumer Watchdog Says (Jan. 3, 2013), <http://www.consumerwatchdog.org/newsrelease/ftc%E2%80%99s-settlement-google-fails-end-key-abuse-consumer-watchdog-says>.

¹³ Press Release, FairSearch, FairSearch: FTC Settlement Not the Last Word, Premature (Jan. 3, 2013), <http://www.fairsearch.org/general/fairsearch-ftc-settlement-not-the-last-word-premature/>.

¹⁴ *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).