



June 20, 2014

VIA CERTIFIED MAIL

Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Freedom of Information Act Request

To the Office of the General Counsel:

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”).

EPIC seeks records and communications in the possession of the agency related to Facebook’s June 12, 2014 announcement that it would use Internet browsing history for advertising purposes.

Background

On June 12, 2014, Facebook announced that it would collect the internet browsing history of users and provide that data to advertisers.¹ The change represents a dramatic departure in the current data collection practices of the company. The change would allow Facebook to install cookies and pixel tags that track users’ browsing history on and off Facebook.² Facebook plans to collect data about the websites users visit and the mobile apps users download.³ Users who object to having their browsing history tracked have been told to opt out of the practice.⁴ The opt-out procedure requires users to go to a separate website and download an opt-out cookie.⁵ The opt-out technique is widely viewed as ineffective.⁶

¹ Facebook, *Making Ads Better and Giving People More Control Over the Ads They See*, Jun. 12, 2014, <http://newsroom.fb.com/news/2014/06/making-ads-better-and-giving-people-more-control-over-the-ads-they-see>.

² Facebook, *About Facebook Ads*, Jun. 12, 2014, <https://www.facebook.com/help/769828729705201>.

³ *Supra* note 1.

⁴ Digital Advertising Alliance, *Opt-Out BETA*, <http://www.aboutads.info/choices/>

⁵ *Id.*

⁶ Jeff Sobern, *Opting in, Opting Out, or No Options at All: The Fight For Control of Personal Information*, 74

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Facebook, which is subject to a Consent Order, told numerous media outlets the company consulted with the Federal Trade Commission before making the changes in its business practices.⁷ According to the *Wall Street Journal*, a Facebook spokesperson said, “We routinely discuss product and policy updates with our regulators – the FTC and the Irish DPC – and this time is no different.”⁸ The *New York Times* noted that “the F.T.C., which was briefed on the company’s plans, declined to comment.”⁹ The *Washington Post* reported that “FTC spokesman Jay Mayfield said: ‘Commission investigations and deliberations are non-public; therefore we cannot comment on any particular case.’”¹⁰ *Big News Network* reported, “The FTC was informed of Facebook’s new initiative but had no immediate comment.”¹¹ The *New York Post* reported, “An FTC spokesman declined to comment on the announcement except to say that ‘the FTC rigorously enforces its orders.’”¹²

Facebook is currently under a consent order from the FTC that prohibits the company from changing its business practices without users’ express consent. In 2009 and 2010, EPIC and other consumer privacy organizations filed complaints with the FTC. The complaints detailed how Facebook’s unannounced changes to its privacy policies “violate[d] user expectations, diminish[ed] user privacy, and contradict[ed] Facebook’s own representations.”¹³ As a result of the 2009 and 2010 complaints, the FTC launched an investigation into the impact of Facebook’s privacy policy changes on users.¹⁴

On July 27, 2012, the agency arrived at a settlement with Facebook that resulted in a consent order. The consent order prohibited further changes to Facebook’s privacy settings.¹⁵ In

WASH. L. REV. 1033, 1099-1100 (1999); Mark E. Budnitz, *Privacy Protection for Consumer Transactions in Electronic Commerce: Why Self-Regulation is Inadequate*, 49 S.C. L. REV. 847 (1998); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1414 (May 2000).

⁷ Reed Albergotti, *Facebook to Target Ads Based on Web Browsing*, WALL STREET J., Jun. 12, 2014, <http://online.wsj.com/articles/facebook-to-give-advertisers-data-about-users-web-browsing-1402561120>.

⁸ *Id.*

⁹ Vindu Goel, *Facebook to Let Users Alter Their Ad Profiles*, NY TIMES, Jun. 12, 2014, <http://www.nytimes.com/2014/06/13/technology/facebook-to-let-users-alter-their-ad-profiles.html>

¹⁰ Hayley Tsukayama, *Facebook draws fire from privacy advocates over ad changes*, WASH. POST, Jun. 12, 2014, <http://www.washingtonpost.com/blogs/the-switch/wp/2014/06/12/privacy-experts-say-facebook-changes-open-up-unprecedented-data-collection>.

¹¹ BIG NEWS NETWORK, *Facebook to share browsing history with advertisers, let users alter ad profiles*, Jun. 12, 2014, <http://www.bignewsnetwork.com/index.php/sid/222849713>.

¹² Kaja Whitehouse, *Facebook to track users’ browser history for ads*, NY POST, Jun. 12, 2014, nypost.com/2014/06/12/facebook-to-track-users-browser-history-for-ads.

¹³ In the Matter of Facebook, Inc., (2009) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/infacebook/EPIC-FacebookComplaint.pdf> [hereinafter EPIC 2009 Facebook Complaint]; In the Matter of Facebook, Inc., (2010) (EPIC Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief), https://epic.org/privacy/infacebook/EPIC_Facebook_Supp.pdf.

¹⁴ Press Release, FED. TRADE COMM’N, *FTC Approves Final Settlement With Facebook* (Aug. 10, 2012), <http://www.ftc.gov/news-events/press-releases/2012/08/ftc-approves-final-settlement-facebook>.

¹⁵ Press Release, FED. TRADE COMM’N, *Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises* (Nov. 29, 2011), <http://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep>.

issuing the order, the FTC found that Facebook “deceived consumers by telling them they could keep their information on Facebook private, and then repeatedly allowing it to be shared and made public.”¹⁶ The consent order requires Facebook “to take several steps to make sure it lives up to its promises in the future, including by giving consumers clear and prominent notice and obtaining their express consent before sharing their information beyond their privacy settings, by maintaining a comprehensive privacy program to protect consumers’ information, and by obtaining biennial privacy audits from an independent third party.”¹⁷

The statements from Facebook indicate that there were specific communications between the company and the Commission regarding this specific change in business practice. There may also be internal memoranda, email, and meeting notes that express the Commission’s view as to whether the change was permissible under the Consent Order.

If the FTC has undertaken any review of these recent change, that assessment should be available for public review. If the FTC has not approved the changes to changes to Facebook’s data collection practices, Facebook may be in violation of its consent order with the FTC.

Documents Requested

EPIC therefore requests copies of the following agency records:

- 1) All legal analyses, memos, opinions, or documents that analyze Facebook’s proposed changes to its data collection practices announced on June 12, 2014;
- 2) All communications between the FTC and Facebook regarding the proposed changes to Facebook’s data collection practices announced on June 12, 2014.

Request for Expedited Processing

Expedited processing is justified because the request: 1) is made by an organization “primarily engaged in disseminating information”; and 2) covers information about which there is an “urgency to inform the public about an actual or alleged federal government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II); *Al-Fayed v. CIA*, 254 F.3d 306 (D.C. Cir. 2001).

EPIC is an organization “primarily engaged in disseminating information.” *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.C. Cir. 2004).

There is an “urgency to inform the public” about the FTC’s review of Facebook’s proposed changes to its data collection practices, which is an “alleged government activity” that affects the internet activity of millions of American users. The FTC is responsible for enforcing the terms of its consent orders, and the Facebook consent order specifically requires the express consent of Facebook users. In order to meaningfully comment on the efficacy of the FTC’s post-order review process and to give or refuse express consent to Facebook’s proposed changes, the public must have access to the rationale underlying the FTC’s apparent approval.

¹⁶ *Id.*

¹⁷ *Supra* note 13.


Request for News Media Fee Status

EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. EPIC is a representative of the news media. *EPIC v. Dep't of Defense*, 241 F.Supp. 2d 5 (D.D.C. 2003).

Based on our status as a news media requester, we are entitled to receive the requested records 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," as described above, any duplication fees should be waived.

Thank you for your consideration of our request. As provided in 16 C.F.R. § 4.11(a)(1)(i)(E), I will anticipate your determination on our request for expedited processing within 10 business days. For questions regarding this request, I can be contacted at 202-483-1140, x 120, or FOIA@epic.org.

Sincerely,



Julia Horwitz
EPIC Consumer Protection Counsel



Ginger P. McCall
EPIC Open Government Project Director