

February 11, 2011

**Freedom of Information Act Appeal**

Office of General Counsel  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
Fax (202) 326-2477

**Re: FOIA-2011-00140  
Records Concerning Google Street View & Communications**

To FOIA Officer:

This letter constitutes an appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and is submitted to the Federal Trade Commission (FTC) on behalf of the Electronic Privacy Information Center (“EPIC”). As detailed below, EPIC appeals the FTC's withholding and redaction of agency records in response to EPIC's November 3, 2010 FOIA request.

On November 3, 2010, EPIC requested from the FTC the following agency records:

1. All records concerning the FTC's inquiry into Google Street View.
2. All records concerning communications between the FTC Chairman and any former Google employees now working in the White House (including, but not limited to, Andrew McLaughlin), regarding the FTC's investigation of Google Cloud Computing services, Google Buzz, or Google Street View.

See Appendix 1.

*Procedural Background*

On November 9, 2010, the FTC wrote to EPIC acknowledging receipt of EPIC's FOIA request, and granting EPIC's request for expedited processing of this matter and a fee waiver for any charges incurred. EPIC received this letter on November 15, 2010. The FTC did not make any substantive determination regarding EPIC's request. See Appendix 2.

On December 7, 2010, EPIC appealed the FTC's failure to make a timely determination concerning EPIC's November 3, 2010 FOIA request. See Appendix 3.

On December 28 2010, the FTC sent a letter to EPIC saying that the agency would not produce the requested documents by the statutory deadline. *See* Appendix 4.

On January 13, 2011, the FTC sent EPIC a partial response to EPIC's request, indicating that the FTC located 260 pages of responsive records, of which 80 were duplicates. The letter also stated that seventy-seven pages, and portions of other pages, were withheld due to claimed exemptions to the FOIA's disclosure requirements. These exemptions claimed included 5 U.S.C. § 552(b)(3); 5 U.S.C. § 552(b)(5); and 5 U.S.C. § 552(b)(7)(A). *See* Appendix 5.

*EPIC Appeals the FTC's Assertion of Exemption b(5) to Withhold Hill Documents Shared with Congress*

In the FTC's response to EPIC's FOIA request, EPIC received several communications from the agency regarding FTC briefings of Congressional members and staff about Google WiFi. In a series of e-mails dated from June 10, 2010 to June 11, 2010, a Hill briefing is mentioned including location information and travel logistics. Appendix 6 at 9-10. In another series of emails dated from October 29, 2010 to November 1, 2010, two other Hill briefings are mentioned several times. *Id.* at 14, 18, 21. In these emails, FTC staff refer to a briefing for the House Committee on Oversight and Government Reform on Google WiFi. *Id.* at 21. They discuss preparing for the briefing, and they also show an attachment titled, "Outline for Energy and Commerce Briefing." *Id.* at 18. According to Sarah Corrigan, a FOIA Officer at the FTC, Hill briefing documents were located and withheld under Exemption b(5).

However, Exemption b(5) is wholly inapplicable to these Hill briefing notes and outlines. Exemption b(5) applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."<sup>1</sup> The purpose of this exemption is to exempt from mandatory disclosure documents that would be privileged from discovery in litigation.<sup>2</sup>

Exemption 5 on its terms only applies to "inter-agency" or "intra-agency" documents.<sup>3</sup> When documents are prepared to aid in the deliberative process of *another* body, other than the agency that created them or another agency, then the Court will not apply Exemption 5.<sup>4</sup> The D.C. Circuit Court has determined that members of Congress are *not* within the FOIA's definition of "agency," so their deliberations are not protected under Exemption 5.<sup>5</sup> Outlines and other documents prepared by the FTC in order to brief

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<sup>1</sup> Freedom of Information Act, 5 U.S.C. § 552(b)(5) (LexisNexis 2009).

<sup>2</sup> H.R. Rep. No. 89-1497 (1966), S. Rep. No. 89-813 (1965), and S. Rep. No. 88-1219 6-7, 12-14 (1964); *cited in* Litigation Under the Federal Open Government Laws 2010, 144 (Harry A. Hammitt, Ginger McCall, Marc Rotenberg, John A. Verdi, and Mark S. Zaid, eds., 2010).

<sup>3</sup> Freedom of Information Act, 5 U.S.C. § 552(b)(5).

<sup>4</sup> *Dow Jones & Co. v. Dep't of Justice*, 724 F. Supp. 985 (D.D.C. 1989), *aff'd in part, rev'd in part*, 917 F.2d 571 (D.C. Cir. 1990) (finding Exemption 5 inapplicable to a letter sent from the Justice Department to the House Ethics Committee summarizing an investigation of a House member because the only deliberative process the letter relates to is of the House Committee).

<sup>5</sup> *Id.*

Congressional representatives and staff are clearly not "inter" or "intra" agency documents, as they are prepared for Congress' benefit. Therefore, any records responsive to EPIC's FOIA that were used in the briefings to Representatives and their staff may not be withheld under Exemption 5.

Even if Exemption b(5) were applied to documents prepared for Congress, the documents must qualify for one of a very small number of privileges. The Supreme Court has recognized five privileges under Exemption b(5); these protect work product, deliberative processes, attorney client communications, confidential commercial communications, and factual statements made to the government in the course of an air crash investigation.<sup>6</sup>

The work product privilege protects mental processes of an attorney that reveal the theory of his case or litigation strategy,<sup>7</sup> while the deliberative process privilege covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.<sup>8</sup>

The attorney-client privilege protects confidential communications, including facts (a) from a client to an attorney and (b) from an attorney to a client, if the communications are based on confidential information provided by the client.<sup>9</sup> Confidential commercial communications are defined as information generated by the government in the process leading up to awarding a contract.<sup>10</sup> Factual statements made to the government in the course of an air crash investigation is an exemption that was created to encourage witnesses and crash participants to speak freely about the facts of the incident.<sup>11</sup>

The FTC does not make clear which of the five privileges it is claiming under Exemption b(5). It is clear that the final two privileges do not apply to DOJ documents responsive to EPIC's FOIA Request. EPIC's request does not involve any information generated by the government during the process leading up to a contract or any information regarding a plane crash. *See* Appendix 1.

The FTC asserts that some documents were withheld under the attorney work-product privilege. *See* Appendix 5. In order for the attorney work-product privilege to apply, the documents in question must be created "because" of pending litigation.<sup>12</sup> However, the FTC gives no indication as to which documents are being withheld due to a claim of work-product privilege, and does not specify any pending litigation that would support the application of this privilege. *See Id.* While many of the communications in these documents were between attorneys, and attorneys contributed to the talking points

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<sup>6</sup> *Id.* at 150.

<sup>7</sup> *Federal Rules of Civil Procedure Rule 26(B)*.

<sup>8</sup> *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

<sup>9</sup> *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975).

<sup>10</sup> *Fed. Open Mkt. Comm. of the Fed. Reserve Sys v. Merrill*, 443 U.S. 340, 360 (1979).

<sup>11</sup> *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984).

<sup>12</sup> *Maine v Dep't of the Interior*, 280 F.3d 60 (1st Cir. 2002).

in question, the talking points were not prepared in anticipation of litigation, but rather in anticipation of a briefing for members of Congress. *See* Appendix 6.

The attorney-client privilege also does not apply because, in the FOIA context, the privilege protects an agency's communications with its attorneys, provided that their disclosure is limited to those who are "authorized to speak or act for the organization in relation to the subject matter of the communication."<sup>13</sup> The contents of the documents in question, notes and outlines for a Congressional briefing, were clearly communicated to people outside of the organization, namely, the Representatives or their staff who attended the briefing. Thus, the agency cannot meet its burden of proving that the information contained in the documents was confidential.

The relevant privilege is the deliberative process privilege, which covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.<sup>14</sup> It is well established that, to claim the deliberative process privilege, an agency must identify "the role of a contested document in a specific deliberative process . . . in order to show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA."<sup>15</sup>

To invoke the deliberative process privilege, an agency must show that an allegedly exempt document is both "pre-decisional" and "deliberative."<sup>16</sup> A deliberative document is one that:

[I]s a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. It must reflect the give-and-take of the consultative process. Merely factual material is not exempt; the document must bear on the formulation or exercise of agency policy-oriented judgment. Thus, deliberative documents are those reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.<sup>17</sup>

The FTC has not met its burden to show that the notes and outlines prepared for the Hill briefings are "deliberative" in nature. In fact it seems quite likely that these documents contain some factual material related to the FTC's "investigation" into Google's WiFi data collection. *See* Appendix 6 at 21.<sup>18</sup> Specifically, the FTC wrote to Google asking for answers to a list of factual questions, and these answers are the type of

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<sup>13</sup> *Coastal States Gas Corporation v. Dep't of Energy*, 617 F.2d 854, 863 (D.C Cir. 1980).

<sup>14</sup> *See Klamath*, 532 U.S. at 8.

<sup>15</sup> *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 259 (D.D.C. 2004).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> E-mail from Jessica Rich to Maneesha Mithal et al (October 29, 2010) (referring to briefing that will "showcase the thorough job we [FTC] do in our investigations" and "what we learned in our own investigation.").

material that may be included in these Hill briefing notes. *See, e.g.*, Appendix 6 at 2.<sup>19</sup> It is difficult to believe that the talking points and outline referenced in the e-mails did not contain "factual material."<sup>20</sup>

Aside from being deliberative, documents must also be pre-decisional – the Supreme Court has held that pre-decisional documents are protected, and post-decisional documents are not.<sup>21</sup> A “pre-decisional document is one that is antecedent to the adoption of agency policy.”<sup>22</sup> Beyond this, an agency must also either “pinpoint an agency decision or policy to which the document contributed,”<sup>23</sup> or identify a decision-making process to which a document contributed.<sup>24</sup> Merely entitling a document “draft” will not necessarily make it “pre-decisional.” In fact, Courts have taken the position that a document is pre-decisional only if a specific decision to which it relates can be identified.<sup>25</sup>

The FTC does not meet its burden to show that the notes and outlines prepared for the Hill briefings are "pre-decisional" in nature. The FTC has not shown that the withheld materials were related to a "specific" agency decision, or any agency decision at all for that matter. *See, e.g.* Appendix 6.<sup>26</sup> The FTC has provided no information about the content of these documents, and the burden is on the agency to do so.<sup>27</sup>

Even if the agency identifies a final decision the documents are related to, the agency must then prove that the facts and conclusions in the withheld documents were not later adopted as the "agency position" on the matter.<sup>28</sup> A pre-decisional document loses that status “if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.”<sup>29</sup> “To the extent the reasoning of the recommendations is expressly adopted, there is no longer any need to protect the consultative process.”<sup>30</sup> As the Supreme Court explained, "the reasoning becomes that of the agency and becomes *its* responsibility to defend," and "agency employees will generally be encouraged rather than discouraged by public knowledge

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<sup>19</sup> Letter from Kathryn Ratte, Senior Attorney, FTC, to Albert Gidari, Perkins and Cole, Attorneys for Google, July 12, 2010 ("How and When did Google begin collecting and storing data? . . . How and where was the payload data stored? . . . What has Google done with the payload data since its discovery?").

<sup>20</sup> *See Judicial Watch*, 297 F. Supp. 2d at 259.

<sup>21</sup> *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 150-151.

<sup>22</sup> *Judicial Watch*, 297 F. Supp. 2d at 259.

<sup>23</sup> *Senate of Puerto Rico v U.S. Dept. of Justice*, 823 F. 2d 574, 585 (D.C. Cir. 1987).

<sup>24</sup> *Judicial Watch*, 297 F. Supp. 2d at 259.

<sup>25</sup> *See, e.g., Senate of P.R.*, 823 F.2d at 585; *see also Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984) ("Accordingly, to approve exemption of a document as pre-decisional, a court must be able 'to pinpoint an agency decision or policy to which the document contributed'").

<sup>26</sup> *See also Judicial Watch*, 297 F. Supp. 2d at 259.

<sup>27</sup> 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action"); *see also EPIC v. Dept. of Homeland Security*, 384 F. Supp. 2d 100, 106 (D.D.C. 2005).

<sup>28</sup> *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

<sup>29</sup> *Id.*

<sup>30</sup> *Afshar v. Department of State*, 702 F.2d 1125, 1142 (D.C. Cir. 1983).

that their policy suggestions have been adopted by the agency."<sup>31</sup> The agency has provided no proof that, if the talking points and outlines prepared for the briefings were pre-decisional, that they were not later adopted as the "agency's position" on the Google WiFi investigation.

*EPIC also appeals the Agency's assertion of Exemption b(5) as a basis for withholding records (or portions of records) in addition to those discussed above*

EPIC appeals the FTC's assertion of FOIA Exemption b(5) to support the withholdings discussed above. Additionally, portions of 40 of the documents EPIC received are marked with Exemption b(5). *See, e.g.* Appendix 6 at 30-41. However the FTC has not provided any factual basis for withholding this information pursuant to Exemption b(5) and the factual basis is not obvious from the surrounding documents. *See* Appendix 5, 6. The burden is on the agency to provide proof that these portions of the communications are properly withheld under Exemption b(5).<sup>32</sup> EPIC therefore appeals the redactions and asks the FTC to disclose the content obscured by the redactions.

*EPIC appeals the FTC's assertion of Exemption b(7)(A) to redact portions of the requested communications*

Portions of 17 of the documents received are marked with Exemption b(7)(A). *See, e.g.*, Appendix 6 at 20-23. Exemption 7(a) under the FOIA applies to documents that are "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings."<sup>33</sup>

However the FTC has not provided any factual basis for withholding this information pursuant to Exemption b(7)(A). *See* Appendix 5. The burden is on the agency to provide proof that these portions of the documents were actually "compiled for law enforcement purposes" and would "interfere with enforcement proceedings" and the agency has provided no such proof.<sup>34</sup> EPIC therefore appeals the redactions and asks the FTC to disclose the content obscured by the redactions.

*EPIC appeals the FTC's withholding of seventy-seven agency records in full*

EPIC appeals the FTC's withholding of seventy-seven agency records in full. The agency failed to provide any factual basis to support the withholding. *See* Appendix 5. The agency failed to identify the seventy-seven records, and failed to perform a sufficient segregability analysis.

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<sup>31</sup> *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 161.

<sup>32</sup> 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action"); *see also* *EPIC v. Dept. of Homeland Security*, 384 F. Supp. 2d 100, 106 (D.D.C. 2005).

<sup>33</sup> Freedom of Information Act, 5 U.S.C. § 552(7)(A) (2000).

<sup>34</sup> *Id.*

### *Request for Expedited Processing*

This appeal 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."<sup>35</sup> EPIC is "primarily engaged in disseminating information."<sup>36</sup>

The FTC's failure to pursue meaningful investigations of Google's business practices impacts the privacy of millions of Internet users. Moreover, its failure to act on not only the well-founded complaints of EPIC but also the letters from Members of Congress raises the substantial concern that the Commission is now guided by political considerations and not its statutory obligations. These are matters that should be considered as soon as possible by the oversight committees of Congress. The agency previously recognized the time-sensitive nature of the records sought by EPIC, granting the request for expedited processing of EPIC's FOIA request on November 9, 2010. Appendix 2.

### *Conclusion*

As set forth above, EPIC appeals the FTC's withholding and redaction of agency records in response to EPIC's November 3, 2010 FOIA request. The agency has failed to provide a factual basis for its withholdings. Additionally, the asserted exemptions are inapplicable to the records withheld.

Thank you for your prompt response to this appeal. As the FOIA provides, I anticipate that you will produce responsive documents within 10 working days. If you have any questions, please feel free to contact me at (202) 483-1140 or [verdi@epic.org](mailto:verdi@epic.org)

Sincerely,

John Verdi  
Director  
EPIC Open Government Project

Sharon Goott Nissim  
EPIC Consumer Protection Fellow

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<sup>35</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

<sup>36</sup> *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).