



March 24, 2015

VIA FACSIMILE (202) 326-2477
 Freedom of Information Act Request
 Office of General Counsel
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Re: Freedom of Information Act Request and Expedited Processing

Dear FOIA Officer:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. 522, and it is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Federal Trade Commission (“FTC”).

EPIC seeks the final staff reports regarding the FTC’s 2012 antitrust investigation of Google.

Factual Background

The Wall Street Journal Article

On March 19, 2015 the *Wall Street Journal* reported that the Federal Trade Commission failed to act on the results of a 2012 investigation of Google’s anti-competitive practices.¹ According to the *Journal*, the Bureau of Competition wrote a 160 page staff report for the Commissioners detailing four areas of anti-competitive concern and concluding that Google was engaging in illegal practices in three of those areas and very close to illegal conduct in the fourth area.² The *Journal* obtained the report in response to a Freedom of Information Act request.³

According to the FTC Staff Report, quoted by the *Journal*, “Google’s conduct has resulted – and will result – in real harm to consumers and to innovation in the online search and advertising markets. Google has strengthened its monopolies over search and

¹ Brody Mullins, Rolfe Winkler, and Brent Kendall, *Inside the U.S. Antitrust Probe of Google*, Wall Street J. (Mar. 19, 2015), available at <http://www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274> [hereinafter “WSJ article.”].

² *Id.*

³ *Id.*

search advertising through anticompetitive means, and has forestalled competitors' and would-be competitors' ability to challenge those monopolies, and this will have lasting negative effects on consumer welfare."⁴ Despite ample evidence to support a substantial action against Google, the Commission took hardly any action at all, determining there was "no evidence of wrongdoing."⁵

The outcome is surprising given that the Staff Report documented Google's search bias, scraping practices, and aggressive search advertising restrictions designed to chill its direct competition. According to the Staff Report, "Google has unlawfully maintained its monopoly over general search, search advertising, and search syndication" in violation of Section 2 and Section 5 of the FTC Act "by scraping content from rival vertical websites in order to improve its own product offerings;" "by entering into exclusive and highly restrictive agreements with web publishers that prevent publishers from displaying competing search results or search advertisements;" and "by maintaining contractual restrictions that inhibit the cross-platform management of advertising campaigns."⁶ The report also finds that Google favored its content over those of its competitors: "While Google embarked on a multi-year strategy of developing and showcasing its own vertical properties, Google simultaneously adopted a strategy of demoting, or refusing to display, links to certain vertical websites in highly commercial categories."⁷

Nevertheless, the Commission voted 5-0 to close its investigation into Google a few months later in January 2013 upon Google's agreement to adopt minimal changes to its business practices.⁸ The Commission may have been influenced by a second sealed staff report, written by the agency's Bureau of Economics, which apparently argued against pursuing a lawsuit.⁹ As a consequence, Google's dominance of the Internet, access to knowledge, and data concerning consumer's private lives both online and in the home has increased.

EPIC's Interest in the 2012 Investigation

EPIC has a particular interest in the 2012 investigation as we had previously brought Google's search bias practices to the attention of the FTC.¹⁰ As we documented in a letter to the Commission in 2011, Google changed YouTube's algorithm post-

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Press Release, *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*, Fed. Trade Comm'n (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>

⁹ WSJ article, *supra* note 1.

¹⁰ Letter from EPIC to the Federal Trade Commission on Google's search preferences in YouTube (Sep. 8, 2011), https://epic.org/privacy/ftc/google/Google_FTC_Ltr_09_08_11.pdf

acquisition to bury our content while simultaneously promoting its own video materials.¹¹ We wrote:

the subjective, secretive ranking criteria that Google uses on YouTube, the video sharing site the company acquired in 2006, unfairly preferences Google's own material on 'privacy' over non-Google material that would be ranked higher with the use of objective, transparent criteria. Following the acquisition, Google revised the YouTube search criteria such that Google's subjective "relevance" rankings became the default for returning search results.¹²

As a consequence, Google elevated the ranking of its promotional videos and made it more difficult for the public to access videos.

As EPIC documented for the Senate Antitrust Committee, Google's change in the ranking algorithm as applied to the search term "privacy" pushed several of the videos available at EPIC.ORG out of the Top Ten, only to be replaced with Google video content for 4 out of the first top 10 videos listed with the search term "privacy."¹³ Google used its dominance in the search engine market to discriminate against non-Google content concerning "privacy." Google's business practices impact not only its business competitors but also the free speech interests of Internet users.¹⁴

In 2012, EPIC alerted the Commission to Google's decision to include personal data gathered from Google+ in the results of users' searches, including photos, posts, and business pages of users and their contacts. Google's changes implicated the company's prioritization of its own content when returning search results. Incorporating results from Google+ into ordinary search results allowed Google to promote its own social network by leveraging its dominance in the search engine market.¹⁵

We fully anticipated that the Commission would act on the concerns we raised and were surprised when it did not. Following the Commission's decision, EPIC pursued a Freedom of Information Act request to determine whether the White House had played a role in the Commission's decision making process.¹⁶ No records were made available to us that supported that conclusion.¹⁷

¹¹ See Stephen Levy, *Exclusive: How Google's Algorithm Rules the Web*, *Wired* (Feb. 22, 2010), available at http://www.wired.com/2010/02/ff_google_algorithm/.

¹² Letter from EPIC, *supra* note 10.

¹³ *Id.*

¹⁴ It is noteworthy also that EPIC's page on the "Right to Be Forgotten," a fundamental right for more than half a billion users of the Internet, is buried deep in the Google search rankings if it is available at all. Google's own page on the topic currently appears at #6.

¹⁵ Letter from EPIC to the Federal Trade Commission on Google's search preferences in Google+ (Jan. 12, 2012), available at <https://epic.org/privacy/EPIC-FTC-Google-Search-letter.pdf>.

¹⁶ FOIA Request from EPIC to the Federal Trade Commission (Jan. 4, 2013), available at <http://epic.org/foia/EPIC-FOIA-FTC-Antitrust.pdf>

¹⁷ Letter from FTC to EPIC (Jan. 17, 2013), available at <https://epic.org/foia/FTC-FOIA-Response-Jan17.pdf>.

Documents Requested

1. The final staff report from the Bureau of Competition regarding the FTC's 2012 antitrust investigation of Google; and
2. The final staff report from the Bureau of Economics regarding the FTC's 2012 antitrust investigation of Google.

Request for Expedited Processing

This request warrants expedited processing because it is made by “a person primarily engaged in disseminating information” and pertains to a matter about which there is an “urgency to inform the public about an actual or alleged federal government activity.”¹⁸ EPIC is “primarily engaged in disseminating information.”¹⁹

There is a particular urgency to inform the public about the FTC's 2012 decision to close the antitrust investigation into Google, given the Wall Street Journal disclosure about the contents of the Staff Report. Those articles have sparked widespread national and international discussion with immediate ramifications for more than a billion users of the Internet who are now dependent on the companies services.²⁰ Oversight hearings in Congress are likely as is further action by lawmakers outside of the United States.²¹ To fully understand whether the FTC made the right decision it is vital to make the complete staff reports available for review as soon as possible.

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee waiver purposes. *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 record with only duplication fees assessed. Further, because disclosure of this information will “contribute

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

¹⁹ *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

²⁰ WSJ article. See also Rebecca R. Ruiz and Conor Dougherty, *Take Google to Court, Staff Report Urged F.T.C.*, N.Y. Times (Mar. 19, 2015), <http://www.nytimes.com/2015/03/20/technology/take-google-to-court-staff-report-urged-ftc.html>; Rolf Winkler and Brody Mullins, *How Google Skewed Search Results*, Wall Street J. (Mar. 19, 2015), <http://www.wsj.com/articles/how-google-skewed-search-results-1426793553>; Jose Pagliery, *Google abused its monopoly power, FTC experts found*, CNN Money (Mar. 19, 2015), <http://money.cnn.com/2015/03/19/technology/google-monopoly-ftc/>; Alexei Oreskovic, *Confidential FTC report found Google anticompetitive tactics: WSJ*, Reuters (Mar. 19, 2015), <http://www.reuters.com/article/2015/03/19/us-google-ftc-idUSKBN0MF2M220150319>; Matt Weinberger, *Government investigators wanted to sue Google after finding 'real harm to consumers' back in 2012*, Business Insider (Mar. 19, 2015), <http://www.businessinsider.com/the-ftc-wanted-antitrust-charges-against-google-2015-3#ixzz3UwA7iFkU>; Jessica Guynn, *FTC staff recommended suing Google for abusing monopoly: WSJ*, USA Today (Mar. 19, 2015), <http://americasmarkets.usatoday.com/2015/03/19/ftc-staff-recommended-suing-google-for-abusing-monopoly-wsj/>.

²¹ James Kanter, “European Lawmaker Pushes Europe to Take Stronger Stance on Google,” N.Y. Times, Mar. 20, 2015, available at http://bits.blogs.nytimes.com/2015/03/20/european-lawmaker-pushes-europe-to-take-stronger-stance-on-google/?_r=0


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)(E)(ii)(I), I will anticipate your response within 20 business days. Should you require additional information, please contact me at 202-483-1140 or by email at FOIA@epic.org.

Respectfully Submitted,



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John Tran
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