



April 27, 2012

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**Re: Freedom of Information Act Request and Request for Expedited Processing**

Dear FOIA Referral Unit:

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”). As detailed below, EPIC seeks a May 27, 2011 letter from the agency to Google concerning an investigation involving possible violations of the Federal Wiretap Act as well as related documents, including but not limited to communications, legal memorandum and other materials.

**Factual Background**

Many countries across the globe have conducted investigations of Google’s Street View project, which began in 2007.<sup>1</sup> The number of investigations increased dramatically once it was determined that Google’s Street View vehicles were collecting private Wi-Fi communications in addition to digital images.<sup>2</sup> As of January 2011, there were ongoing investigations in at least 12 countries. At least 9 countries have found Google guilty of violating privacy laws as a result of the investigations.<sup>3</sup>

<sup>1</sup> Press Release, Google, Inc., *Google Announces New Mapping Innovations at Where 2.0 Conference* (May 29, 2007), [http://www.google.com/press/annnc/maps\\_where20.html](http://www.google.com/press/annnc/maps_where20.html).

<sup>2</sup> See Electronic Privacy Information Center, *Investigation of Google Street View* (last visited April 27, 2012), available at <http://epic.org/privacy/streetview/>; Kevin J. O’Brien, “Google Data Admission Angers European Officials,” *N.Y. Times*, May 15, 2010 at B5.

<sup>3</sup> See, e.g. Josh Halliday, “Google Street View 'broke South Korea privacy law': Police official says Google breached laws after it admitted collecting emails and personal data,” *The Guardian*, Jan. 11, 2011; “Google breached Canada's privacy laws,” *CBCNews*, Oct. 19, 2010; Jennifer Baker, “Swiss Court Says Google's Street View Breaks Privacy Rules,” *PCWorld*, Apr. 5, 2011; Kristen Gelineau, “Australia: Google Street View Broke Privacy Law,” *Huffington Post*, July 9, 2010.

The Federal Communications Commission (“FCC”) recently determined that Google collected Wi-Fi network data throughout the United States between May 2007 and May 2010.<sup>4</sup> The data collected by the Street View vehicles included “payload” data, “the content of Internet communications,” such as entire e-mail messages, passwords, and URLs.<sup>5</sup> The FCC also found that “[f]or many months, Google deliberately impeded and delayed the Bureau’s investigation.”<sup>6</sup> According to the FCC Report, due to Google’s unwillingness to comply with the agency’s investigation, the FCC was unable to gather sufficient evidence to find the company in violation of the Communications Act.<sup>7</sup>

In response to the FCC report, Google issued a statement and, among several points, claimed that the Department of Justice sent a letter on May 27, 2011 to Google notifying the company of closure of the Department’s investigation. Google stated that:

[T]he Department of Justice (“DOJ”) conducted and long ago completed its own thorough examination of the facts. The DOJ had access to Google employees, reviewed the key documents, and concluded that it would not pursue a case for violation of the Wiretap Act.<sup>8</sup>

Google’s letter went on to describe some of its interactions with the DOJ investigatory team. In response to the FCC’s statements about “Engineer Doe,” a Google employee who refused to cooperate with the FCC investigation, Google stated that “[e]ven the DOJ did not seek (or gain) access to Engineer Doe once advised that he had asserted his constitutional rights.”<sup>9</sup> Google noted that it provided information to the FCC about “the status of the DOJ investigation.”<sup>10</sup> Google later referred to the fact that the FCC “indicated that it would not proceed in the same manner as the DOJ and the FTC.”<sup>11</sup> In regards to the substance of the FCC and DOJ investigation, Google claims that there was an absence of “knowledge or intent” and that “[t]he DOJ reached the same conclusion in its declination letter to Google.”<sup>12</sup>

So far, the Department of Justice has not publicly acknowledged any investigation of Google in the Street View matter nor has it indicated the outcome of any such investigation.

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<sup>4</sup> Chief, Enforcement Bureau, Fed. Commc’n Comm’n, *In the Matter of Google, Inc.: Notice of Apparent Liability for Forfeiture*, DA 12-592, Apr. 13, 2012, available at <http://transition.fcc.gov/DA-12-592A1.pdf>.

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

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

<sup>7</sup> *Id.*

<sup>8</sup> Letter from E. Ashton Johnston, Counsel to Google, Inc., to P. Michelle Ellison, Chief of the Enforcement Bureau of the Fed. Commc’ns Comm’n at 1-2 (April 26, 2012), available at <http://epic.org/privacy/streetview/documents/google-response-to-fcc.pdf>.

<sup>9</sup> *Id.* at 4 n.9.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Id.* at 15.

### Documents Requested

EPIC requests copies of all agency records related to the Department's investigation of the Google Street View matter, including but not limited to:

1. A letter sent by the Department of Justice to Google on May 27, 2011, indicating that the agency had pursued and subsequently closed an investigation concerning Google Street View and possible violations of the federal wiretap act.
2. All records, including communications, legal memorandum, and other materials, related to the investigation of Google, Inc. for possible violations of the ECPA, 18 U.S.C. §§ 2510-22 or other federal statutes in relation to the Wi-fi interception matter.

### Request for Expedited Processing

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

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

There is a particular urgency for the public to obtain information about the investigation of Google's business practices, especially in light of the FCC's recent decision to fine Google \$25,000 for failing to cooperate with a related investigation. Google's response to the FCC's Notice of Apparent Liability refers to a DOJ "examination of the facts" that was allegedly completed "long ago."<sup>13</sup> The DOJ has not yet made any public announcement as to the conclusion of such an examination, and the public's interest in Department's efforts to stop the unlawful interception of private Internet communications is great.

EPIC recently wrote a letter to Attorney General Eric Holder highlighting the importance of this investigation and the protections granted under the ECPA.<sup>14</sup> The privacy of home Wi-Fi communications is a core interest protected by the ECPA and other wiretap laws, and Americans are increasingly reliant on Wi-Fi communications at home and at work. Two prominent Congressmen, Rep. Edward Markey (D-Mass.) and Sen. Richard Blumenthal (D-Conn.) have spoken out about the inadequacy of the FCC's action, and called for further action by Government officials. This is a matter of

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<sup>13</sup> Letter from E. Ashton Johnston, Counsel to Google, Inc., to P. Michelle Ellison, Chief of the Enforcement Bureau of the Fed. Comm'n's Comm'n at 1-2 (April 26, 2012), *available at* <http://epic.org/privacy/streetview/documents/google-responsc-to-fcc.pdf>.

<sup>14</sup> See Letter of EPIC to Attorney General Eric Holder (Apr. 17, 2012), *available at* <http://epic.org/privacy/streetview/EPIC-Google-SV-Ltr-DOJ-4-17-12.pdf>.

importance to many Americans who use Wi-Fi networks and depend on the legal protections of the ECPA and wiretap laws to limit abuses and privacy violations.

Request for “News Media” Fee Status

EPIC is a “representative of the news media” for fee waiver purposes. *EPIC v. Department 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 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 6 C.F.R. § 5.5(d)(4), we will anticipate your determination on our request for expedited processing within ten (10) calendar days.

Respectfully Submitted,



Alan Butler  
EPIC Appellate Advocacy Fellow



Ginger McCall  
Director, EPIC Open Government Project