

VIA EMAIL

April 5, 2021

Elizabeth Tucci
Chief FOIA Officer
Freedom of Information Act Request
Office of General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Email: FOIA@ftc.gov

Dear Ms. Tucci:

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 Google’s biennial privacy compliance assessment for 2018–2020 (“Google Assessment”) mandated by the FTC’s 2013 Consent Order as well as related records and communications concerning compliance with the Order.¹

Documents Requested

- (1) The 2018 – 2020 Google Assessment; and
- (2) All additional communications between Google and the FTC concerning Google’s compliance with the 2013 FTC Consent Order since the most recent Google Assessment in 2018, including any supplemental and compliance reports.

Background

² In 2011, the FTC entered into a Consent Order with Google after finding the company had violated the FTC Act by engaging in unfair and deceptive uses of users’ personal information.³ The consent order followed a 2010 complaint from EPIC to the FTC highlighting major privacy violations in Google’s rollout of the Google Buzz social networking tool.⁴

¹ Consent Order, *In the Matter of Google, Inc.*, FTC File No. 102-3136 (Oct. 24, 2011) [hereinafter the “2013 FTC Consent Order” or “Final Order”].

² Complaint, *In the Matter of Google, Inc.*, FTC File No. 102-3136 (Oct. 13, 2011).

³ *Id.*

⁴ EPIC, *In re Google Buzz* (2010), <https://epic.org/privacy/ftc/googlebuzz/>.

Under the Consent Order, Google is obligated to submit to a biennial audit of its privacy and data protection practices by an independent third party, the findings of which are produced in the Google Assessment.⁵ The biennial audit requires the third party to set forth the specific privacy controls Google implemented and maintained during that period; explain how these privacy controls were appropriate for Google's size and complexity, the nature and scope of Google's activities, and the sensitivity of the covered information; explain how the privacy controls that Google implemented met or exceeded the protections required; and certify that the privacy controls were operated with sufficient effectiveness to reasonably assure privacy protections for the covered information and that those controls operated as such throughout the reporting period.⁶

The most recent Google Assessment, covering years 2018 through 2020, has not been made publicly available. There are growing reasons to be concerned about Google's data security and privacy practices. First, in the last year, Google has been named in multiple antitrust lawsuits brought by the U.S. Department of Justice (DOJ) and nearly 40 state attorneys general.⁷ In addition, Google recently unveiled a new proposal for online ad targeting, Federated Learning of Cohorts (FLoC).⁸ FLoCs would rework how advertisers are allowed to target consumers on Google Chrome, which has a 60 percent global share of the web browser market.⁹ Google has also expanded its collection of personal data since the last Assessment through the acquisition of Fitbit, which poses significant threats to privacy¹⁰ and has attracted scrutiny from the DOJ.¹¹ EPIC itself has sued in the past to ensure compliance with the 2013 FTC Consent Order,¹² and publication of the 2018-2020 Assessment is critical to monitor and ensure Google's continuous compliance with its privacy and data protection obligations.

⁵ 2013 FTC Consent Order, *supra* note 1.

⁶ *Id.*

⁷ See *Justice Department Sues Monopolist Google For Violating Antitrust Laws*, Dep't of Justice (Oct. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>; Tony Romm, *Nearly 40 States Sue Google Alleging Search Manipulation, Marking the Third Antitrust Salvo Against the Tech Giant*, Wash. Post (Dec. 17, 2020), <https://www.washingtonpost.com/technology/2020/12/17/google-search-antitrust-lawsuit/>.

⁸ Chetna Bindra, *Building a Privacy-First Future for Web Advertising*, Google (Jan. 25, 2021), <https://blog.google/products/ads-commerce/2021-01-privacy-sandbox/>; see also *Federated Learning of Cohorts (FLoC)*, GitHub (Mar. 8, 2021), <https://github.com/WICG/floc>.

⁹ Paresh Dave & Diane Bartz, *Google's Privacy Push Draws U.S. Antitrust Scrutiny*, Reuters (Mar. 18, 2021), <https://www.reuters.com/article/us-tech-antitrust-google-exclusive-idUKKBN2BA10I>.

¹⁰ Letter from EPIC et al. to Joseph J. Simons, Chair, Fed. Trade Comm'n et al. (Nov. 13, 2019), <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ebde6b294f87f7f383f8bc1/1589503667828/Op+position-Letter-GoogleFitbit-Merger-1.pdf>.

¹¹ EPIC, *Google Closes Fitbit Acquisition While DOJ's Review of Merger Continues* (Jan. 14, 2021), <https://epic.org/2021/01/google-closes-fitbit-acquisiti.html>.

¹² EPIC, *EPIC v. FTC (Enforcement of the Google Consent Order)* (Feb. 8, 2012), <https://epic.org/privacy/ftc/google/consent-order.html#lawsuit>.

Request for Expedition

EPIC is entitled to expedited processing of this request under the FOIA and the FTC's FOIA regulations because there is a "compelling need." 5 U.S.C. § 552(a)(6)(E)(v)(II); 16 C.F.R. § 4.11(a)(1)(i)(G). Specifically, this request is entitled to expedited processing because, first, there is an "urgency to inform the public concerning [an] actual . . . Government activity," and second, this request is made by "a person primarily engaged in disseminating information." 16 C.F.R. § 4.11(a)(1)(i)(G).

First, there is an "urgency to inform the public concerning [an] actual . . . Government activity." § 4.11(a)(1)(i)(G). The "actual . . . Government activity" at issue is the FTC's enforcement of the 2013 Consent Order against Google, which includes biannual assessments.

The "urgency" to inform the public about this activity is clear given Google Chrome's nearly 50% share of the U.S. browser market.¹³ Every day, over one hundred million people in the U.S. are affected by Google's privacy and data security practices.¹⁴ Transparency of Google's privacy practices and compliance with the 2013 Consent Order are imperative to prevent overcollection and abuse of personal data by Google. The Commission must provide the public with the most up-to-date information about Google's practices.

Second, EPIC is an organization "primarily engaged in disseminating information" to the public because it is a representative of the news media. 16 C.F.R. § 4.11(a)(1)(i)(G). As the Court explained in *EPIC v. DOD*, "EPIC satisfies the definition of 'representative of the news media'" entitling it to preferred fee status under the FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief. 16 C.F.R. § 4.11(a)(1)(i)(G); 5 U.S.C. § 552(a)(6)(E)(vi).

Request for "News Media Fee Status and Public Interest Fee Waiver"

EPIC is a "representative of the news media" for fee classification purposes. *EPIC v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC's status as a "news media" requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 16 C.F.R. § 4.8(b)(2)(iii); 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Further, any duplication fees should also be waived because (i) disclosure of the requested information is "likely to contribute significantly to the public understanding of the

¹³ Shanhong Liu, *Market Share of Leading Internet Browsers in the United States and Worldwide as of February 2021*, Statista (Mar. 22, 2021), <https://www.statista.com/statistics/276738/worldwide-and-us-market-share-of-leading-internet-browser>.

¹⁴ Joseph Johnson, *Digital Population in the United States as of January 2021*, Statista (Mar. 4, 2021), <https://www.statista.com/statistics/1044012/usa-digital-platform-audience/>.

operations or activities of the government” and (ii) disclosure of the information is not “primarily in the commercial interest” of EPIC, the requester. 16 C.F.R. §§ 4.8(e)(2)(i)–(ii); 5 U.S.C. § 552(a)(4)(A)(iii). EPIC’s request satisfies this standard based on the FTC’s considerations for granting a fee waiver. 16 C.F.R. § 4.8(e)(2).

(1) Disclosure of the requested information is likely to contribute to the public understanding of the operations or activities of the government.

First, disclosure of the requested documents is in the public interest because it is “likely to contribute significantly to public understanding of the operations or activities of the government.” 16 C.F.R. § 4.8(2)(i). The FTC components evaluate four factors to determine whether this requirement is met: (i) the subject matter of the request “concerns the operation and activities of the Federal government”; (ii) the disclosure “is likely to contribute to an understanding of these operations or activities”; (iii) the disclosure “is likely to contribute [to] public understanding” of the issue; and (iv) the disclosure will provide a “significant” contribution to public understanding. §§ 4.8(2)(i)(A)–(D).

On the first factor, the subject of the request self-evidently concerns identifiable “operations or activities of the Federal government.” 16 C.F.R. § 4.8(2)(i)(A). The FTC’s oversight of Google’s compliance with the 2013 Consent Order and communications between the FTC and Google regarding such compliance both constitute federal government activity.

On the second factor, disclosure “is likely to contribute to an understanding of these operations or activities” because the release of this information will inform lawmakers, privacy advocates, and the public about whether and how Google is complying with the 2013 Consent Order. 16 C.F.R. § 4.8(2)(i)(B). As noted, Google has not only made changes to its business but also is the subject of multiple state and federal lawsuits regarding its business practices. The disclosure of this information will contribute to the public understanding of Google’s data use and protection policies at issue in the 2013 Consent Order.

On the third factor, disclosure “is likely to contribute [to] public understanding” of the issue. 16 C.F.R. § 4.8(2)(i)(C). EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.¹⁵ EPIC consistently publishes critical documents obtained through the FOIA and through litigation on its robust website for educational purposes.¹⁶ Moreover, EPIC publishes an award-winning email and online newsletter that

¹⁵ EPIC, *About EPIC*, <http://epic.org/epic/about.html>.

¹⁶ EPIC, <https://www.epic.org/>.

highlights critical documents obtained through the FOIA.¹⁷ EPIC’s FOIA work is also prominently featured in major media outlets.¹⁸

On the fourth factor, disclosure will provide a “significant” contribution to public understanding. 16 C.F.R. § 4.8(2)(i)(D). The release of the most recent Google Assessment and related communications would significantly increase public understanding of the FTC’s enforcement of the 2013 Consent Order and Google’s compliance with the same. Google’s privacy policies affect over a hundred million Americans every day,¹⁹ and far more users worldwide.²⁰ Disclosure of the requested information would inform these individuals and contribute significantly to public understanding of how their personal data is being collected and used by Google.

(2) Disclosure of the information is not primarily in the commercial interest of the requester

Second, disclosure of the information is not “primarily in [EPIC’s] commercial interest.” 16 C.F.R. § 4.8(2)(ii)(A). Again, EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties. EPIC has no commercial interest in the requested records and has established there is significant public interest in the requested records.

For these reasons, EPIC’s fee waiver request should be granted.

Conclusion

Thank you for your consideration of this request. EPIC anticipates your determination on its request within ten calendar days. 16 C.F.R. § 4.11(a)(1)(i)(G); 5 U.S.C. § 552(a)(6)(E)(ii)(I). For questions regarding this request contact Enid Zhou at 202-483-1140 x104 or Zhou@epic.org, cc: FOIA@epic.org.

Respectfully submitted,

/s/ Gillian Vernick
Gillian Vernick
EPIC IPIOP Clerk

¹⁷ EPIC, *EPIC Alert*, <https://www.epic.org/alert/>.

¹⁸ EPIC, *EPIC in the News*, https://epic.org/news/epic_in_news.php/.

¹⁹ Johnson, *supra* note 14.

²⁰ Dave & Bartz, *supra* note 8.