

VIA E-MAIL

May 29, 2019

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

Dear Ms. Hipsley:

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 concerning the FTC Associate Director of Enforcement James A. Kohm after the Commission voted to accept the proposed consent order with Facebook in November 2011 to the present day.¹

Documents Requested

- (1) All memorandums created or signed by Associate Director Kohm related to the enforcement of the 2011 Consent Order against Facebook, including but not limited to the March 2018 memo reported by the *New York Times*;²
- (2) All internal communications sent by Associate Director Kohm to employees in the FTC Division of Enforcement related to enforcement of the 2011 Consent Order against Facebook;
- (3) All records of events, meetings, and other FTC-related matters concerning Associate Director Kohm and Facebook after the Commission voted to accept the proposed consent order with Facebook in November 2011 to present day.

¹ Press Release, Fed. Trade Comm’n, Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises (Nov. 29, 2011), <https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep>.

² Nicholas Confessor & Cecilia King, *Facebook Data Scandals Stoke Criticism That a Privacy Watchdog Too Rarely Bites*, N.Y. Times (Dec. 30, 2018), <https://www.nytimes.com/2018/12/30/technology/facebook-data-privacy-ftc.html>.

Background

From 2009 to 2011, the EPIC and a coalition of consumer organizations filed several complaints with the FTC, alleging that Facebook was changing user settings and disclosing personal data to third parties without consent.³ EPIC had conducted extensive research and documented the instances of Facebook overriding the users' privacy settings to make personal information publicly available and enabling application developers to collect the personal information of users' friend networks without their knowledge or affirmative consent.⁴

In response to EPIC's complaints and detailed investigation, the FTC gathered further information and eventually issued a consent order against Facebook.⁵ In the announcement of the settlement, the FTC stated that "Facebook told users they could restrict sharing of data to limited audiences – for example with 'Friends Only.' In fact, selecting 'Friends Only' did not prevent their information from being shared with third-party applications their friends used."⁶ And the FTC found unfair or deceptive practices in Facebook's "Verified Apps" program, which falsely claimed to certify the security of participating apps to protect user privacy.⁷

The consent order bars Facebook from making any future misrepresentations about privacy and security of a user's personal information, requires Facebook to establish a comprehensive privacy program, requires Facebook to remove user information within thirty days after a user deletes an account, requires Facebook to obtain a user's express consent before enacting changes in its data sharing methods, and requires Facebook to have an independent privacy audit every two years.⁸

Between the announcement of the proposed settlement on November 29, 2011 and the filing of this FOIA request on May 29, 2019, the FTC has never charged Facebook with a single violation of the consent order. Not one.

³ EPIC, et al, *In the Matter of Facebook, Inc.* (Complaint, Request for Investigation, Injunction, and Other Relief) (Dec. 17, 2009), <https://epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf>; *See also*, EPIC, Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief (January 14, 2010), https://epic.org/privacy/inrefacebook/EPIC_Facebook_Supp.pdf; EPIC, *In re Facebook*, <https://epic.org/privacy/inrefacebook/>.

⁴ Press Release, Fed. Trade Comm'n, Facebook Settles FTC Charges that It Deceived Consumers by Failing to Keep Privacy Promises (Nov. 29, 2011), <https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep>.

⁵ *In the Matter of Facebook, Inc., a corporation*, Federal Trade Commission, <https://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc>.

⁶ *Id.*

⁷ *Id.*

⁸ Consent Order, *In the Matter of Facebook, Inc.*, Docket No. C-4365, 3–4 (Federal Trade Commission July 27, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf> [hereinafter Consent Order].

Cambridge Analytica Breach

On March 16, 2018, Facebook admitted to the unlawful transfer of up to 87 million user profiles to the data mining firm Cambridge Analytica.⁹ That company harvested the data obtained from Facebook without user consent to influence the 2016 U.S. presidential election and the vote on Brexit.¹⁰ Cambridge Analytica collected the private information of approximately 270,000 users and their extensive friend networks under false pretenses as a research-driven application.¹¹ This clearly violates the consent order, which states that Facebook “shall not misrepresent in any manner, expressly or by implication . . . the extent to which [Facebook] makes or has made covered information accessible to third parties; and the steps [Facebook] takes or has taken to verify the privacy or security protections that any third party provides.”¹²

In the wake of the Cambridge Analytica breach, Congress held a joint hearing about Facebook’s failure to protect the personal data of users, calling on Mark Zuckerberg to publicly testify on the company’s privacy practices.¹³ Several members of Congress, including Senator Blumenthal, stated that Facebook had violated the consent order.¹⁴

Reports are also widespread of multiple Facebook investigations in many states and around the world. According to *Bloomberg News*, Facebook faces seven separate data protection probes in Ireland.¹⁵ *Gizmodo* reports that at least six state attorneys general have launched their own investigations of the company.¹⁶ In October 2018, the U.K. Information Commissioner’s Office (“ICO”) concluded its Facebook investigation in the wake of the Cambridge Analytical scandal and fined Facebook £500,000 for failing to protect user data.¹⁷

⁹ Press Release, Facebook, Suspending Cambridge Analytica and SCL Group from Facebook (Mar. 16, 2018), <https://newsroom.fb.com/news/2018/03/suspending-cambridge-analytica/>.

¹⁰ See Danny Hakim & Matthew Rosenberg, *Data Firm Tied to Trump Campaign Talked Business With Russians*, *New York Times* (Mar. 17, 2018), <https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-russia.html>.

¹¹ *Id.*

¹² Consent Order, *supra* note 8, at 3–4.

¹³ *Facebook, Social Media Privacy, and the Use and Abuse of Data: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018) <https://www.judiciary.senate.gov/meetings/facebook-social-media-privacy-and-the-use-and-abuse-of-data>.

¹⁴ See Press Release, Senator Richard Blumenthal, Blumenthal Calls for Stricter FTC Oversight of Facebook and Fines Over Possible Consent Decree Violations (April 19, 2018), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-calls-for-stricter-ftc-oversight-of-facebook-and-fines-over-possible-consent-decree-violations>.

¹⁵ Stephanie Bodoni, *Facebook Faces 7 Data Probes as Irish Watchdog Gets Tough*, *Bloomberg News* (Feb. 1, 2019), <https://www.bloomberg.com/news/articles/2019-02-01/facebook-faces-seven-data-probes-as-irish-watchdog-gets-tough?srnd=technology-vp>.

¹⁶ Tom McKay, *Report: Attorneys General in Six States Are Now Investigating Facebook's Data Practices*, *Gizmodo* (Feb. 2, 2019), <https://gizmodo.com/report-attorneys-general-in-six-states-are-now-investi-1832294726>.

¹⁷ Jim Waterson, *UK Fines Facebook £500,000 for Failing to Protect User Data*, *The Guardian* (Oct. 25, 2018), <https://www.theguardian.com/technology/2018/oct/25/facebook-fined-uk-privacy-access-user-data-cambridge-analytica>.

FTC Opens an Investigation into Facebook

On March 26, 2018, the FTC confirmed that it was an investigation into Facebook.¹⁸ In February 2019, it was reported that Facebook and the FTC are in discussion of a potential settlement over privacy violations, but the settlement had not reached the Commissioners for a vote.¹⁹ The Commissioners met in mid-December 2018 and were briefed that the FTC had found evidence of violations of the consent order.²⁰

On December 30, 2018, the *New York Times* reported that Associate Director of Enforcement James A. Kohm drafted a memo about the prospect of taking action against Facebook.²¹ It was reported that the memo, drafted in March 2018, concluded that Facebook was not responsible for Cambridge Analytica's privacy abuses and that Facebook had taken reasonable steps to address the problem.²² Facebook's actions to address the Cambridge Analytica scandal, according to the memo, most likely did not violate the consent order.²³ As the Associate Director for the FTCs' Enforcement Division, Associate Director Kohm directly leads the enforcement of the 2011 consent order over Facebook and has in several instances communicated directly with the technology giant on consent decree matters.²⁴ According to the *New York Times* article, two former FTC staffers stated that Associate Director Kohm "had expressed skepticism about proving harm in cases against tech companies."²⁵

March 26, 2019 marked the one-year anniversary of the reopening of the investigation. EPIC and others have urged the FTC to take action before March 26, 2019, yet the Commission has not charged Facebook with a single violation.²⁶

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

¹⁸ Press Release, Fed. Trade Comm., Statement by the Acting Director of FTC's Bureau of Consumer Protection Regarding Reported Concerns about Facebook Privacy Practices (Mar. 26, 2018), <https://www.ftc.gov/news-events/press-releases/2018/03/statement-acting-director-ftcs-bureau-consumer-protection>.

¹⁹ Cecilia King, *Facebook Fine Could Total Billions if F.T.C. Talks Lead to a Deal*, N.Y. Times (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/technology/facebook-ftc-settlement.html>.

²⁰ *Id.*

²¹ Confessor & King, *supra* note 1.

²² *Id.*

²³ *Id.*

²⁴ See e.g., Second Interim Production: Communications Between FTC and Facebook About Compliance with Consent Order 102-03 (Oct. 12, 2018), <https://epic.org/foia/FTC/facebook/EPIC-18-03-20-FTC-FOIA-20181012-FTC-FB-Communications.pdf> (showing an e-mail chain between Associate Director Kohm and Facebook counsel regarding compliance with the consent order).

²⁵ Confessor & King, *supra* note 1.

²⁶ See, e.g., EPIC, *#EnforceTheOrder*, <https://epic.org/enforce-the-order/>.

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 memorandums and communications drafted by Associate Director Kohm in his official capacity is an “actual . . . Government activity.” Records about FTC-related activities concerning Associate Director Kohm about enforcing the consent order against Facebook is also a government activity.

The “urgency” to inform the public about this activity is clear given that the one-year deadline from when the FTC confirmed that it was investigating Facebook has passed and there is still no action from the Commission about Facebook’s potential privacy violations. So far, the FTC has issued no fines or declared that Facebook violated the consent order when there has been widely reported evidence of potential violation from both Facebook²⁷ and from news outlets²⁸ of potential consent order violations. The Commissioners were even briefed by FTC staff of considerable evidence of violations of the consent order in mid-December.²⁹ It has also been reported that Associate Director Kohm drafted an undisclosed memorandum last spring about taking enforcement action against Facebook where he echoed Facebook’s own argument that the technology giant most likely did not violate the consent order. The release of the requested information will urgently inform the public about Acting Director Kohm’s position on holding Facebook accountable under the consent order. Release of this information will allow the public to scrutinize Associate Director Kohm’s priorities as the leader of the enforcement division responsible for enforcing the consent order against Facebook.

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).

²⁷ See e.g., Facebook, *Important Message from Facebook’s White Hat Program* (June 21, 2013), available at <https://web.archive.org/web/20181223201511/https://www.facebook.com/notes/facebook-security/important-message-from-facebooks-white-hat-program/10151437074840766> (describing a bug in its Download Your Information tool that leaked the e-mail addresses and phone numbers of six million Facebook users).

²⁸ See e.g., Alyssa Newcomb, *A Timeline of Facebook’s Privacy Issues—And Its Responses*, NBC News (Mar. 24, 2018), <https://www.nbcnews.com/tech/social-media/timeline-facebook-s-privacy-issues-its-responses-n859651>; Jessi Hempel, *A Short History of Facebook’s Privacy Gaffes*, Wired (Mar. 30, 2018), <https://www.wired.com/story/facebook-a-history-of-mark-zuckerberg-apologizing/>; Natasha Lomas, *A Brief History of Facebook’s Privacy Hostility Ahead of Zuckerberg’s Testimony*, TechCrunch (April 10, 2018), <https://techcrunch.com/2018/04/10/a-brief-history-of-facebooks-privacy-hostility-ahead-of-zuckerbergs-testimony/>.

²⁹ King, *Facebook Fine Could Total Billions if F.T.C. Talks Lead to a Deal*, *supra* note 19.

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 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). Information related to the activities of Associate Director Kohm, including memorandums and communications drafted by him in his official capacity as the Director of the Enforcement Division, constitute a federal government activity.

On the second factor, disclosure “is likely to contribute to an understanding of these operations or activities” because the FTC has published none of Associate Director Kohm’s memorandums or communications related to the enforcement of the consent order against Facebook. 16 C.F.R. § 4.8(2)(i)(B). The release of this information will contribute to the understanding of Associate Director Kohm’s priorities and position on regulating Facebook as leader of the division responsible for enforcing the consent order. In eight years, the FTC has not charged Facebook with violating the consent order when there has been mounting public evidence of privacy violations admitted by Facebook and reported by news media.

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.³⁰ EPIC consistently publishes critical documents obtained through the FOIA and through litigation on its robust website for educational

³⁰ EPIC, *About EPIC*, <http://epic.org/epic/about.html>.

purposes.³¹ Moreover, EPIC publishes an award-winning email and online newsletter that always highlights critical documents obtained through the FOIA.³² EPIC's FOIA work is also prominently featured in major media outlets.³³

On the fourth factor, the disclosure will provide a "significant" contribution to public understanding. 16 C.F.R. § 4.8(2)(i)(D). Since the consent order, the public has been left in the dark about whether the FTC has been appropriately enforcing the order and investigating any potential privacy violations by Facebook. The release of this information would significantly contribute to the public understanding of whether the Associate Director Kohm has been fulfilling his responsibilities in enforcing consent orders when there is mounting public evidence of violations both reported by news outlets and Facebook itself. For instance, the release of the undisclosed memorandum, as reported by the *New York Times*, would allow the public to significantly understand Associate Director Kohm's position on the prospect of disciplining Facebook.

(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 Enid Zhou

Enid Zhou

EPIC Open Government Counsel

³¹ EPIC.org, <https://www.epic.org/>.

³² EPIC, *EPIC Alert*, <https://www.epic.org/alert/>.

³³ See EPIC, *EPIC in the News*, https://epic.org/news/epic_in_news.php/.