

VIA E-MAIL

July 15, 2019

Heather Hipsley  
Chief FOIA Officer  
Freedom of Information Act Request  
Office of General Counsel  
Federal Trade Commission  
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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 the expedited release of the FTC’s proposed settlement with Facebook, including dissenting opinions, as first reported the *Wall Street Journal* on July 12, 2019.<sup>1</sup>

### Documents Requested

The proposed FTC settlement, and any dissenting opinions, concerning Facebook

### 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.<sup>2</sup> EPIC had conducted extensive research and documented the instances of Facebook overriding the users’ privacy settings to make personal

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<sup>1</sup> Emily Glazer, Ryan Tracy, & Jeff Horwitz, *FTC Approves Roughly \$5 Billion Facebook Settlement*, *Wall Street Journal* (July 12, 2019), <https://www.wsj.com/articles/ftc-approves-roughly-5-billion-facebook-settlement-11562960538>.

<sup>2</sup> EPIC, et al, *In the Matter of Facebook, Inc.* (Complaint, Request for Investigation, Injunction, and Other Relief) (Dec. 17, 2009), <https://epic.org/privacy/infacebook/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/infacebook/EPIC\\_Facebook\\_Supp.pdf](https://epic.org/privacy/infacebook/EPIC_Facebook_Supp.pdf); EPIC, *In re Facebook*, <https://epic.org/privacy/infacebook/>.

information publicly available and enabling application developers to collect the personal information of users' friend networks without their knowledge or affirmative consent.<sup>3</sup>

In response to EPIC's complaints and detailed investigation, the FTC gathered further information and eventually issued a consent order against Facebook.<sup>4</sup> 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."<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

### *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.<sup>8</sup> That company harvested the data obtained from Facebook without user consent to influence the 2016 U.S. presidential election and the vote on Brexit.<sup>9</sup> Cambridge Analytica collected the private information of approximately 270,000 users and their extensive friend networks under false pretenses as a research-driven application.<sup>10</sup> This conduct clearly violated 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."<sup>11</sup>

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<sup>3</sup> 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>.

<sup>4</sup> *In the Matter of Facebook, Inc., a corporation*, Federal Trade Commission, <https://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc>.

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

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

<sup>7</sup> 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].

<sup>8</sup> Press Release, Facebook, Suspending Cambridge Analytica and SCL Group from Facebook (Mar. 16, 2018), <https://newsroom.fb.com/news/2018/03/suspending-cambridge-analytica/>.

<sup>9</sup> See Danny Hakim & Matthew Rosenberg, *Data Firm Tied to Trump Campaign Talked Business With Russians*, N.Y. Times (Mar. 17, 2018), <https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-russia.html>.

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

<sup>11</sup> Consent Order, *supra* note 7, at 3–4.

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.<sup>12</sup> Several members of Congress, including Senator Blumenthal, stated that Facebook had violated the consent order.<sup>13</sup>

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.<sup>14</sup> *Gizmodo* reports that at least six state attorneys general have launched their own investigations of the company.<sup>15</sup> 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.<sup>16</sup>

### *FTC Investigates Facebook and Issues Settlement*

On March 26, 2018, the FTC confirmed that it was an investigation into Facebook.<sup>17</sup> In February 2019, it was reported that Facebook and the FTC were in discussion of a potential settlement over privacy violations, but the settlement had not reached the Commissioners for a vote.<sup>18</sup> The Commissioners met in mid-December 2018 and were briefed that the FTC had found evidence of violations of the consent order.<sup>19</sup>

On July 12, 2019, the *Wall Street Journal* first reported that the FTC endorsed a \$5 billion settlement with Facebook over its mishandling of users' personal information.<sup>20</sup> In a 3–2 vote in favor of the settlement, the FTC commissioners voted along party lines and transferred

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<sup>12</sup> *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>.

<sup>13</sup> 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>.

<sup>14</sup> 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>.

<sup>15</sup> 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>.

<sup>16</sup> 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>.

<sup>17</sup> 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>.

<sup>18</sup> 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>.

<sup>19</sup> *Id.*

<sup>20</sup> Glazer, *supra* note 1.

the settlement to the Justice Department’s civil division to finalize.<sup>21</sup> As part of FTC procedure, the Justice Department’s review typically does not change the outcome of the decision made by the commission.<sup>22</sup> The \$5 billion settlement is the largest fine the FTC has imposed on a technology company. It has been reported that, as part of the settlement, Facebook “agreed to more comprehensive oversight of how it handles user data . . . But none of the conditions in the settlement will impose strict limitations on Facebook’s ability to collect and share data with third parties.”<sup>23</sup> Details of the settlement have not been publicly disclosed.

### 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 final judgement and any dissenting opinions from the FTC is an “actual . . . Government activity.” The FTC opened an investigation into Facebook after the Cambridge Analytica scandal and the commission concluded its investigation by issuing a \$5 billion settlement with Facebook.

The “urgency” to inform the public about this activity is clear given that it has been over a year since the FTC confirmed that it was investigating Facebook and there was, until last week, no action from the commission about Facebook’s potential privacy violations. The \$5 billion fine is the largest fine issued by the FTC yet details of the settlement, including non-monetary remedies, have not been released.

News of the settlement sparked strong criticism from Congress with some senators slamming the FTC for not implementing sweeping structural changes at the company or a larger fine. For instance, Senator Richard Blumenthal (D-CT) stated, “[t]he FTC must be held accountable for this seemingly inadequate, unconscionably delayed, & historically hollow result. There must be Congressional hearings.”<sup>24</sup> Senator Mark Warner (D-VA) responded to the Facebook settlement by planning to introduce additional legislation stating, “[g]iven Facebook’s repeated privacy violations, it is clear that fundamental structural reforms are required. With the

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Cecilia Kang, *FTC Approves Facebook Fine of About \$5 Billion*, N.Y. Times (July 12, 2019), <https://www.nytimes.com/2019/07/12/technology/facebook-ftc-fine.html>.

<sup>24</sup> Richard Blumenthal (@SenBlumenthal), Twitter (July 12, 2019, 3:01PM), <https://twitter.com/SenBlumenthal/status/1149800906956976128>.

FTC either unable or unwilling to place reasonable guardrails to ensure that user privacy and data are protected, it's time for Congress to act.”<sup>25</sup>

The release of the requested information will inform the public about whether the FTC effectively held Facebook accountable under the consent order. Release of this information will also allow the public to scrutinize the FTC's final judgement and determine whether the settlement terms are an appropriate response to violations of the consent order.

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 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).

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<sup>25</sup> Press Release, Mark R. Warner, Senator from VA, Sen. Warner Responds to Reported FTC Facebook Settlement (July 12, 2019), <https://www.warner.senate.gov/public/index.cfm/2019/7/sen-warner-responds-to-reported-ftc-facebook-settlement>.

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 proposed settlement and any dissenting opinions from the FTC issued to Facebook as part of an enforcement proceeding 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 not released the settlement or any dissenting opinions after it has been reported that the commission has issued a \$5 billion dollar fine to Facebook. 16 C.F.R. § 4.8(2)(i)(B). The release of this information will contribute to the understanding of how the FTC is enforcing the consent order and what are the terms of the settlement.

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.<sup>26</sup> EPIC consistently publishes critical documents obtained through the FOIA and through litigation on its robust website for educational purposes.<sup>27</sup> Moreover, EPIC publishes an e-mail and online newsletter that always highlights critical documents obtained through the FOIA.<sup>28</sup> EPIC’s FOIA work is also prominently featured in major media outlets.<sup>29</sup>

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 what types of violations Facebook was charged with and whether the commission ordered any non-monetary remedies.

*(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.

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<sup>26</sup> EPIC, *About EPIC*, <http://epic.org/epic/about.html>.

<sup>27</sup> EPIC.org, <https://www.epic.org/>.

<sup>28</sup> EPIC, *EPIC Alert*, <https://www.epic.org/alert/>.

<sup>29</sup> See EPIC, *EPIC in the News*, [https://epic.org/news/epic\\_in\\_news.php/](https://epic.org/news/epic_in_news.php/).

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