

VIA E-MAIL

November 21, 2018

Freedom of Information Act Appeal
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.,
Washington, D.C. 20580

Freedom of Information Act Appeal, FOIA-2018-00912

This letter constitutes an appeal of the Federal Trade Commission's ("FTC") withholding of records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(6)(A) and 16 C.F.R. § 4.11(a)(3). The FOIA request was submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the FTC on May 11, 2018 ("EPIC's FOIA Request").

EPIC's FOIA Request sought records in possession of the agency related to the Irish Data Protection Commissioner's ("DPC") inquiries to the FTC's inquiries regarding Facebook's compliance with the 2011 FTC Consent Order. *See* Appendix A.

The FTC issued a final response to EPIC on August 24, 2018, and produced 413 pages of publicly-available documents in response to EPIC's FOIA Request. *See* Appendix B. In the final response, the FTC asserted that "some" responsive records were being withheld pursuant to FOIA Exemptions 3, 5, 7(A), and 7(E), but did not identify the total number of pages withheld. The letter provided no substantive reasoning on why each exemption applied.

EPIC has reviewed the agency's final response and the records released, and has determined that the agency has not established that Exemptions 3, 5, 7(A), and 7(E) apply to the withheld material. The agency in its final response provided a conclusory description of each exemption but included no explanation or evidence of why each exemption is applicable. EPIC contacted the FTC to clarify the application of the exemptions and the FTC attorney assigned to EPIC's FOIA Request stated that 42 pages were withheld in full and that the exemptions applied to different sections of the withheld pages. She declined to provide any further detail on which exemptions applied to which respective pages.

For this and other reasons below, EPIC appeals the original agency determination regarding the application of Exemptions 3, 5, 7(A), and 7(E). The FTC has failed to carry its burden to justify the assertion of all exemptions to withhold portions of the documents located by the agency. EPIC also challenges the FTC's failure to release reasonably segregable material. The determination should be withdrawn and the remaining 42 pages of responsive records should be disclosed to EPIC.

Procedural Background

On May 11, 2018, EPIC submitted EPIC's FOIA Request to the FTC via e-mail. EPIC specifically requested:

- (1) Records including emails, communications, and memoranda related to Facebook's compliance with the 2011 FTC Consent Decree between the agency and the Irish Data Protection Commissioner for its 2011 Audit of Facebook Ireland Ltd. (issued on December 21, 2011); and
- (2) Records including emails, communications, and memoranda related to Facebook's compliance with the 2012 FTC Consent Order between the agency and the Irish Data Protection Commissioner for its 2012 Re-Audit of Facebook Ireland Ltd. (issued on September 21, 2012).

EPIC also requested expedited processing and a fee waiver.

On May 29, 2018, EPIC received a letter from the FTC granting expedited processing and a public interest fee waiver. *See* Appendix C.

On June 13, 2018, EPIC received a letter from the FTC stating that the agency would not be able to respond to EPIC's FOIA Request within the statutory 20-business day deadline. The FTC cited "unusual circumstances" and invoked an extension for processing the request. *See* Appendix D.

On August 24, 2018, the FTC sent a final determination letter and produced 413 pages of publicly-available documents in response to EPIC's FOIA Request. The agency in the final response did not indicate the total number of pages reviewed or identify the total number of pages withheld. The FTC merely state that it was "granting partial access to the accessible records." *See* Appendix B. The FTC stated that it was denying access to "some" records because the (undisclosed number of) records fall within Exemptions 3, 5, 7(A), and 7(E). The letter provided no justification for the application of each exemption and only included general descriptions of the exemptions.

On November 19, 2018, EPIC called Ms. Kamay Lafalaise, the FTC attorney assigned to EPIC's FOIA Request, to clarify the language of the production letter. Ms. Lafalaise stated that the phrase "granting partial access to the accessible records" is incorrectly worded and should be construed to mean that EPIC received access to a portion of the total number of records reviewed and some responsive records were withheld under an applicable exemption. Ms. Lafalaise stated that 42 pages were withheld in full and each cited exemption applied to different portions of the pages. Ms. Lafalaise declined to describe over the phone how these exemptions were applied throughout the 42 pages.

EPIC Appeals the FTC's August 24, 2018 Release of Information

EPIC appeals the FTC's final response withholding in full 42 pages of responsive records. EPIC challenges the FTC's application of Exemptions 3, 5, 7(A), and 7(E) and challenges the agency's failure to release reasonably segregable material.

While the FOIA specifies that certain categories of information may be exempt from disclosure, “these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The “agency bears the burden of establishing that an exemption applies.” *PETA v. NIH*, 745 F.3d 535 (D.C. Cir. 2014). An agency must describe its “justifications for withholding the information with specific detail.” *ACLU v. DOD*, 628 F.3d 612, 619 (D.C. Cir. 2011)). For instance, with the agency cannot simply support its exemption claims with “vague, conclusory affidavits, or those that merely paraphrase the words of a statute.” *Church of Scientology of Cal., Inc. v. Turner*, 662 F.2d 784, 787 (D.C. Cir. 1980) (per curiam). In short, the FOIA “mandates a strong presumption in favor of disclosure.” *EPIC v. DOJ*, 511 F. Supp. 2d 56, 64 (D.D.C. 2007) (internal citations omitted). Here, the agency provided no support for the exemptions claimed and the presumption of disclosure should apply.

EPIC Appeals the FTC’s Application of Exemption 3

EPIC appeals the FTC’s assertion of FOIA Exemption 3 to withhold an unspecified portion of 42 pages of responsive records. The FTC failed to carry its burden to establish that the exemption applies, offering no explanation to justify its withholding.

The FOIA does not require the production of certain records “specifically exempted from disclosure by statute” if that statute “establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3). Here, the FTC asserts that records responsive to EPIC’s request are exempt from disclosure under Section 21(b) and (f) of the FTC Act, which protects confidential materials received by foreign law enforcement agencies in law enforcement investigations. “Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute’s coverage.” *Ass’n of Retired R.R. Workers, Inc. v. U.S. R.R. Retirement Bd.* 830 F.2d 331, 336 (D.C. Cir. 1987) (quoting *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978)). To assess an agency’s assertion of Exemption 3, the D.C. Circuit uses a two-part test: (1) whether “the statute in question [is] a statute of exemption as contemplated by exemption 3,” and (2) whether “the withheld material satisf[ies] the criteria of the exemption statute.” *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C. Cir. 1990); *CREW v. DOJ*, 160 F. Supp. 3d 226, 236 (D.D.C. 2016). An agency’s “recit[ion of] statutory standards” or “overly vague or sweeping” support “will not . . . carry the government’s burden.” *Larson v. Dep’t of State*, 565 F.3d 857, 864 (D.C. Cir. 2009).

EPIC does not contest that Section 21(b) and (f) of the FTC Act is an Exemption 3 statute. But EPIC contends that the FTC has not shown that any of the 42 pages of records responsive to this request “satisfy the criteria” of Section 21(b) and (f). The FTC has only paraphrased the text of Exemption 3, by stating that the agency was “denying access to *some* responsive records under FOIA Exemption 3” (emphasis added) because they are exempt under Sections 21(b) and (f) of the FTC Act. The FTC also described Section 21, but did not identify the number of pages or any of the specific types of information withheld. A conclusory restatement of an exemption and description of an applicable statute does not satisfy the agency’s obligation to justify its action under the FOIA, thereby failing the second part in the D.C. circuit’s two-part test.

For the foregoing reason, FTC's withholding of portions of the requested record under Exemption 3 must fail.

EPIC's Appeals the FTC's Application of Exemption 5

EPIC appeals the FTC's application of Exemption 5 to the 42 pages of responsive records that the agency withheld in full. The FOIA specifies that certain categories of information may be exempt from disclosure, "[b]ut these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Under the FOIA, the "agency bears the burden of establishing that an exemption applies." *Id.* Here, the FTC has failed to carry its burden to establish that the Exemption 5 applies to any of the 42 pages, offering no support for the assertion that segments of the withheld records fall within attorney work product, deliberative process privilege, and attorney client privileges. The FTC stated that "[s]ome responsive records contain staff analysis, opinions and recommendations" (emphasis added) and that some portions fall within Exemption 5 because they are "deliberative and pre-decisional and are an integral part of the agency's decision making process." Based on the bare, conclusory reasoning the FTC provided for all 42 pages, it is not clear that the records are deliberative and pre-decisional.

Exemption (b)(5) covers "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency..." 5 U.S.C. § 552(b)(5). As a threshold matter a record must be "Inter-Agency or Intra-Agency" record to fall within the Exemption. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 2 (2001); *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 238 (D.D.C. 2013). "Exemption 5, properly construed, calls for 'disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be.'" *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 153 (1975) (internal citations omitted). Here, the FTC asserts the deliberative process privilege, which is intended to "prevent injury to the quality of agency decisions." *Sears, Roebuck & Co.*, 421 U.S. at 151. Specifically, three policies undergird the privilege:

First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that "officials should be judged by what they decided," not for matters they considered before making up their minds.

Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (internal citations omitted).

The agency has a burden of "identify[ing] a 'definable decisionmaking process' to which withheld documents contributed[.]" *Competitive Enter Inst. v. EPA*, 12 F. Supp. 3d 100, 118 (D.D.C. 2014) (emphasis added) (quoting *Access Reports v. DOJ*, 926 F.2d 1192, 1196 (D.C. Cir. 1991). "[I]n order to carry its burden, the agency must describe not only the contents of the document but also enough about its context, viz. the agency's decisionmaking process, to

establish that it is a pre-decisional part thereof.” *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1204 (D.C. Cir. 1991). “A mere recitation of the standard for protection under the deliberative process privilege is not sufficient. Rather, [the agency] must identify what prospective ‘final policy’ the documents predate.” *Heartland All. For Human Needs & Human Rights v. DHS*, No. CV 16-211 (RMC), 2018 WL 647634, at *5 (D.D.C. Jan. 31, 2018).

The agency has failed to satisfy its burden because the FTC provided no evidence to support its deliberative process privilege claim. The agency offered only a bare, conclusory statement to support its claim to Exemption 5 being broadly applied to all 42 pages of responsive records. The FTC did not establish what deliberative process could be implicated by release of the records, or what role that the withheld pages played in that process. Therefore, the FTC failed to support its claim for Exemption 5 and provided no valid reason as why all 42 pages of responsive records should be shielded from public view.

EPIC appeals the FTC’s Application of Exemption 7(A)

EPIC appeals the FTC’s assertion of FOIA Exemption 7(A) to withhold 42 pages of responsive records about communications between the FTC and the Irish DPC. The FTC failed to carry its burden to establish that the exemption applies, having offered no support for its claim that the records were compiled for law enforcement purposes.

Exemption 7(A) of the Freedom of Information Act permits the agency to withhold “records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A). An agency seeking to withhold records under Exemption 7(A) must establish three elements. First, the agency must show that the record was “compiled for law enforcement purposes.” 5 U.S.C. § 552(b)(7); *see John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989) (“Before it may invoke [Exemption 7], the Government has the burden of proving the existence of such a compilation for such a purpose.”); *Pub. Empls. for Env’tl. Responsibility v. U.S. Section, Int’l Boundary and Water Comm’n*, 740 F.3d 195, 202–03 (D.C. Cir. 2014). The D.C. Circuit refers to this as “the threshold requirement of Exemption 7.” *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002). Second, enforcement proceedings must be “pending or reasonably anticipated,” 5 U.S.C. § 552(b)(7)(A). *STS Energy Partners LP v. FERC*, 82 F. Supp. 3d 323, 332 (D.D.C. 2015). Third, the agency must demonstrate such proceedings “would be jeopardized by the premature release” of records at issue. *Id.*

The FTC failed to carry the burden to establish that the 42 pages withheld meet any of the three elements required under Exemption 7(A). EPIC’s FOIA Request described in detail the Irish DPC’s 2011 and 2012 audit of Facebook Ireland and the FTC and Irish DPC’s Memorandum of Understanding to mutually assist and exchange information to protect consumer privacy. The events described in EPIC’s FOIA Request predate the FTC’s March 2018 announcement of an open investigation into Facebook’s privacy practices. Prior to the Cambridge Analytica scandal, the FTC did not launch any open investigations into Facebook for possible violations of the 2011 Consent Decree. The FTC offered no support for the assertion of the exemption. The FTC did not describe whether the records were compiled for law enforcement purposes, state that enforcement proceedings are pending, or demonstrate that a release of information would jeopardize these proceedings. Rather, the agency “merely

paraphrase[ed] the words of the statute.” *Church of Scientology of Cal., Inc.*, 662 F.2d 7 at 787. See also *EPIC v. FBI*, No. 1:14-cv-01311, 2017 WL 680370, at *5 (D.D.C Feb. 21, 2017) (rejecting an agency affidavit as support for the threshold requirement where it “simply asserts, without any elaboration, that there is some unspecified “nexus” between the [requested record] and the agency’s law enforcement.”). For the foregoing reason, the FTC’s withholding under Exemption 7(A) must also fail.

EPIC Appeals the FTC’s Application of Exemption 7(E)

EPIC appeals the FTC’s application of Exemption 7(E) to withhold 42 pages of responsive records about communications between the FTC and the Irish DPC. As described above, the agency must establish that a FOIA exemption applies. An agency may claim Exemption 7(E) for “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). The agency’s invocation of Exemption 7(E) is entitled to deference, but “[s]uch deference does not, however, excuse the requirement that an agency describe its ‘justifications for withholding the information with specific detail.’” *EPIC v. FBI*, No. 235 F. Supp. 3d 207, 213 (D.D.C. 2017) (quoting *ACLU v. DOD*, 628 F.3d 612, 619 (D.C. Cir. 2011)).

Based on the agency’s vague response, there is no evidence that any of the 42 pages of records withheld were compiled for law enforcement purposes. Again, EPIC’s FOIA Request described in detail events that occurred prior to the FTC’s March 2018 announcement of an open investigation into Facebook. Exemption 7(E) requires the agency to describe its justification with specific detail, yet the FTC offered no support for its assertion of the exemption. The FTC solely stated “[s]ome information is exempt from disclosure under FOIA Exemption 7(E)” and provided a generalized description of the exemption. The agency did not identify which pages or portions of pages were exempt, nor did the agency offer any explanation of why Exemption 7(E) applies to the withheld material. For the foregoing reason, the FTC’s withholdings under Exemption 7(E) must also fail and the agency must release the records to EPIC.

EPIC Challenges the FTC’s Failure to Release Reasonably Segregable Material

EPIC also challenges the scope of the Exemptions 3, 5, 7(A), and 7(E) exemptions asserted by the FTC. As with the agency’s assertion of the four exemptions, the FTC entirely failed to justify withholding the 42 pages in their entirety and refusing to release any reasonably segregable portions of the pages.

Even if an agency has properly invoked a FOIA exemption, which EPIC does not concede, the agency must still release any “reasonably segregable portion” of the records requested. 5 U.S.C. § 552(b); *Stolt-Nielsen Transp. Group Ltd v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008); *Oglesby v. United States Dep’t of the Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). The burden is on the agency to “provide a detailed justification for its non-segregability.” *Johnson v. EOUSA*, 310 F.3d 771, 776 (D.C. Cir. 2002) (internal quotation marks omitted). This includes “a statement of [the government’s] reasons” and a “descri[ption of] what proportion of the information in a document is non-exempt and how that material is dispersed throughout the

document.” *Mead Data Cent., Inc. v. Dep’t of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

The FTC made no attempt to explain its decision to withhold 42 pages of responsive records in their entirety. The agency’s letter did not, for instance, provide evidence that any non-exempt material in the withheld records is inextricably entwined with exempt material. The agency did not even address whether there is non-exempt material in the withheld portions of the 42 pages. When EPIC contacted agency counsel to request clarification of the basis of the agency’s determination, the FTC counsel stated that each exemption applied to different portions of the withheld pages, not that the pages were exempt in their entirety. Yet, the FTC counsel refused to inform EPIC over the phone which portions of the 42 pages were subject to the different claimed exemptions. To the extent that the Office of General Counsel finds that Exemptions 3, 5, 7(A), and 7(E) only apply to any part of the withheld pages, the FTC must still release any reasonably segregable portion of those pages. For these reasons set forth above, the FTC is required by the FOIA to release further, reasonably segregable portions of the requested documents.

I certify this explanation is true and correct to the best of my knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi). For the foregoing reasons, the FTC must grant EPIC’s appeal of the agency’s withholding under Exemption 3, 5, 7(A), and 7(E).

Conclusion

Thank you for your consideration of this appeal. I anticipate your determination on our appeal within twenty working days. 5 U.S.C. § 552(a)(6)(A)(ii). For question regarding this appeal, I can be contacted at 202-483-1140 x104 or FOIA@epic.org, cc: Zhou@epic.org.

Respectfully submitted,

/s Enid Zhou

Enid Zhou

EPIC Open Government Counsel

APPENDIX A

VIA EMAIL

May 11, 2018

Sarah Mackey
Chief FOIA Officer
Freedom of Information Act Request
Office of General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Ms. Mackey:

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 related to the Irish Data Protection Commissioner’s (“DPC”) inquiries to the FTC regarding Facebook’s compliance with the 2012 FTC Consent Order.¹

Documents Requested

- (1) Records including emails, communications, and memoranda related to Facebook’s compliance with the 2011 FTC Consent Decree between the agency and the Irish Data Protection Commissioner for its 2011 Audit of Facebook Ireland Ltd. (issued on December 21, 2011);² and
- (2) Records including emails, communications, and memoranda related to Facebook’s compliance with the 2012 FTC Consent Order between the agency and the Irish Data Protection Commissioner for its 2012 Re-Audit of Facebook Ireland Ltd. (issued on September 21, 2012).³

¹ Consent Order, *In the Matter of Facebook, Inc.*, Docket No. C-4365 (Federal Trade Commission July 27, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf> [hereinafter the “2012 FTC Consent Order” or “Final Order”].

² Office of the Data Prot. Comm’r of Ir., Facebook Ireland Ltd: Report of Audit (2011), <https://www.dataprotection.ie/documents/facebook%20report/final%20report/report.pdf> [hereinafter “2011 DPC Audit”].

³ Office of the Data Prot. Comm’r of Ir., Facebook Ireland Ltd: Report of Re-Audit (2012), https://dataprotection.ie/documents/press/Facebook_Ireland_Audit_Review_Report_21_Sept_2012.pdf [hereinafter “2012 DPC Audit”].

Background

From 2009 to 2011, EPIC and a coalition of consumer organizations pursued several complaints with the FTC, alleging that Facebook had changed user privacy settings and disclosed the personal data of users to third parties without the consent of users.⁴ In response to an extensive complaint from EPIC and other consumer privacy organizations, the FTC launched an investigation and issued a Preliminary Order against Facebook in 2011 and then a Final Order in 2012.⁵ In the press release accompanying the settlement, the FTC stated that Facebook “deceived consumers by telling them they could keep their information on Facebook private, and then repeatedly allowing it to be shared and made public.”⁶

The 2012 FTC Consent Order bars Facebook from making any future misrepresentations about the privacy and security of a user’s personal information, requires Facebook to obtain a user’s express consent before enacting changes its data disclosure practices, and requires Facebook to have an independent privacy audit every two years for the next twenty years.⁷

In the same year that the FTC issued a Preliminary Order against Facebook, the Austrian privacy group “Europe-v-Facebook” and other parties filed formal complaints to the Office of the Data Protection Commissioner (“DPC”) addressing various issues including data access by third party applications.⁸ Europe-v-Facebook’s complaint specifically described (1) that third party applications could retrieve data from “friends” of users who install the application without their friends’ consent and (2) that it is unclear which applications receive this data and whether they would adhere to data protection regulations.⁹ The DPC then initiated an audit of Facebook Ireland to assess its compliance with both Irish Data Protection Law and European Union (“EU”) law.

The 2011 DPC Audit builds on the work by other regulators, including the FTC.¹⁰ Specifically, the 2011 DPC Audit examined the privacy governance structure within Facebook Ireland and stated that the 2011 Preliminary Order “should ensure that Facebook will adopt a rigorous approach to privacy and data protection issues” and that the focus of the audit was on possible changes needed to ensure compliance with Irish and EU data protection law.¹¹

⁴ *In re Facebook*, EPIC.org, <https://epic.org/privacy/inrefacebook/>.

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

⁶ Press Release, Federal Trade Commission, 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>.

⁷ *Id.*

⁸ *See e.g.*, Compl. Against Facebook Ireland, Ltd. – 13 “Applications”, Europe-v-Facebook to Office of the Data Protection Commissioner (Aug. 18, 2011), http://www.europe-v-facebook.org/Complaint_13_Applications.pdf.

⁹ *Id.*

¹⁰ 2011 DPC Audit, *supra* note 2 at 3.

¹¹ *Id.* at 4.

In the 2011 DPC Audit, the Data Protection Commissioner made several recommendations to Facebook Ireland, including new safeguards concerning third party applications. The DPC found that the proactive monitoring and action against third party applications who breach platform policies to be insufficient to ensure users that their data is safe from third party applications.¹² Moreover, the DPC found that the “reliance on developer adherence to best practice or stated policy in certain cases” is insufficient to ensure security in user data.¹³ Facebook Ireland responded to this recommendation by stating that they have proactive auditing and automated tools “not just to detect abuse . . . but to prevent it in the first place.”¹⁴

In 2012, the DPC again audited Facebook Ireland to determine whether Facebook implemented the DPC’s recommendations from the previous audit. The DPC found a “satisfactory response” from Facebook Ireland regarding its additional steps in preventing third party applications from accessing unauthorized user information.¹⁵ Following the 2012 DPC Audit, then Deputy Commissioner Gary Davis stated “[i]t is also clear that ongoing engagement with [Facebook Ireland] will be necessary as it continues to bring forward new ways of serving advertising to users and retaining users on the site.”¹⁶

Following the 2012 DPC Audit, the FTC and the DPC signed a Memorandum of Understanding to mutually assist and exchange information to enforce compliance with the privacy laws in each respective country.¹⁷ The Memorandum of Understanding requires that both the FTC and the DPC “share information, including complaints and other personally identifiable information” that they believe would be relevant to investigation or enforcement proceedings and also “coordinate enforcement against cross-border [privacy violations] that are priority issues” for both countries.¹⁸

In May 2014, Facebook announced plans to modify its platform to restrict access to friends data by 2015.¹⁹ At that time, DPC regulator Billy Hawkes stated that Facebook “is in

¹² *Id.* at 97.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 2012 DPC Audit, *supra* note 3 at 7–8.

¹⁶ Press Release, Data Protection Comm’r, Report of Review of Facebook Ireland’s Implementation of Audit Recommendations Published – Facebook Turns Off Tag Suggest in the EU (Sept. 9, 2012), https://www.dataprotection.ie/docs/21/09/12_Press_Release_-_Facebook_Ireland_Audit_Review_Report/1233.htm.

¹⁷ Memorandum of Understanding Between the United States Federal Trade Commission and the Office of the Data Protection Commissioner of Ireland on Mutual Assistance in the Enforcement of Laws Protecting Personal Information in the Private Sector, Ir.-U.S., June 26, 2013, https://www.ftc.gov/system/files/documents/cooperation_agreements/130627usirelandmouprivacyprotection.pdf [hereinafter “Memorandum of Understanding”].

¹⁸ *Id.* at 3–4.

¹⁹ Josh Constantine & Frederic Lardinois, *Everything Facebook Launched at F8 and Why*, TechCrunch (May 2, 2014), <https://techcrunch.com/2014/05/02/f8/>.

compliance with its obligations under Irish and European data-protection law.”²⁰ Third party applications, however, did not have to delete the data they already obtained prior to the 2015 platform upgrade.²¹

Cambridge Analytica

Two years after the DPC found a “satisfactory response” from Facebook Ireland regarding third party applications, a third party application harvested the data of 50 million Facebook users and transferred the data to a political data analytics firm — Cambridge Analytica.

On March 16, 2018, Facebook admitted to the unlawful transfer of 50 million user profiles to the data mining firm Cambridge Analytica.²² Relying on the data provided by Facebook, a Cambridge University researcher collected the private information of approximately 270,000 users and their extensive friend networks under false pretenses as a research-driven application.²³ The data from 50 million profiles was subsequently transferred to Cambridge Analytica, a political consulting firm hired by President Trump’s 2016 election campaign that offered services that could identify personalities of voters and their voting behavior.²⁴ Cambridge Analytica engaged in the illicit collection of Facebook user data from 2014 to 2016.²⁵ Facebook discovered this violation in 2015 but did not inform the public until this year.²⁶

Following the Cambridge Analytica scandal, Irish Data Protection Commissioner Helen Dixon stated that she “is following up with Facebook Ireland” to ensure its oversight for app developers and third parties’ use of data is effective.²⁷ Likewise, the FTC recently announced that it has an open investigation into Facebook’s privacy practices.²⁸ According to Acting Director

²⁰ Derek Scally, *Ireland Has Failed to Regulate Facebook on Behalf of Europe*, Irish Times (Mar. 24, 2018), <https://www.irishtimes.com/opinion/ireland-has-failed-to-regulate-facebook-on-behalf-of-europe-1.3437931>.

²¹ Josh Constine, *Facebook is Shutting Down its API for Giving Your Friend’s Data to Apps*, TechCrunch (Apr. 28, 2015), <https://techcrunch.com/2015/04/28/facebook-api-shut-down/>.

²² Press Release, Facebook, *Suspending Cambridge Analytica and SCL Group from Facebook* (Mar. 16, 2018), <https://newsroom.fb.com/news/2018/03/suspending-cambridge-analytica/> [hereinafter “Facebook Press Release”].

²³ *Id.*

²⁴ Matthew Rosenberg, Nicholas Confessore, & Carole Cadwalldr, *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. Times (Mar. 17, 2018), <https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html>.

²⁵ *Id.*

²⁶ Facebook Press Release, *supra* note 20.

²⁷ Conor Humphries, *Facebook’s Lead EU Regulator ‘Following Up’ on Third Party Data Use*, Reuters (Mar. 20, 2018), <https://www.reuters.com/article/us-facebook-cambridge-analytica-ireland/facebook-lead-eu-regulator-following-up-on-third-party-data-use-idUSKBN1GW1FO>.

²⁸ Press Release, Fed. Trade Comm’n, *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>.

Tom Pahl, “[c]ompanies who have settled previous FTC actions must also comply with FTC order provisions imposing privacy and data security requirements.”²⁹

Request for Expedition

EPIC is entitled to expedited processing of this request under the FOIA and the FTC’s FOIA regulations. 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 communications with the DPC regarding Facebook’s compliance with the 2012 Consent Order. It is undisputed that the FTC works with foreign consumer protection authorities and often cooperates with foreign authorities on enforcement and policy matters.³⁰ Specifically, the FTC and the DPC’s Memorandum of Understanding to mutually exchange information for the purpose of enforcing privacy laws is applicable to the DPC’s “ongoing engagement” with Facebook Ireland.³¹

The “urgency” to inform the public about this activity is clear given that Facebook violated the terms of its 2012 Consent Order by allowing problematic and illegal data collection via third party applications. The Cambridge Analytica whistleblower that caused media headlines described exactly what was described in Europe-v-Facebook’s complaint to the Irish DPC in 2011 regarding access of user data through third party applications. Release of this information is urgent because Mark Zuckerberg refused to testify publicly before the U.K. parliament to explain how the information of 50 million users ended up in the possession of a foreign data analysis firm.³² Moreover, the British Information Commissioner has called for the release of additional information and executed a warrant to inspect the Cambridge Analytica office.³³

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).

²⁹ *Id.*

³⁰ See *International Consumer Protection*, Fed. Trade Comm’n, <https://www.ftc.gov/policy/international/international-consumer-protection/>.

³¹ See Memorandum of Understanding, *supra* note 17.

³² Alex Hern & Dan Sabbagh, *Zuckerberg’s Refusal to Testify Before UK MPs ‘Absolutely Astonishing’*, The Guardian (Mar. 27, 2018), <https://www.theguardian.com/technology/2018/mar/27/facebook-mark-zuckerberg-declines-to-appear-before-uk-fake-news-inquiry-mps>.

³³ Statement, Information Commissioner’s Office, ICO Statement: Investigation Into Data Analytics For Political Purposes (Mar. 19, 2018), <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/03/ico-statement-investigation-into-data-analytics-for-political-purposes/>.

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my 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(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 these 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). As previously stated, the subject of this request self-evidently concerns the FTC’s role in consulting with the DPC when the office was conducting both the 2011 DPC Audit and 2012 DPC Audit.

On the second factor, disclosure “is likely to contribute to an understanding of these operations or activities” because Facebook’s compliance with the 2012 Consent Order has a direct impact on its subsidiaries abroad. 16 C.F.R. § 4.8(2)(i)(B). Facebook Ireland is responsible for data processing activities and data protection for all Facebook users outside of the U.S. and Canada.³⁴ Facebook’s Terms of Service applies to all of its users, but depending on where the user resides, the contract that governs these terms are either between Facebook, Inc. or Facebook

³⁴ Press Release, Data Protection Comm’r, Report of Data Protection Audit of Facebook Ireland Published (Dec. 21, 2011), https://www.dataprotection.ie/docs/21/12/11_Press_Release_-_Report_of_Data_Protection_Audit_of_/1175.htm.

Ireland, Ltd.³⁵ Large U.S. companies like Facebook, Google, Twitter, and LinkedIn have their European headquarters in Ireland. Irish regulators have the lead responsibility for regulating these technology companies to comply with EU law, which includes contacting the foreign regulators, such as the FTC, on international consumer protection matters.

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.³⁶ EPIC consistently publishes critical documents obtained through the FOIA and through litigation on its robust website for educational purposes.³⁷ Moreover, EPIC publishes an award-winning email and online newsletter that always highlights critical documents obtained through the FOIA.³⁸

On the fourth factor, the disclosure will provide a “significant” contribution to public understanding. 16 C.F.R. § 4.8(2)(i)(D). The release of this information would significantly contribute to the public understanding of the FTC’s techniques for cross-border law enforcement, namely, when foreign governments raise questions about a company’s compliance with the FTC’s orders. Furthermore, the public has a right to know FTC responds to the concerns that Facebook has violated the FTC’s consent order.

(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 that there is significant public interest in the requested records.

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

³⁵ *Statement of Rights and Responsibilities*, Facebook (Jan. 30, 2015), <https://www.facebook.com/terms.php> (Section 18.1 states: “If you are a resident of or have your principal place of business in the US or Canada, this Statement is an agreement between you and Facebook, Inc. Otherwise, this Statement is an agreement between you and Facebook Ireland Limited.”).

³⁶ *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

³⁷ EPIC.org, <https://www.epic.org/>.

³⁸ *EPIC Alert*, EPIC.org, <https://www.epic.org/alert/>.

Conclusion

Thank you for your consideration of this request. I anticipate your determination on our 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 I can be contacted at 202-483-1140 x104 or Zhou@epic.org, cc: FOIA@epic.org.

Respectfully submitted,

/s Enid Zhou

Enid Zhou

EPIC Open Government Fellow

/s Sam Lester

Sam Lester

EPIC Consumer Privacy Fellow

APPENDIX B



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

AUG 24 2018

Enid Zhou
EPIC
1718 Connecticut Ave NW, Suite 200
Washington, DC 20009

Re: FOIA-2018-00912
Facebook

Dear Ms. Zhou:

This is in response to your request dated May 11, 2018, under the Freedom of Information Act seeking access to:

- (1) Records including emails, communications, and memoranda related to Facebook's compliance with the 2011 FTC Consent Decree between the agency and the Irish Data Protection Commissioner for its 2011 Audit of Facebook Ireland Ltd. (issued on December 21, 2011); and
- (2) Records including emails, communications, and memoranda related to Facebook's compliance with the 2012 FTC Consent Order between the agency and the Irish Data Protection Commissioner for its 2012 Re-Audit of Facebook Ireland Ltd. (issued on September 21, 2012).

In accordance with the FOIA and agency policy, we have searched our records as of May 11, 2018, the date we received your request in our FOIA office.

We have located responsive records. I am granting partial access to the accessible records. Portions of these pages fall within one or more of the exemptions to the FOIA's disclosure requirements, as explained below.

I am denying access to some responsive records under FOIA Exemption 3, 5 U.S.C. § 552(b)(3), because they are exempt from disclosure by another statute. Specifically, Sections 21(b) and (f) provide that the FTC may not disclose any material obtained from a foreign law enforcement agency or other foreign government agency, if the foreign law enforcement agency or other foreign government agency has requested confidential treatment, or has precluded such disclosure under other use limitations, as a condition of providing the material.

Some responsive records contain staff analyses, opinions, and recommendations. Those portions are deliberative and pre-decisional and are an integral part of the agency's decision making process. They are exempt from the FOIA's disclosure requirements by FOIA Exemption 5, 5 U.S.C. § 552(b)(5). *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

Some records are exempt from disclosure under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), because disclosure of that material could reasonably be expected to interfere with the conduct of the Commission's law enforcement activities. See *Robbins Tire & Rubber Co. v. NLRB*, 437 U.S. 214 (1978).

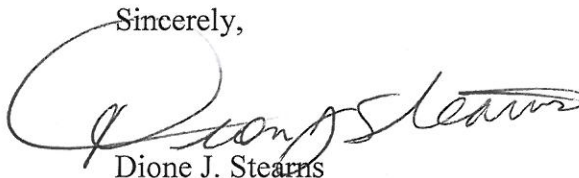
Some information is exempt from disclosure under FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E). Exemption 7(E) protects information that would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. See *Foster v. DOJ*, 933 F. Supp. 687(E.D. Mich. 1996).

If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, or via email at FOIAAppeal@ftc.gov, within 90 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

You also may seek dispute resolution services from the FTC FOIA Public Liaison Richard Gold via telephone at 202-326-3355 or via e-mail at rgold@ftc.gov; or from the Office of Government Information Services via email at ogis@nara.gov, via fax at 202-741-5769, or via mail at Office of Government Information Services (OGIS), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Kamay Lafalaise at 202-326-3780.

Sincerely,

A handwritten signature in black ink, appearing to read "Dione J. Stearns". The signature is written in a cursive style with a large, looping initial "D".

Dione J. Stearns
Assistant General Counsel

APPENDIX C



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Enid Zhou
EPIC
1718 Connecticut Ave NW, Suite 200
Washington, DC 20009

MAY 29 2018

Re: FOIA-2018-00912
Facebook

Dear Ms. Zhou:

On May 11, 2018 we received your request dated May 11, 2018 under the Freedom of Information Act seeking access to:

- (1) Records including emails, communications, and memoranda related to Facebook's compliance with the 2011 FTC Consent Decree between the agency and the Irish Data Protection Commissioner for its 2011 Audit of Facebook Ireland Ltd. (issued on December 21, 2011); and
- (2) Records including emails, communications, and memoranda related to Facebook's compliance with the 2012 FTC Consent Order between the agency and the Irish Data Protection Commissioner for its 2012 Re-Audit of Facebook Ireland Ltd. (issued on September 21, 2012).

In that request, you asked that we expedite our review of this matter.

We are granting your request for expedited treatment because we have found that you have met the "compelling need" standard by establishing that you are a "person primarily engaged in disseminating information," and by demonstrating that an "urgency to inform the public concerning actual or alleged Federal Government activity" exists. *See* 5 U.S.C. § 552 (a)(6)(E)(v).

In your request, you also asked for a public interest fee waiver. We are granting that request.

If you have any questions about the way we are handling your request or about our FOIA regulations or procedures, please contact Kamay Lafalaise at 202-326-3780.

Sincerely,

A handwritten signature in blue ink, reading "Dione J. Stearns", is written over the word "Sincerely,".

Dione J. Stearns
Assistant General Counsel

APPENDIX D



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

JUN 13 2018

Enid Zhou
EPIC
1718 Connecticut Ave NW, Suite 200
Washington, DC 20009

RE: FOIA-2018-00912
Facebook

Dear Ms. Zhou:

On May 11, 2018 we received your request dated May 11, 2018 under the Freedom of Information Act seeking access to:

(1) Records including emails, communications, and memoranda related to Facebook's compliance with the 2011 FTC Consent Decree between the agency and the Irish Data Protection Commissioner for its 2011 Audit of Facebook Ireland Ltd. (issued on December 21, 2011); and

(2) Records including emails, communications, and memoranda related to Facebook's compliance with the 2012 FTC Consent Order between the agency and the Irish Data Protection Commissioner for its 2012 Re-Audit of Facebook Ireland Ltd. (issued on September 21, 2012).

This letter is to inform you that we will be unable to respond to your request within the statutory 20-business day deadline as codified in 5 U.S.C. § 552(a)(6)(A)(i).

The FOIA, as amended in 2002, allows for an extension of the 20-day deadline if one of three types of "unusual circumstances" exist. *See* 5 U.S.C. § 552(a)(6)(B)(iii). Your request falls under the following circumstances:

- (1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
- (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; and
- (3) The need for consultation, which shall be conducted with all practicable speed, with another agency or two or more agency components having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

You may seek dispute resolution services from the FTC FOIA Public Liaison Richard Gold via telephone at 202-326-3355 or via e-mail at rgold@ftc.gov; or from the Office of Government Information Services via e-mail at ogis@nara.gov, via fax at 202-741-5769, or via mail at Office of Government Information Services (OGIS), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740.

We are continuing to process your request at this time. If you should have any questions regarding your request, or if you would like to narrow your request to reduce the necessary response time, please contact me at 202-326-3780.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Lafalaise', written in a cursive style.

Kamay Lafalaise
Attorney