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November 18, 2013

VIA FAX (202) 326-2477

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

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

Dear FOIA Officer:

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”).

As detailed below, EPIC seeks agency records concerning the FTC’s investigation into Facebook’s proposed changes to the Statements of Rights and Responsibilities and the Data Use Policy regarding the use of the images and names of Facebook users.

Factual Background

The Electronic Privacy Information Center (“EPIC”) is a public interest research center located in Washington, D.C. EPIC focuses on emerging privacy and civil liberties issues and is a leading consumer advocate before the FTC. EPIC has a particular interest in protecting consumer privacy, and has played a leading role in developing the authority of the FTC to address emerging privacy issues and to safeguard the privacy rights of consumers.¹

¹ See, e.g., Letter from EPIC Executive Director Marc Rotenberg to FTC Commissioner Christine Varney, EPIC (Dec. 14, 1995) (urging the FTC to investigate the misuse of personal information by the direct marketing industry), http://epic.org/privacy/intemet/ftc/ftc_letter.html; *DoubleClick, Inc.*, FTC File No. 071-0170 (2000) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/intemet/ftc/DCLK_complaint.pdf; *Microsoft Corporation*, FTC File No. 012-3240 (2002) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/consumer/MS_complaint.pdf; *Choicepoint, Inc.*, FTC File No. 052-3069 (2004) (Request for Investigation and for Other Relief), <http://epic.org/privacy/choicepoint/fcaltr12.16.04.html>.

On July 27, 2012, the Commission entered into a consent order with Facebook regarding violations of Section 5 of the FTC Act.² The settlement followed a complaint by EPIC,³ and established new privacy safeguards for Facebook users. The settlement prohibits Facebook from misrepresenting the extent to which it maintains the privacy or security of covered information.⁴ Additionally, prior to any sharing of users' personal information with a third party, Facebook must make a clear and prominent disclosure and obtain the affirmative express consent of its users.⁵

On August 29, 2013, Facebook proposed new changes that would allow Facebook to routinely use the images and names of Facebook users for commercial advertising without consent.⁶ Under the original Statement of Rights and Responsibilities, Facebook said to users:

You can use your privacy settings to limit how your name and profile picture may be associated with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. You give us permission to use your name and profile picture in connection with that content, subject to the limits you place.⁷

Under the Proposed Statement of Rights and Responsibilities, Facebook planned to say to users:

You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you.⁸

Facebook also proposed to dramatically expand the use of personal information for advertising purposes. Originally, the Facebook Data Use Policy said:

We do not share any of your information with advertisers (unless, of course, you give us permission). As described in this policy, we may share your information when we have removed from it anything that personally identifies you or combined it with other information so that it no longer personally identifies you. We use the information we receive, including the information you provide at

² See *Facebook, Inc.*, FTC Docket No. C-4365 (2012) (Decision and Order), <http://www.ftc.gov/os/caselist/0923184/120810facebookdo.pdf> [hereinafter *FTC Facebook Consent Order*].

³ See *Facebook, Inc.*, (2009) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf>; *Facebook, Inc.*, (2010) (EPIC Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief); *Facebook, Inc.*, (2010) (EPIC Complaint, Request for Investigation, Injunction, and Other Relief), https://epic.org/privacy/facebook/EPIC_FTC_FB_Complaint.pdf

⁴ *FTC Facebook Consent Order* § I.

⁵ *FTC Facebook Consent Order*, § II.

⁶ See *Proposed Statement of Rights and Responsibilities*, FACEBOOK, https://fbcdn-dragon-a.akamaihd.net/hphotos-ak-prn1/851575_209563965879553_209116475_n.pdf

⁷ *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last visited Sept. 4, 2013).

⁸ *Proposed Statement of Rights and Responsibilities*, FACEBOOK, https://fbcdn-dragon-a.akamaihd.net/hphotos-ak-prn1/851575_209563965879553_209116475_n.pdf.

registration or add to your account or timeline, to deliver ads and to make them more relevant to you. This includes all of the things you share and do on Facebook, such as the Pages you like or key words from your stories, and the things we infer from your use of Facebook.⁹

Under the Proposed Data Use Policy, Facebook planned to say to users:

... we may use all of the information we receive about you to serve ads that are more relevant to you. For example, this includes:

- information you provide at registration or add to your account or timeline,
- things you share and do on Facebook, such as what you like, and your interactions with advertisements, partners, or apps,
- keywords from your stories, and
- things we infer from your use of Facebook.¹⁰

EPIC, joined by several consumer and privacy organizations, wrote to the Commission, arguing that Facebook's changes violated users' privacy and the terms of the 2012 settlement.¹¹ As EPIC and others explained,

Facebook's proposed policy changes violate the terms of the Order. Under the proposed policy, Facebook may create advertisements using an individual's "name, and profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand [they] like) served or enhanced by [Facebook]." By associating a user's "name, profile picture, content, and information" with commercial content, Facebook creates new advertisements. These advertisements represent "nonpublic user information" because they consist of information that had previously been restricted by the user's privacy settings, specifically the user's choice whether or not to disclose information for a particular purpose. Furthermore, these advertisements are disclosed to "third parties": the user's Facebook contacts. Thus, Facebook's proposed policy violates the Order's prohibition on sharing information without user consent.¹²

Senator Ed Markey sent a similar letter, stating that Facebook's changes "raise[] a number of questions about whether Facebook is improperly altering its privacy policy without proper user consent and, if the changes go into effect, the degree to which Facebook users will

⁹ *Data Use Policy*, FACEBOOK, https://www.facebook.com/full_data_use_policy

¹⁰ *Proposed Data Use Policy*, FACEBOOK, https://fbcdn-dragon-a.akamaihd.net/hphotos-ak-prn1/851585_445264755581605_1677569786_n.pdf.

¹¹ Letter from EPIC, to the Federal Trade Commission (Sep. 4, 2013), *available at* <https://epic.org/privacy/ftc/Privacy-Grps-FTC-tr-9-13.pdf>.

¹² *Id.*

lose control over their personal information.”¹³ Facebook temporarily suspended the changes, and the New York Times reported that the Commission had begun an investigation.¹⁴

On November 14, 2013, Facebook announced that its changes regarding the use of consumer’s content in advertising would begin to take effect.¹⁵ The New York Times again reported on the Commission’s enforcement efforts, stating that the agency “raised no strong objections.”¹⁶

Documents Requested

EPIC requests copies of the following agency records in possession of the FTC:

1. All records related to the Commission’s investigation into Facebook’s September 2013 changes regarding the use of user content in commercial messages.

Request for Expedited Processing

This request warrants expedited processing because it is made by “a person primarily engaged in disseminating information ...” and it pertains to a matter about which there is an “urgency to inform the public about an actual or alleged federal government activity.”¹⁷

The FOIA provides that agencies must establish procedures for expedited processing of a FOIA request where the requester “demonstrates a compelling need” for the information. §552(a)(6)(E)(i)(I). “Compelling need” can be demonstrated in two ways: either the requester can show “that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to impose an imminent threat to the life or physical safety of an individual,” or “with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity. §552(a)(6)(E)(v)(I)-(II).

EPIC satisfies the requirement that there is an urgency to inform the public concerning actual or alleged Federal Government activity. The D.C. Circuit has established a three-part test for this requirement. First, a court must consider “whether the request concerns a matter of current exigency to the American public;” second, “whether the consequences of delaying a response would compromise a significant recognized interest,” and finally, “whether the request concerns federal government activity.” *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

¹³ Letter from Sen. Ed Markey, to Edith Ramirez, Chair of the Federal Trade Commission (Sep. 11, 2013), *available at* <http://www.markey.senate.gov/record.cfm?id=345696>.

¹⁴ Vinu Goel and Edward Wyatt, *Facebook Privacy Change Is Subject of F.T.C. Inquiry*, N.Y. TIMES, Sep. 12, 2013, at B1. *Available at* <http://www.nytimes.com/2013/09/12/technology/personaltech/ftc-looking-into-facebook-privacy-policy.html>.

¹⁵ *Updates to Data Use Policy, Statement of Rights and Responsibilities Take Effect*, FACEBOOK, Nov. 15, 2013, at <https://www.facebook.com/notes/10153503594325301>

¹⁶ Vinu Goel, *Facebook Reasserts Posts Can Be Used to Advertise*, N.Y. TIMES, Nov. 16, 2013, at B1. *Available at* <http://www.nytimes.com/2013/11/16/technology/facebook-amends-privacy-policies.html>.

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

The D.C. District Court uses several factors to assess whether a matter is of “current exigency to the American public.” In *Edmonds v. F.B.I.*, CIV.A. 02-1294 (ESH), 2002 WL 32539613 (D.D.C. Dec. 3, 2002), the court found that where the matter was covered in the news media and had attracted the attention of members of Congress, the requester had “amply demonstrated” her right to expedited processing. The Commission’s investigation of Facebook’s compliance with the July 2012 Consent Order has attracted both media and Congressional attention. It has been the subject of a series of articles in the *New York Times*, and has been reported in *The Washington Post*, the *Wall Street Journal*, and *Reuters*.¹⁸ Furthermore, it has attracted the attention of Senator Ed Markey, who urged the Commission to “pay close attention to any change that could harm our nation’s young people.”¹⁹

The inquiry into “whether the consequences of delaying a response would compromise a significant recognized interest” is closely related to the “current exigency” inquiry. Where the court finds a “matter of current exigency,” and the public lacks full information about the matter, “it is the compelling need for such public understanding that drives the urgency of the request.” *Bloomberg, L.P. v. United States Food & Drug Admin.*, 500 F. Supp. 2d 371, 378 (S.D.N.Y. 2007). Delaying a response in this matter would compromise the public’s well-established interest in the right to privacy. Approximately 128 million people in the United States visit facebook.com every day – about one out of three people.²⁰

Finally, EPIC is “primarily engaged in disseminating information.” This has been established explicitly in D.C. District Court (“[T]he Court concludes that EPIC is indeed “primarily engaged in disseminating information” for the purposes of expediting the request. *Cf. EPIC v. Dep’t of Defense*, 241 F.Supp.2d 5, 11 [D.D.C.2003] [finding that EPIC is a “representative of the news media” for FOIA fee waiver request purposes because it “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience”]).²¹

Request for “News Media” Fee Status

EPIC is a “representative of the news media” for fee waiver purposes.²² Based on our status as a “news media” requester, we are entitled to receive the requested record with only duplication fees assessed. Further, because disclosure of this information will “contribute

¹⁸ See, e.g., Hayley Tsukayama, *FTC evaluating Facebook policy changes*, Wash. Post, Sep. 11, 2013, at http://www.washingtonpost.com/business/technology/ftc-evaluating-facebook-policy-changes/2013/09/11/daldb8ba-1b3f-11e3-8685-5021e0c41964_story.html; Vindu Goel and Edward Wyatt, *Facebook Privacy Change Is Subject of F.T.C. Inquiry*, N.Y. TIMES, Sep. 12, 2013, at B1; Vindu Goel, *Facebook Reasserts Posts Can Be Used to Advertise*, N.Y. TIMES, Nov. 16, 2013, at B1.

¹⁹ Letter from Sen. Ed Markey, to Edith Ramirez, Chair of the Federal Trade Commission (Sep. 11, 2013), available at <http://www.markey.senate.gov/record.cfm?id=345696>.

²⁰ Jennifer Saba, *Facebook reveals daily users for U.S. and UK, data aimed at advertisers*, REUTERS, Aug. 14, 2013, at <http://in.reuters.com/article/2013/08/13/facebook-users-idINDEE97C0DC20130813>.

²¹ *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

²² *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

significantly to public understanding of the operations or activities of the government,” any duplication fees should be waived.

This FOIA request involves the right of a person to control the use of their image for commercial purposes - the cornerstone of modern privacy law. Responsive documents will hold a great informative value regarding the efforts of the government agency most responsible for the protection of internet users to keep users safe from commercial exploitation.

Conclusion

Thank you for your consideration of this request. As provided in 16 C.F.R. § 4.11(a)(E), we will anticipate your determination on our request for expedited processing within ten (10) business days.

Respectfully Submitted,

/s/ Julia Horwitz

Julia Horwitz

EPIC Open Government Coordinator

/s/ David Jacobs

David Jacobs

EPIC Consumer Privacy Counsel