



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

Office of the General Counsel

September 11, 2013

Duffy Carolan
Davis, Wright, Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 64111-6533

Re: Freedom of Information Act Appeal (FOIA Request Nos. 2013-00859/00860)

Dear Ms. Carolan:

This letter responds to your August 8, 2013 letter appealing the FTC's partial denials of FOIA Request Nos. 2013-00859/00860, submitted by your client Matthew Drange and the Center for Investigative Reporting/*The Bay Citizen*.

As reflected in a May 13, 2013 letter from Dione Stearns, Assistant General Counsel, Mr. Drange agreed to amend the underlying requests to focus only on FTC records "related solely to the Google 'search' investigation, FTC Matter Number 1110163." As amended, FOIA-2013-00859 sought internal FTC correspondence and external correspondence between the FTC and the Department of Justice regarding the FTC's recently-closed Google search investigation, while FOIA-2013-00860 sought internal FTC correspondence and external correspondence between the FTC and the Senate Judiciary Committee regarding the Google search investigation.

By later dated July 16, 2013, the FTC's FOIA Unit responded to FOIA-2013-00859. The Unit located 37 pages of responsive records and released some of them, while withholding others under the deliberative process privilege of FOIA Exemption 5, 5 U.S.C. § 552(b)(5). After the Unit located almost 1,200 pages of responsive records for FOIA-2013-00860, it responded over three letters dated May 28, July 9, and July 26, 2013. Again, the Unit released some of these records while withholding others, citing FOIA Exemptions 3, 5, 7(A), and 7(C), 5 U.S.C. §§ 552(b)(3), (b)(5), (b)(7)(A), (b)(7)(C). With respect to Exemptions 3 and 5, the FOIA Unit specifically cited section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f), and the deliberative process privilege. Your August 8 appeal letter requested that the FTC fully release these withheld or partially-withheld responsive documents.

Regarding FOIA-2013-00860, your appeal points out that FOIA Exemption 5 generally does not exempt communications with Congress, which is not an "agency" for purposes of the "intra-agency" and "inter-agency" communications protected under the exemption. I agree. The FTC has released, or will release, its responsive records of final communications with Congress, including Senate Judiciary Committee staff.

On the other hand, most of the material withheld under Exemption 5 pertained to entirely deliberative staff recommendations regarding how best to respond to official congressional inquiries (“Questions for the Record”) about the agency’s Google search investigation. While the FTC will release its final responses provided to Congress as well as some additional segregable factual material, it need not release the draft responses prepared by agency staff. *See, e.g., Judicial Watch, Inc. v. DOJ*, 800 F. Supp. 2d. 202, 218-219 (D.D.C. 2011) (deliberative process privilege protects records created in order to respond to Congressional inquiries related to the dismissal of a particular case); *Judicial Watch, Inc. v. DHS*, 736 F. Supp. 2d. 202, 208-09 (D.D.C. 2010) (deliberative process privilege protects agency staff’s email recommendations and evaluations for responding to Congressional inquiries regarding a specific controversial case); *Judicial Watch, Inc. v. DOJ*, 306 F. Supp. 2d 58, 71-72 (D.D.C. 2004) (deliberative process privilege protects internal agency emails created to prepare upcoming congressional testimony). While some of these deliberations post-date the agency’s decision to close the Google search investigation, they were “generated as part of a continuous process of agency decision making, viz., how to respond to on-going inquiries, [so] they are pre-decisional and, given their deliberative nature . . . , they were properly withheld under Exemption 5.” *Judicial Watch*, 736 F. Supp. 2d. at 208. Therefore, the FTC will continue to withhold these deliberative records.

With respect to the withholding of other documents created *before* the close of the Commission’s Google search investigation, many of these records concern the agency’s internal discussions regarding the progress of the investigation. These records are clearly protected by the deliberative process privilege, and many are also protected by the attorney work product doctrine (and thus protected by Exemption 5), which applies to documents prepared by attorneys in contemplation of litigation, *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947), including documents prepared in connection with enforcement investigations. *See Exxon Corp. v. DOE*, 585 F. Supp. 690, 700 (D.D.C. 1983). For example, FOIA-2013-00859 requested FTC and Department of Justice attorney communications regarding specific administrative investigations and contemplated administrative litigation involving Google. While the deliberative process privilege does not protect segregable and non-deliberative factual material, the attorney work product doctrine “simply does not distinguish between factual and deliberative material.” *Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, 371 (D.C. Cir. 2005). However, I am directing the FOIA Unit to release some additional records that are neither deliberative nor created in contemplation of litigation.

Finally, your August 8 letter asserts that the FTC cannot continue to protect the identities of various entities under FOIA exemptions 3 or 7(C). Upon further reflection, I agree that Exemption 3 and section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f), do not protect the mere identities of the large corporate entities that submitted information to the FTC in this investigation. However, Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), protects the identity of any confidential source (including corporate entities) that provided information to the agency in connection with an investigation. I am therefore directing the FOIA Unit to release records that identify Google (the publicly-identified target of this investigation) as a source of information, but the FTC will continue to withhold records that would identify other, confidential sources.

In addition, individual submitters’ (and some FTC staff members’) identities will continue to be withheld under Exemption 7(C) Although your letter complained that “the agency

must balance privacy interests with the public interest when deciding whether to redact a document under Exemption 7(C),” the courts have “consistently supported nondisclosure of names or other information identifying individuals appearing in law enforcement records, including investigators, suspects, witnesses, and informants. . . . [W]e [have] adopted a *categorical rule* permitting an agency to withhold information identifying private citizens mentioned in law enforcement records, unless disclosure is ‘necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity.’” *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003) (emphasis added). In this case, there is no evidence or allegation that any agency staff members have engaged in illegal activity. Moreover, even if there were such allegations, they would not apply to *private individuals* who have cooperated with the FTC’s investigation. The FTC will continue to withhold these individuals’ identities.

After receiving this remand determination, the FOIA Unit will continue to process your request and will complete its review as quickly as possible. If you are not satisfied with the FOIA Unit’s final response, you may appeal once again 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, within 30 days of receiving the FOIA Unit’s response. If you do submit another appeal, please enclose a copy of your original request and appeal, and a copy of this letter.

Sincerely,



David C. Shonka
Acting General Counsel



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Matthew Drange
The Bay Citizen
2130 Center St. Suite 103
Berkley, CA 94704

SEP 27 2013

Re: FOIA-2013-00859
Google correspondence

Dear Mr. Drange:

This is in response to your request dated May 6, 2013, under the Freedom of Information Act seeking access to correspondence between the FTC and DOJ, or within the FTC, relating to the division of responsibilities between the two agencies in the Google search investigation, FTC matter number 1110163. In accordance with the FOIA and agency policy, we have searched our records as of May 7, 2013, the date we received your request in our FOIA office.

We responded to your request by letter dated July 16. On August 13, 2013, we received an appeal from Duffy Carolan on your behalf. On September 11, 2013 your appeal was granted in part and the request was remanded to the FOIA office for further review. On further review of the responsive records, we have determined that 28 additional pages should be released in part under the FOIA. Portions of these pages fall within the exemptions to the FOIA's disclosure requirements, as explained below.

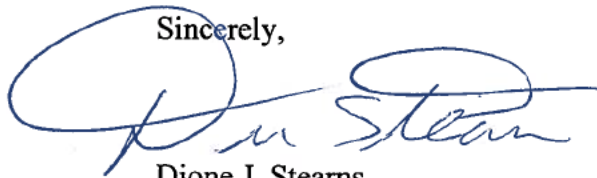
Some responsive records contain staff analyses, opinions, and recommendations. Those portions are deliberative and pre-decisional and are an integral part of the agency's decision making process. They are exempt from the FOIA's disclosure requirements by FOIA Exemption 5.5 U.S.C. § 552(b)(5). *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). Additionally, some records contain information prepared by an attorney in contemplation of litigation which is exempt under the attorney work-product privilege. *See Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947).

I am also withholding personal identifying information, the release of which could be expected to cause an unwarranted invasion of personal privacy. This information is exempt from release under FOIA Exemption 6, 5 U.S.C. § 552(b)(6), because individuals' right to privacy outweighs the general public's interest in seeing personal identifying information. *See The Lakin Law Firm v. FTC*, 352 F.3d 1122 (7th Cir. 2003).

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, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response. If you believe that we should choose to disclose additional materials beyond what the FOIA requires, please explain why this would be in the public interest.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dione J. Stearns". The signature is fluid and cursive, with a large loop at the beginning and a long horizontal stroke at the end.

Dione J. Stearns
Assistant General Counsel

Enclosed: 28 pages

Kelly, Andrea

From: Woodward, Mark
Sent: Wednesday, November 17, 2010 12:35 PM
To: Armstrong, Norman
Subject: RE: Google

But has not been cleared to either agency as of today?

(b)(5)



Thanks,
Mark W., x2754

From: Armstrong, Norman
Sent: Wednesday, November 17, 2010 12:32 PM
To: Woodward, Mark
Subject: Re: Google

It does. But, we actually have not formally put in for clearance. It has been the subject of discussion between the agencies for awhile.


From: Woodward, Mark
To: Armstrong, Norman
Sent: Wed Nov 17 12:20:53 2010
Subject: RE: Google

(b)(5)



Thanks,
Mark W., x2754

Not Responsive



Kelly, Andrea

From: Feinstein, Richard
Sent: Friday, July 01, 2011 11:32 AM
To: Armstrong, Norman
Subject: FW: Google Clearance

This is the language that captures the deal. (b)(5)

(b)(5)

From: Berg, Karen E.
Sent: Friday, July 01, 2011 9:25 AM
To: Feinstein, Richard
Cc: Jones, Robert L.
Subject: RE: Google Clearance

Okay, here are the notes on that one:

(b)(5)

From: Feinstein, Richard
Sent: Friday, July 01, 2011 9:19 AM
To: Berg, Karen E.
Cc: Jones, Robert L.
Subject: RE: Google Clearance

Yes.

From: Berg, Karen E.
Sent: Friday, July 01, 2011 9:18 AM
To: Feinstein, Richard
Cc: Jones, Robert L.
Subject: RE: Google Clearance

Okay, is that the one Barbara Blank is doing in ACP?

From: Feinstein, Richard
Sent: Friday, July 01, 2011 9:17 AM
To: Berg, Karen E.

Cc: Jones, Robert L.
Subject: RE: Google Clearance

Karen—

The other place to look might be in the comments section (b)(5)

(b)(5)

(b)(5) Thanks for checking.

Rich

From: Berg, Karen E.
Sent: Friday, July 01, 2011 9:12 AM
To: Feinstein, Richard
Cc: Jones, Robert L.
Subject: RE: Google Clearance

Rich, I checked in the comments section on (b)(5) and below is let me know.
(b)(5)

K

(b)(5)

From: Seldin, Kathy (b)(6)
Sent: Tuesday, May 03, 2011 3:47 PM
To: Jones, Robert L.
Cc: Hughes, Jared A.
Subject: RE: Google/Nortel add on clearance request

(b)(5)

From: Jones, Robert L. [mailto:RJONES@ftc.gov]
Sent: Tuesday, May 03, 2011 2:50 PM
To: Seldin, Kathy
Cc: Hughes, Jared A.
Subject: FW: Google/Nortel add on clearance request

Kathy,

(b)(5)

Bob

From: Brink, Patricia (b)(6)
Sent: Tuesday, May 03, 2011 11:53 AM
To: Feinstein, Richard; Shelanski, Howard
Cc: Kimmelman, Gene; Forrest, Katherine; Seldin, Kathy; Hughes, Jared A.; Tierney, James
Subject: Google/Nortel add on clearance request

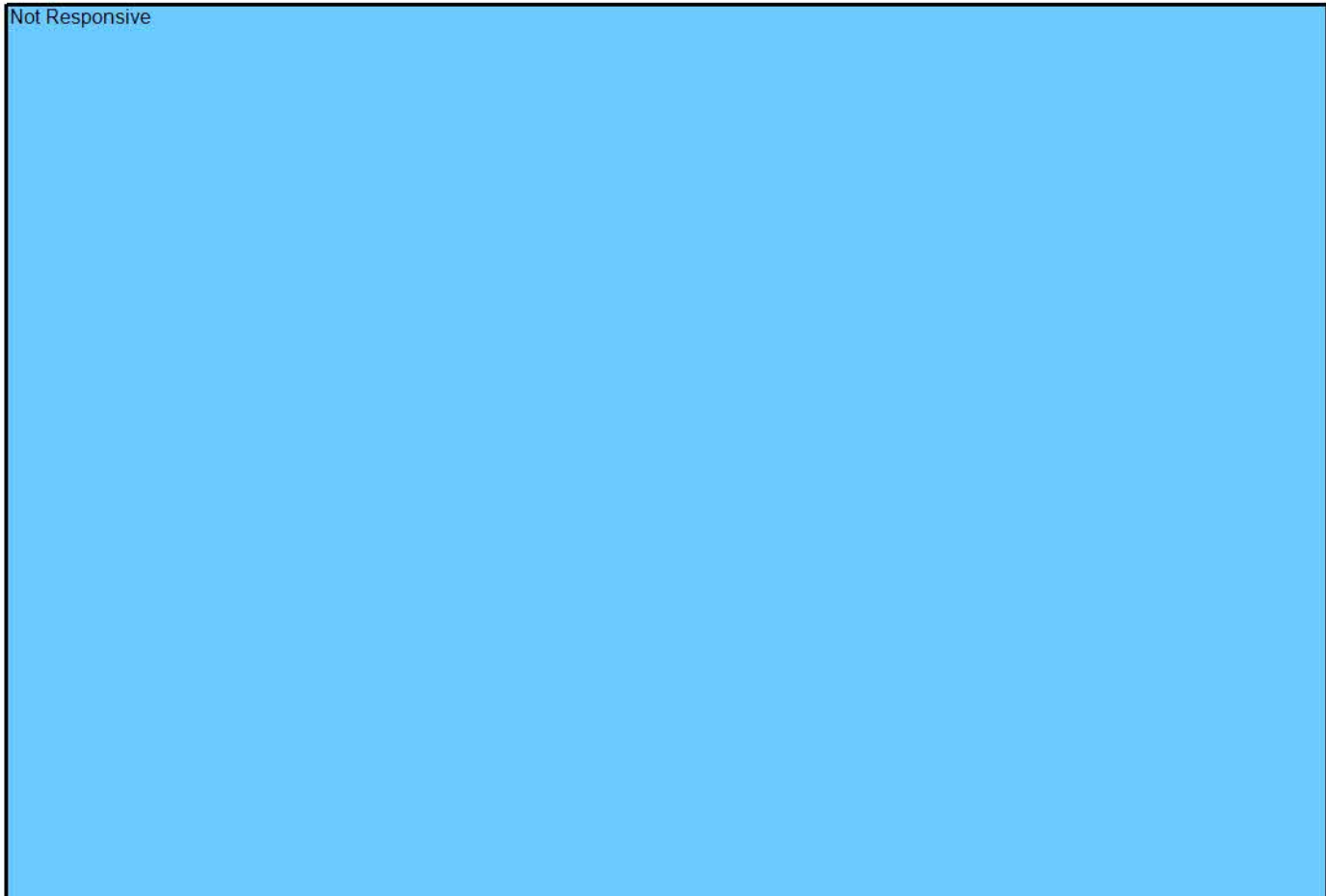
Howard and Rich ↵

(b)(5)



Patty Brink
Director of Civil Enforcement
Antitrust Division
202/514-2562

Not Responsive



Kelly, Andrea

From: Brink, Patricia (b)(6)
Sent: Friday, January 07, 2011 4:25 PM
To: Armstrong, Norman; Kimmelman, Gene; Boast, Molly; Forrest, Katherine
Subject: Re: Google

OK. Can you ask Rich to call Gene Kimmelman? His number is 514-2408. Thanks.

From: Armstrong, Norman
To: Brink, Patricia; Jones, Robert L.
Cc: Seldin, Kathy
Sent: Fri Jan 07 14:41:43 2011
Subject: RE: Google
Patty-
Rich will be calling Molly later today to discuss. Thanks

From: Brink, Patricia (b)(6)
Sent: Friday, January 07, 2011 2:25 PM
To: Armstrong, Norman; Jones, Robert L.
Cc: Seldin, Kathy
Subject: Re: Google

(b)(5)

From: Brink, Patricia
To: 'Armstrong, Norman' ; 'Jones, Robert L.'
Cc: Seldin, Kathy
Sent: Thu Jan 06 16:29:20 2011
Subject: FW: Google

Norm and Bob –

(b)(5)

We'd appreciate your prompt attention.

Patty

From: Seldin, Kathy
Sent: Thursday, January 06, 2011 11:56 AM
To: 'Jones, Robert L.'

Cc: Wallace, Shana M.; Hughes, Jared A.

Subject: Google

(b)(5)



Kelly, Andrea

From: Jones, Robert L.
Sent: Monday, December 13, 2010 11:49 AM
To: Armstrong, Norman
Subject: Fw: Google Section Two Investigation

From: Brink, Patricia <(b)(6)>
Sent: Monday, December 13, 2010 11:29 AM
To: Jones, Robert L.; Armstrong, Norman
Cc: Forrest, Katherine <(b)(6)>; Boast, Molly <(b)(6)>; Seldin, Kathy <(b)(6)>; Wallace, Shana M. <(b)(6)>
Subject: Google Section Two Investigation

Bob,

(b)(5)

We would greatly appreciate a prompt response.

Thanks,
Patty

From: Brink, Patricia <(b)(6)>
Sent: Friday, December 03, 2010 5:03 PM
To: Jones, Robert L.
Cc: Seldin, Kathy; Wallace, Shana M.
Subject: RE: Not Responsive

Bob -

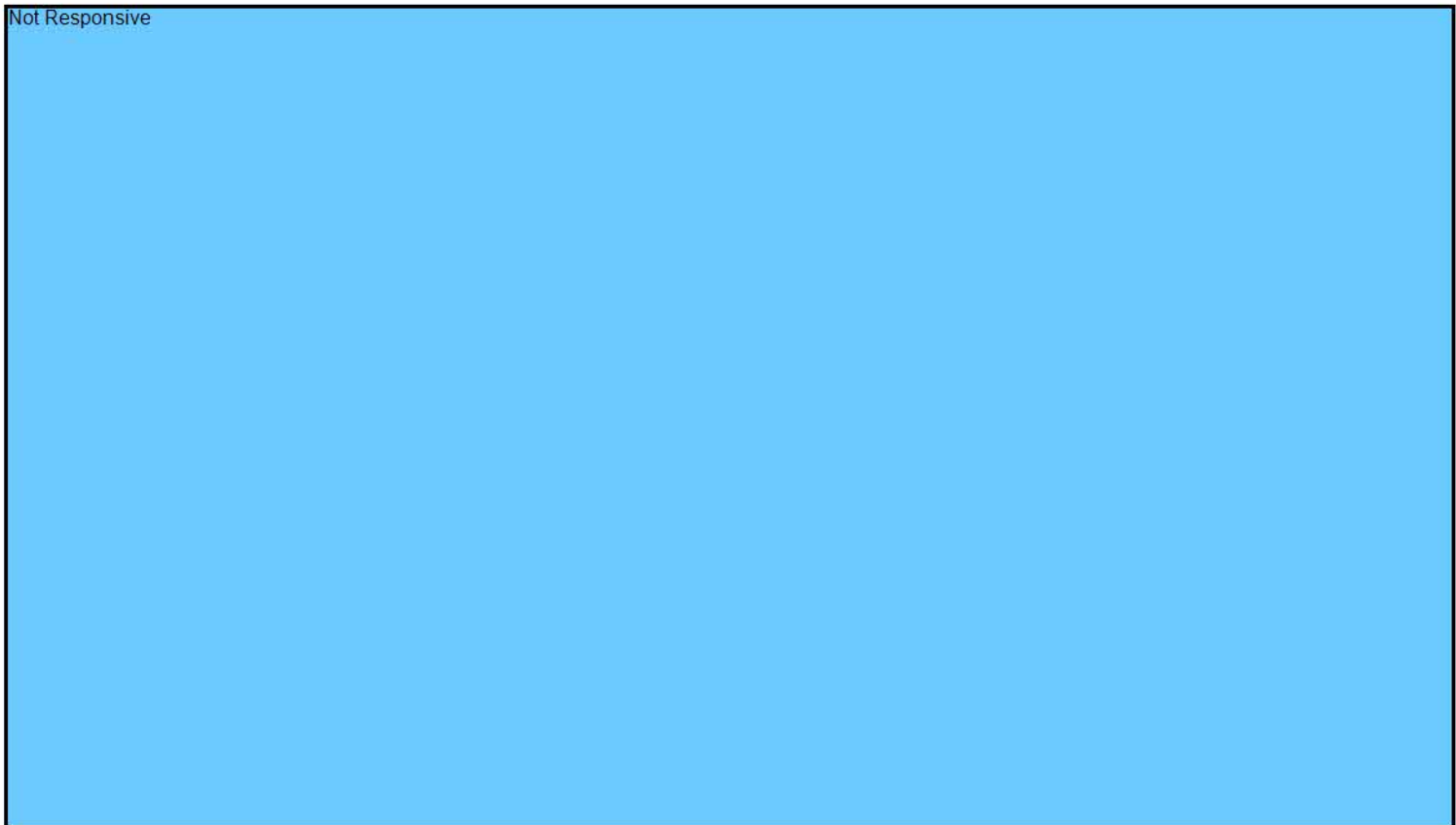
(b)(5), Not Responsive

(b)(5)



Thanks, Patty

Not Responsive



From: Seldin, Kathy (b)(6)
Sent: Monday, November 08, 2010 3:13 PM
To: Jones, Robert L.

Cc: Wallace, Shana M.
Subject: Google/ITA and Google Inc.

Bob,

I know you have been doing some "housekeeping" recently, and checking-in on outstanding matters in clearance. [Redacted]

[Redacted]

[Redacted]

[Redacted] Let me know if you have any questions.

Thanks,
Kathy

From: Wallace, Shana M. [Redacted]
Sent: Friday, October 22, 2010 5:07 PM
To: Seldin, Kathy; Jones, Robert L.
Subject: [Redacted]

Bob,

Patty has asked that I forward the below message on her behalf.

Thanks so much,
Shana

Bob -

[Redacted]

Thanks,

Patty Brink
Deputy Director, Office of Operations
Antitrust Division
202/514-2562

Patty Brink
Director of Civil Enforcement
Antitrust Division
202/514-2562

Kelly, Andrea

From: Armstrong, Norman
Sent: Friday, April 01, 2011 5:48 PM
To: Feinstein, Richard
Subject: FW: Google

Additional relevant emails.

-----Original Message-----

From: Jones, Robert L.
Sent: Friday, December 03, 2010 7:03 PM
To: Armstrong, Norman
Cc: Feinstein, Richard
Subject: Re: Google

Understood.

----- Original Message -----

From: Armstrong, Norman
Sent: Friday, December 03, 2010 06:48 PM
To: Jones, Robert L.
Cc: Feinstein, Richard
Subject: Re: Google

(b)(5)



----- Original Message -----

From: Jones, Robert L.
Sent: Friday, December 03, 2010 06:31 PM
To: Armstrong, Norman
Subject: Re: Google

Yep. Here's the response from Patty on their position:

(b)(5)



Kelly, Andrea

From: Feinstein, Richard
Sent: Wednesday, January 09, 2013 9:24 AM
To: Levitas, Pete
Subject: RE: Google Clearance

(b)(5)

From: Levitas, Pete
Sent: Wednesday, January 09, 2013 9:23 AM
To: Feinstein, Richard
Subject: RE: Google Clearance

(b)(5)

From: Feinstein, Richard
Sent: Wednesday, January 09, 2013 9:21 AM
To: Jones, Robert L.
Cc: Armstrong, Norman; Levitas, Pete
Subject: RE: Google Clearance

Thanks, Bob. I now recall several of those.

From: Jones, Robert L.
Sent: Wednesday, January 09, 2013 9:15 AM
To: Feinstein, Richard
Cc: Armstrong, Norman; Levitas, Pete
Subject: RE: Google Clearance

Not Responsive

(b)(5)

From: Feinstein, Richard
Sent: Wednesday, January 09, 2013 8:57 AM
To: Jones, Robert L.
Cc: Armstrong, Norman; Levitas, Pete
Subject: RE: Google Clearance

Thanks. (b)(5)

(b)(5)

(b)(5)

From: Jones, Robert L.
Sent: Wednesday, January 09, 2013 8:52 AM
To: Feinstein, Richard
Subject: RE: Google Clearance

Here it is:



From: Feinstein, Richard
Sent: Tuesday, January 08, 2013 6:08 PM
To: Jones, Robert L.
Subject: RE: Google Clearance

Yep. That's fine.

From: Jones, Robert L.
Sent: Tuesday, January 08, 2013 5:46 PM
To: Feinstein, Richard
Subject: Re: Google Clearance

Absolutely. First thing tomorrow if that's okay.

From: Feinstein, Richard
Sent: Tuesday, January 08, 2013 05:07 PM
To: Jones, Robert L.
Subject: Google Clearance

Bob—



(b)(5)

Rich

Richard A. Feinstein
Director
Bureau of Competition
Federal Trade Commission

202-326-3658
rfeinstein@ftc.gov

Kelly, Andrea

From: Vladeck, David
Sent: Tuesday, November 13, 2012 11:08 AM
To: Shonka, David C.; JDL; Feinstein, Richard; Kraus, Elizabeth; Gray, Joshua Barton; Shelanski, Howard
Cc: Young, June; Renner, Christopher; Lupovitz, Joni; Gorman, Frank; Harwood, Charles A.; Prewett, Cecelia; Kaplan, Peter P.; Heyer, Kenneth; Dafny, Leemore; Levitas, Pete; Lehner, Mary; Matties, Deborah J.
Subject: Re: State of Play Meeting on Google--can everyone meet tomorrow at, say, 2:30 after the senior staff meeting? If that won't work, how about 4:30?

(b)(5)

From: Shonka, David C.
Sent: Tuesday, November 13, 2012 10:49 AM
To: Vladeck, David; JDL; Feinstein, Richard; Kraus, Elizabeth; Gray, Joshua Barton; Shelanski, Howard
Cc: Young, June; Renner, Christopher; Lupovitz, Joni; Gorman, Frank; Harwood, Charles A.; Prewett, Cecelia; Kaplan, Peter P.; Heyer, Kenneth; Dafny, Leemore; Levitas, Pete; Lehner, Mary; Matties, Deborah J.
Subject: RE: State of Play Meeting on Google--can everyone meet tomorrow at, say, 2:30 after the senior staff meeting? If that won't work, how about 4:30?

(b)(5)

From: Vladeck, David
Sent: Tuesday, November 13, 2012 10:44 AM
To: Shonka, David C.; JDL; Feinstein, Richard; Kraus, Elizabeth; Gray, Joshua Barton; Shelanski, Howard
Cc: Young, June; Renner, Christopher; Lupovitz, Joni; Gorman, Frank; Harwood, Charles A.; Prewett, Cecelia; Kaplan, Peter P.; Heyer, Kenneth; Dafny, Leemore; Levitas, Pete; Lehner, Mary; Matties, Deborah J.
Subject: RE: State of Play Meeting on Google--can everyone meet tomorrow at, say, 2:30 after the senior staff meeting? If that won't work, how about 4:30?

(b)(5)

From: Shonka, David C.
Sent: Tuesday, November 13, 2012 10:32 AM
To: Vladeck, David; JDL; Feinstein, Richard; Kraus, Elizabeth; Gray, Joshua Barton; Shelanski, Howard
Cc: Young, June; Renner, Christopher; Lupovitz, Joni; Gorman, Frank; Harwood, Charles A.; Prewett, Cecelia; Kaplan, Peter P.; Heyer, Kenneth; Dafny, Leemore; Levitas, Pete; Lehner, Mary; Matties, Deborah J.
Subject: RE: State of Play Meeting on Google--can everyone meet tomorrow at, say, 2:30 after the senior staff meeting? If that won't work, how about 4:30?

(b)(5)

(b)(5)



From: Vladeck, David

Sent: Tuesday, November 13, 2012 7:03 AM

To: Shonka, David C.; JDL; Feinstein, Richard; Kraus, Elizabeth; Gray, Joshua Barton; Shelanski, Howard

Cc: Young, June; Renner, Christopher; Lupovitz, Joni; Gorman, Frank; Harwood, Charles A.; Prewett, Cecelia; Kaplan, Peter P.; Heyer, Kenneth; Dafny, Leemore; Levitas, Pete; Lehner, Mary; Matties, Deborah J.

Subject: Re: State of Play Meeting on Google--can everyone meet tomorrow at, say, 2:30 after the senior staff meeting?
If that won't work, how about 4:30?

(b)(5)



(b)(5)

From: Shonka, David C.

Sent: Tuesday, November 13, 2012 06:50 AM

To: Vladeck, David; JDL; Feinstein, Richard; Kraus, Elizabeth; Gray, Joshua Barton; Shelanski, Howard

Cc: Young, June; Renner, Christopher; Lupovitz, Joni; Gorman, Frank; Harwood, Charles A.; Prewett, Cecelia; Kaplan, Peter P.; Heyer, Kenneth; Dafny, Leemore; Levitas, Pete; Lehner, Mary; Matties, Deborah J.

Subject: Re: State of Play Meeting on Google--can everyone meet tomorrow at, say, 2:30 after the senior staff meeting? If that won't work, how about 4:30?

(b)(5)

From: Vladeck, David

Sent: Tuesday, November 13, 2012 01:15 AM

To: Shonka, David C.; JDL; Feinstein, Richard; Kraus, Elizabeth; Gray, Joshua Barton; Shelanski, Howard

Cc: Young, June; Renner, Christopher; Lupovitz, Joni; Gorman, Frank; Harwood, Charles A.; Prewett, Cecelia; Kaplan, Peter P.; Heyer, Kenneth; Dafny, Leemore; Levitas, Pete; Lehner, Mary; Matties, Deborah J.

Subject: Re: State of Play Meeting on Google--can everyone meet tomorrow at, say, 2:30 after the senior staff meeting? If that won't work, how about 4:30?

(b)(5)

From: Shonka, David C.

Sent: Monday, November 12, 2012 10:35 PM

To: Vladeck, David; JDL; Feinstein, Richard; Kraus, Elizabeth; Gray, Joshua Barton; Shelanski, Howard

Cc: Young, June; Renner, Christopher; Lupovitz, Joni; Gorman, Frank; Harwood, Charles A.; Prewett, Cecelia; Kaplan, Peter P.; Heyer, Kenneth; Dafny, Leemore; Levitas, Pete; Lehner, Mary; Matties, Deborah J.

Subject: RE: State of Play Meeting on Google--can everyone meet tomorrow at, say, 2:30 after the senior staff meeting? If that won't work, how about 4:30?

(b)(5)

(b)(5)

From: Vladeck, David

Sent: Monday, November 12, 2012 4:37 PM

To: JDL; Shonka, David C.; Feinstein, Richard; Kraus, Elizabeth; Gray, Joshua Barton; Shelanski, Howard

Cc: Young, June; Renner, Christopher; Lupovitz, Joni; Gorman, Frank; Harwood, Charles A.; Prewett, Cecelia; Kaplan, Peter P.; Heyer, Kenneth; Dafny, Leemore; Levitas, Pete; Lehner, Mary; Matties, Deborah J.

Subject: Re: State of Play Meeting on Google--can everyone meet tomorrow at, say, 2:30 after the senior staff meeting? If that won't work, how about 4:30?

(b)(5)

From: JDL

Sent: Monday, November 12, 2012 03:58 PM

To: Vladeck, David; Shonka, David C.; Feinstein, Richard; Kraus, Elizabeth; Gray, Joshua Barton; Shelanski, Howard

Cc: Young, June; Renner, Christopher; Lupovitz, Joni; Gorman, Frank; Harwood, Charles A.; Prewett, Cecelia; Kaplan, Peter P.; Heyer, Kenneth; Dafny, Leemore; Levitas, Pete; Lehner, Mary; Matties, Deborah J.

Subject: State of Play Meeting on Google--can everyone meet tomorrow at, say, 2:30 after the senior staff meeting? If that won't work, how about 4:30?

(b)(5)

Kelly, Andrea

From: Renner, Christopher
Sent: Thursday, December 06, 2012 5:24 PM
To: Bayer Femenella, Peggy
Cc: Widnell, Nicholas; Seidman, Mark; Levitas, Pete; Munck, Suzanne
Subject: RE: Commission Consent Statement -- Google MMI 12 6 12PBF.docx

(b)(5)

Not Responsive

Kelly, Andrea

From: Lehner, Mary
Sent: Wednesday, October 10, 2012 6:46 PM
To: Feinstein, Richard; Kaplan, Peter P.; JDL; Levitas, Pete; Renner, Christopher
Cc: Prewett, Cecelia; Katz, Mitchell J.
Subject: Re: Ryan Lynch's Google story in parr global

As do I. For the record, I believe JDL's comments, quoted by Lynch, were off the record. And of course we didn't schedule then cancel three meetings with this guy. We tried to accommodate him as he requested, but the timing didn't work.

From: Feinstein, Richard
Sent: Wednesday, October 10, 2012 06:13 PM
To: Kaplan, Peter P.; JDL; Levitas, Pete; Renner, Christopher; Lehner, Mary
Cc: Prewett, Cecelia; Katz, Mitchell J.
Subject: RE: Ryan Lynch's Google story in parr global

(b)(5)

From: Kaplan, Peter P.
Sent: Wednesday, October 10, 2012 6:00 PM
To: JDL; Feinstein, Richard; Levitas, Pete; Renner, Christopher; Lehner, Mary
Cc: Prewett, Cecelia; Katz, Mitchell J.
Subject: Ryan Lynch's Google story in parr global

FYI thought I should note for you that Ryan Lynch did in fact file a story in this publication policy and regulatory report. It is an incoherent jumble of old junk that is, ultimately, inconsequential. If anyone hears from Ryan again, feel free to send him our way.

Tks

Peter



INTELLIGENCE ROUND-UP

The Intelligence Round-Up contains a daily summary of PaRR's proprietary coverage in addition to a rundown of last week's top headlines.

OCTOBER 10 - PROPRIETARY INTELLIGENCE

Can the FTC handle 'Big Google'?

The US antitrust investigation of Google (NASDAQ: GOOG) has renewed concerns over the Federal Trade Commission's (FTC) ability to handle innovation issues and the decision-making process used to assign probes to either the commission or the Department of Justice (DoJ), according to several sources close to the investigation.

The two agencies do not appear to be cooperating with each other in the case, which the regulators call "Big Google" to differentiate it from Google merger reviews, according to a person familiar with the matter. The person said there would be no reason for the agencies to cooperate, because the DoJ has no experience with the issues involved in the current investigation.

However, the DoJ has been available to the FTC "to chat or to share expertise", even if the FTC has not taken advantage of that availability, said one of the sources close to the process.

"It's not a question of being cooperative; it's a question of splitting the work," the first source close explained.

Former government attorneys differed in their assessment of the decision to divide the cases.

"The agencies reached an accommodation on Google, where the FTC would take the non-merger case and Justice would look at the merger matters involving Google," former FTC Chairman Bill Kovacic told PaRR.

Kovacic said it would make "enormous sense" for one agency to handle all issues in a specific field or involving a particular company.

"You would never, in a rational world, subdivide experience," he explained.

However, Spencer Weber Waller, a law professor at Loyola University Chicago and former antitrust trial attorney at the DoJ, said that dividing cases between the agencies simply reflects the realities of the US clearance process.

"We have dual enforcement," he said. "Agencies have to allocate out matters. It's just a fact of life when you have two agencies."

Others told PaRR the binary approach is ineffective, particularly in complex areas such as technology and innovation.

"To me it makes no sense for one agency to be thinking about how acquisitions by Google may lessen competition, and the other agency to be doing an after-the-fact analysis of the same issue," said Allen Grunes, a former DoJ antitrust litigator and currently an attorney at Brownstein Hyatt Farber Schreck.

This point is further exemplified by recent revelations that the FTC investigation has expanded to include Google's handling of standard essential patents which it received in its acquisition of Motorola Mobility.

The DoJ had studied the pool of patents and cleared the transaction only after Google made assurances to abide by fair, reasonable and non-discriminatory (FRAND) standards. Yet DoJ misgivings persist, and it

appears the agencies will concurrently monitor the same issue.

“In light of the importance of this industry to consumers and the complex issues raised by the intersection of the intellectual property rights and antitrust law ... the division continues to monitor the use of SEPs (standard essential patents) in the wireless device industry, particularly in the smartphone and computer tablet markets. The division will not hesitate to take appropriate enforcement action to stop any anticompetitive use of SEP rights,” the DoJ said in a letter concluding its review of the Motorola buy.

The clearance process “is really kind of a mess”, said an industry attorney who formerly worked at one of the agencies.

“There’s really no clear structure to it,” the attorney said. “Because the FTC uses a different process than the DoJ does, especially because it’s not clear in advance who is going to be handling your case, you don’t necessarily know how to handicap it before it gets there.”

Kovacic drew an analogy to baseball in explaining his concerns about the clearance process.

“There’s a theory of hitting that if you don’t get a minimum number of at-bats, you’re not sharp. You’ve got to hit enough to be good,” the former chairman said. “To know whether you’re the guy who should be playing, I’ve got to see you hit enough times.

“I think there’s a similar notion in other fields, that there’s a critical mass of activity that is essential to really being good at what you’re doing. I think that’s true for competition analysis, and especially these sectors, which are the hardest to understand.

“It’s crazy to subdivide the activity. You can have two groups that have an inadequate knowledge of what they’re doing, instead of focusing that activity on one. That’s one of the bizarre sorts of trades that come under the existing framework,” Kovacic said.

FTC versus DoJ

Justification for the FTC’s jurisdiction over “Big Google” may lie in the different legal powers of the two antitrust bodies.

Specifically, Section 5 of the FTC Act, passed in 1914, granted the FTC power to prohibit “unfair or deceptive acts or practices in or affecting commerce”. The DoJ has no such authority.

Section 5 gives the FTC “some wiggle room beyond the literal rulings under Section 2 of the Sherman Act”, Waller explained.

According to FTC Chairman Jon Leibowitz, the agency’s track record in using its Section 5 power in cases against N-Data and Intel (NASDAQ: INTC) reflects the agency’s increasing regulatory authority to determine competition fairness.

“I think certainly since [Commissioner] Rosch came to the commission there has been a bipartisan majority for using Section 5,” Leibowitz recently commented during an American Bar Association antitrust conference.

The industry attorney argued that Leibowitz, who holds a Democratic seat on the commission, and Rosch, who holds a Republican seat, had helped steer the Google case toward the FTC.

“It’s very clear that Leibowitz and Rosch want to use this case to bolster their Section 5 power. I bet they tried really hard to get this in part because this would be useful for that function,” the attorney said.

The first source close disagreed, saying there was no "hidden agenda or hidden reason" why the FTC got "Big Google".

"It's a series of discussions about who wants to do it, who has the resources, what's the most appropriate at a particular time," the same source added.

It remains unclear whether the FTC plans to bring a pure Section 5 case or if the agency will bring any case at all.

"There continues to be a bipartisan majority for using Section 5 and I think you will be seeing – over the next let's say, year, 18 months, or perhaps even sooner – some matters brought by the commission using Section 5 either as a separate count in addition to monopolization or standing on its own," said Leibowitz.

A spokesperson for the DoJ declined to comment when asked about Google, saying only that as a general matter investigations are divided between the agencies "based on previous cases and expertise".

An FTC spokesperson said the agency had no comment on anything related to Google, and instead provided PaRR with a list of cases, workshops, and reports detailing the FTC's experience handling innovation issues.

Through his staff, Chairman Leibowitz arranged and subsequently cancelled interviews with PaRR on 4 October, 5 October, and 9 October.

Instagram-Facebook review raised questions

The list of experience provided by the FTC included Section 5 cases such as N-Data and Intel, as well as the agency's previous Google-related work, such as the AdMob-Google and Doubleclick-Google deals.

Yet the spokesperson also listed Instagram-Facebook (NASDAQ: FB), a review that multiple sources said never should have received a second request.

"I can't think of any justification for the FTC to have spent several months reviewing that deal," said Grunes.

"Maybe they wanted to look like they were doing a really thorough job," the industry attorney suggested. "And by virtue of taking their time with a case like that, they got the experience. It may be that they took a long time because they knew people thought they didn't have the capacity."

"You really don't know unless you're inside, and I just don't know. I don't know what the motives were," said Kovacic.

The FTC and the DoJ are sometimes forced to issue second requests to compensate for time lost to protracted clearance battles between the agencies.

However, a source familiar with the Instagram-Facebook review said the DoJ was happy to let the FTC take the case. The DoJ "didn't think it was worth ... trying to grab", the source explained, because the agency did not view the acquisition as raising issues of market concentration.

Concerns over the FTC's capacity

In conversations with PaRR, sources offered different perspectives on the FTC's capacity to review issues of technology and innovation.

Grunes said that past experience should have favored the DoJ in the "Big Google" case.

“DoJ has far more experience with advertising-supported media than the FTC has,” he wrote in an emailed response to PaRR. “DoJ reviews radio, television and newspapers, among other such businesses. Google is an advertising-supported media company and the nature of advertising markets is an important part of the Google review. That is squarely a DoJ issue.”

However, the industry attorney argued the agencies are approximately equal in their capacity, and there is no reason the FTC would be in a worse position than the DoJ.

The first source close to the process agreed, saying, “Both agencies have expertise in tech areas, and I don’t think either agency would claim to have a particular advantage over the other in terms of expertise on any of these matters.”

The second source provided a more nuanced view, arguing the agencies “have different strengths and weaknesses at different times”.

According to the second source close, the FTC regulators have been strong on hospital cases, but the commission has failed to capitalize on other opportunities, such as the Medco-Express Scripts (NASDAQ: ESRX) and EMI-Universal mergers. Universal is a subsidiary of Vivendi (EN Paris: VIV).

The FTC cleared Medco-Express Scripts in April without restrictions, and in September the commission allowed the EMI-Universal deal to proceed without imposing any conditions beyond those specified by the European Commission.

These two mergers “were the highlight cases of the last six months”, the second source said, and the FTC “did pretty much nada on antitrust enforcement”.

The second source gave credit to the FTC for strong enforcement of privacy issues related to Google, but said regulators at the commission have been significantly weaker in addressing antitrust concerns.

“I think the jury is still out on where they are and their recent past on antitrust enforcement,” the second source close argued.

If the FTC hopes to address questions over its antitrust capabilities, “Google would be it,” the second source added.

by Ryan Lynch in Washington DC

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Kelly, Andrea

From: Prewett, Cecelia
Sent: Tuesday, October 09, 2012 10:28 AM
To: JDL
Subject: FW: standard-essential patents

See thread I told you about earlier...

-----Original Message-----

From: Kaplan, Peter P.
Sent: Tuesday, October 09, 2012 10:21 AM
To: Prewett, Cecelia; Shelanski, Howard
Subject: RE: standard-essential patents

This reporter has a MO that centers on trying to play everyone off each other. Last week he asked for FTC comment on anonymous statements to the effect that DOJ knew more about innovation cases than FTC. We declined to comment on anything relative to Google or any comparisons regarding DOJ. Our only comment was to point out the long list of FTC innovation and technology related cases/reports/workshops, and that FTC has hired two highly respected chief technologists...

I spoke to DOJ press about this guy last week, and I plan to call them again today for a follow-up conversation. (b)(5)

(b)(5)

Howard, let me know what you think and feel free to call when you become available.

-----Original Message-----

From: Prewett, Cecelia
Sent: Tuesday, October 09, 2012 9:16 AM
To: Shelanski, Howard; Kaplan, Peter P.
Subject: RE: standard-essential patents
Importance: High

Peter? Didn't you just deal with this reporter on this story? Can you call Howard and debrief him? Thanks!

-----Original Message-----

From: Shelanski, Howard
Sent: Monday, October 08, 2012 10:16 PM
To: Prewett, Cecelia; Kaplan, Peter P.
Subject: Fw: standard-essential patents

FYI. I really don't like this. I think the particular quote comparing me and Fiona is silly and I think this kind of story is bad for both agencies. (b)(5)

(b)(5)

Thanks..

----- Original Message -----

From: Scott-Morton, Fiona [mailto:Fiona.ScottMorton@usdoj.gov]

Sent: Monday, October 08, 2012 04:53 PM

To: Shelanski, Howard

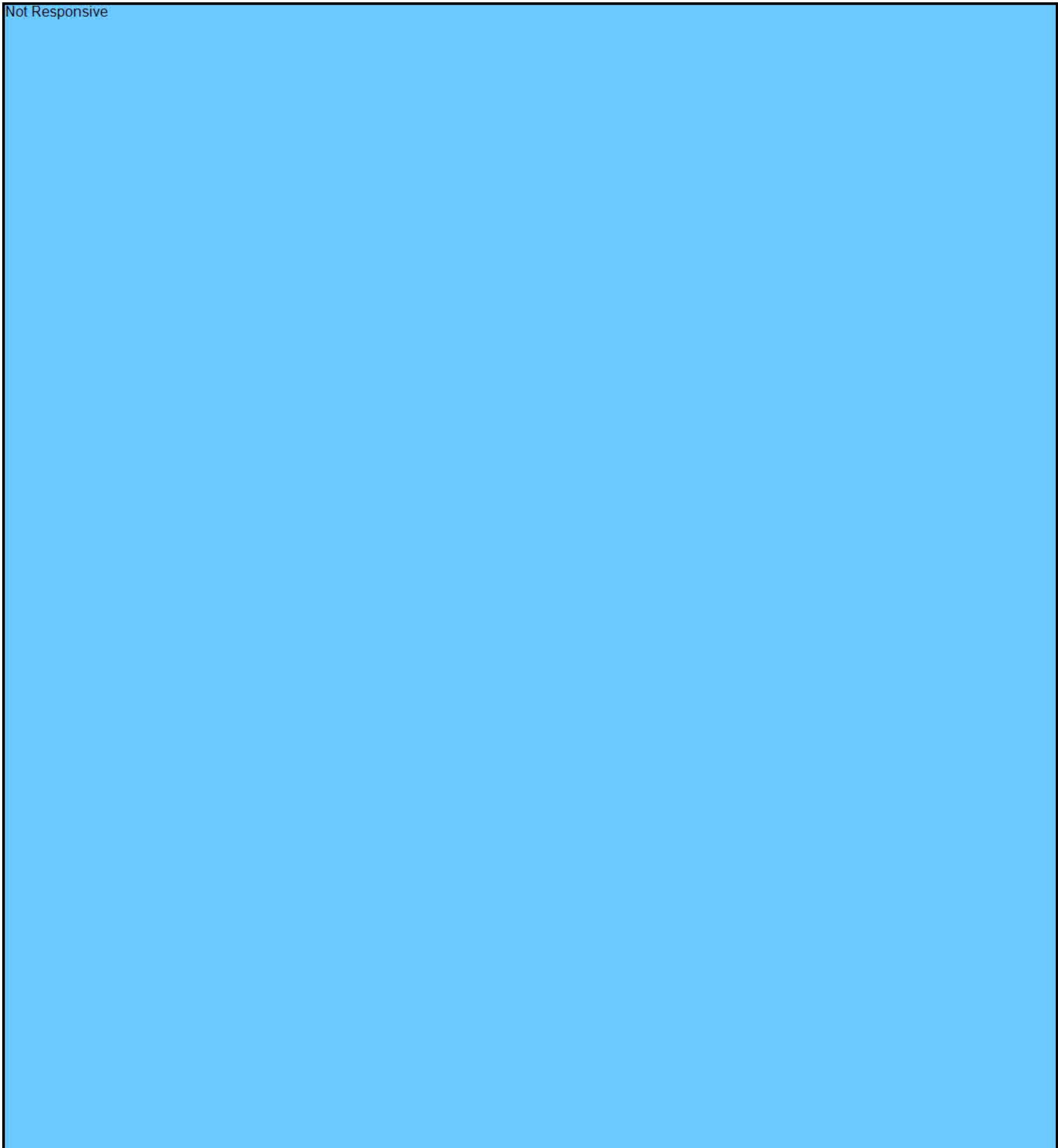
Subject: Fw: standard-essential patents

See below. Apparently the story is broader than us: quotes from ftc about politicization at doj. Ridiculous. Anyway, I thought you might want to know an article like this could turn up.

I am not replying but others are talking to this guy.

He sent a second message fixing the typo in your name.

Not Responsive



Kelly, Andrea

From: Rosch, Tom
Sent: Thursday, December 06, 2012 12:04 PM
To: JDL
Subject: RE: Media Reports of Meetings with DOJ re Google

Thanks a million, Jon. All the best, Tom.

From: JDL
Sent: Thursday, December 06, 2012 9:45 AM
To: Rosch, Tom
Subject: Re: Media Reports of Meetings with DOJ re Google

Agree, agree, agree.

Saw the first story yesterday (b)(5),(b)(6) He informed me in an email that (b)(6)
told him these were all ginned up by (b)(6) (b)(5)
(b)(5)

I see Rich at 10:30 and will follow up for more detail.

Jon

Sent by Jon Leibowitz from his BlackBerry

From: Rosch, Tom
Sent: Thursday, December 06, 2012 09:40 AM
To: JDL
Subject: Media Reports of Meetings with DOJ re Google

Dear Jon, I read with interest this morning's early clips. The last one is a Post article about multiple meetings with the DoJ by anti-Google activists who have "given up" on our willingness to seek meaningful relief by Google. (b)(5)

(b)(5)