

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

)	
ELECTRONIC PRIVACY INFORMATION)	
CENTER,)	
)	
Plaintiff,)	
)	Civil Action No. 18-0942 (TJK)
v.)	
)	
FEDERAL TRADE COMMISSION,)	
)	
Defendant.)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFF’S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON ATTORNEY’S FEES AND COSTS**

Plaintiff Electronic Privacy Information Center (“EPIC”) brought a claim under the Freedom of Information Act (“FOIA”) against the Federal Trade Commission (“FTC”), alleging that the FTC failed to make a determination or produce requested documents within the time period mandated by FOIA. ECF No. 1. Prior to EPIC filing its Complaint, the FTC had begun processing and responding to the request and had invoked statutory extension mechanisms. EPIC short-circuited the administrative process, however, filing this lawsuit before the statutory period for the FTC to respond had run. As a normal part of its FOIA processing, the FTC continued its efforts to respond to EPIC’s request after EPIC filed its Complaint on April 20, 2018; the FTC produced responsive records on a rolling basis and completed its production by October 2018.

EPIC now seeks attorney’s fees to obtain records that the agency was already processing when EPIC filed its lawsuit. As discussed below, EPIC has not demonstrated that it is either eligible or entitled to fees. The Court should therefore deny Plaintiff’s Motion for Partial

Summary Judgment on Attorney's Fees and Costs ("EPIC Motion") (ECF No. 28).

FACTUAL BACKGROUND

On March 20, 2018, EPIC submitted a FOIA request to the FTC seeking five categories of records:

- Assessments of Facebook's privacy practices submitted to the FTC in 2013, 2015, and 2017 (categories 1-3);
- Records related to the auditor approved by the FTC to undertake those Assessments (category 4); and
- Communications between the FTC and Facebook regarding the Assessments (category 5).

Stearns Decl. ¶ 6; Exhibit A. From the day EPIC submitted its FOIA request and throughout the search and production process, the FTC was diligent, transparent, and responsive.

Search for and Processing of the Records Prior to Filing of EPIC's Complaint

On March 29, 2018, the FTC acknowledged receipt of EPIC's FOIA request and assigned it to the FTC's expedited complex processing track. Stearns Decl. ¶¶ 11-12; Exhibit B. As of that date, the FTC had received numerous similar FOIA requests, Stearns Decl. ¶ 9, and had already commenced the search for these records. On March 28, 2018, the assigned attorney in the FTC's FOIA office sent a request for documents to the Enforcement Division of the FTC's Bureau of Consumer Protection, the division responsible for monitoring Facebook's compliance with the FTC's 2011 consent order. *Id.* ¶ 10. The FOIA attorney sent a document request to additional Enforcement Division employees on April 4, 2018, specifying that the request encompassed all the categories of records sought by EPIC. *Id.* ¶ 13. On April 5, 2018, an attorney in the Enforcement Division provided the Facebook Assessments to the FOIA office, stated that she would search next for the other categories of requested documents, and identified employees in the FTC's Division of Privacy and Identity Protection ("DPIP") who might have responsive records. *Id.* ¶ 13. That same day, the FOIA attorney contacted DPIP staff and asked

them to search for the requested records, drawing their attention in particular to the pending requests for all communications between the FTC and Facebook or its third-party assessors. *Id.* ¶ 14. While the search for responsive records continued, *id.* ¶¶ 15-16, on April 16, 2018, the FTC publicly posted on its website (under “Frequently Requested Records”) the three Facebook Assessments as released with substantial redactions in response to prior FOIA requests. *Id.* ¶ 17.

On April 17, 2018, the FTC informed EPIC that the agency was unable to respond to EPIC’s request within FOIA’s usual 20-working day deadline and invoked the additional 10-working day extension provided by FOIA for “unusual circumstances.” *Id.* ¶ 18; Exhibit C. Specifically, the FOIA office “need[ed] to search for and collect the requested records” from offices that are “separate from the office processing the request” and to “consult[] ... with ... two or more components of the agency having a substantial interest in the determination of the request....” 5 U.S.C. § 552(a)(6)(B)(iii). Furthermore, the FTC also was required under its organic statute and governing regulations to provide notification to Facebook in advance of any disclosure, because the requested records contained confidential commercial information submitted by Facebook through PricewaterhouseCoopers (“PwC”), the auditor that prepared the Assessments. Stearns Decl. ¶ 22; *see* 15 U.S.C. §§ 46(f) and 57b-2(c)(2); 16 C.F.R. 4.10(e) and (g). On April 17, 2018, the FTC FOIA office provided this pre-disclosure notification to allow Facebook to identify information that it viewed as confidential and to substantiate the basis for nondisclosure of that information. *Id.* ¶ 23.

On April 18, 2018, EPIC separately called the FTC’s FOIA Public Liaison and the assigned FOIA attorney and asked that the FTC bifurcate its FOIA request by prioritizing the first three categories of records it requested—the 2013, 2015, and 2017 Facebook Assessments. Stearns Decl. ¶ 21; Exhibit D. EPIC expressed its belief that the “unusual circumstances” that

warranted a 10-working day extension did not apply to the Facebook Assessments. The assigned FOIA attorney told EPIC that the three Facebook Assessments, as released from prior FOIA requests, had been posted on the FTC's website and that the FTC was re-reviewing and reprocessing those records in light of the recent FOIA requests to determine if previously redacted information could now be disclosed. Stearns Decl. ¶ 21. Two days later, on April 20, 2018, EPIC filed this suit, alleging that the FTC failed to make a timely determination regarding its request and wrongfully withheld records. Compl. ¶¶ 41-47.

Continued Search for, Processing, and Final Production of Records

The FTC continued its orderly search for and processing of EPIC's and the multiple other pending FOIA requests for records related to the Facebook Assessments. On April 23, 2018, the FTC's FOIA unit received additional responses and documents from employees in the Enforcement Division and DPIP. Stearns Decl. ¶ 24. On May 2 and May 3, 2018, upon learning of other potential locations of responsive records, the FOIA unit sent a request for documents to a Commissioner's office, the Director of the Bureau of Consumer Protection, and the Bureau's front office. *Id.* ¶ 25. Throughout the month of May, the FOIA unit continued to receive responses and records from various FTC offices. *Id.* At the same time, the FOIA unit engaged in discussions with Facebook and PwC regarding the confidential commercial information submitted by them in the Facebook Assessment and related records to identify what portion of those records warranted protected from disclosure under FOIA and other applicable laws, and what portion could be released. Facebook provided comments on the FTC's proposed redactions to the Facebook Assessments up until the middle of June, and the FTC was then able to make its final determinations as to those records. *Id.* ¶ 26.

On June 26, 2018, the FTC released newly-processed records responsive to categories 1-3

of EPIC's request, and posted these documents on its website. *Id.* ¶ 27. The parties informed the Court of this partial release of responsive records in a June 26, 2018 Joint Status Report. ECF No. 7. The FTC continued its consultations with Facebook and PwC concerning confidential commercial information in records responsive to categories 4 and 5 of EPIC's request. Stearns Decl. ¶ 28. The parties' July 26, 2018 Joint Status Report noted that those entities might elect to join this action or initiate another action to limit or quash production of unredacted documents. ECF No. 8 at 2. On September 10, 2018, the FTC produced to EPIC a comprehensive set of records responsive to categories 1-4 of its request: the Facebook Assessment records previously released on June 26, 2018, and an additional 152 pages of records responsive to category 4. Stearns Decl. ¶ 29; EPIC Motion, Ex. 1. The FTC produced records responsive to category 5 of EPIC's request on October 10, 2018, and, after locating additional records, made its final release to EPIC on October 19, 2018. Stearns Decl. ¶¶30-31; EPIC Motion, Exs. 2 and 3. The records released in these productions contained redactions requested or made by Facebook and PwC.

After EPIC reviewed the production, it posed a series of questions to the FTC regarding approximately 50 pages of withheld material. ECF No. 10 at 1. On February 22, 2019, the FTC provided EPIC with a *Vaughn index*, explaining the basis for the agency's withholding determinations. ECF No. 13 at 1. When EPIC indicated that it intended to challenge the FTC's redactions made to protect Facebook's confidential business information, the FTC agreed to engage in further discussions with Facebook and PwC in an effort to further narrow the scope of the issues. But neither Facebook nor PwC authorized the release of any withheld material. ECF No. 14 at 1. On May 3, 2019, Facebook filed a motion to intervene. On August 28, 2019, the Court granted the motion, over EPIC's opposition. ECF No. 21. EPIC ultimately decided not to challenge any of the FTC's withholdings. ECF No. 25 at 1.

ARGUMENT

Courts “may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred” in FOIA cases in which “the complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E)(i). A FOIA plaintiff may not, however, recover fees and costs unless the plaintiff is both eligible for and entitled to the award. *See Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 524 (D.C. Cir. 2011).

A. EPIC Is Not Eligible For Attorney’s Fees

To determine eligibility for an award of attorney’s fees, the court “asks whether a plaintiff has substantially prevailed and thus may receive fees.” *Id.* A FOIA plaintiff may “substantially prevail” if the plaintiff obtains relief through (1) a judicial order, or an enforceable written agreement or consent decree; or (2) “a voluntary or unilateral change in position by the agency, if the [plaintiff’s] claim is not insubstantial.” 5 U.S.C. § 552(a)(4)(E)(ii). The second provision codifies the “so-called ‘catalyst theory’ for determining a fee request against the United States, under which a plaintiff is deemed to have ‘substantially prevailed’ for purposes of § 552(a)(4)(E) if the ‘litigation substantially caused the requested records to be released.’” *Gerhard v. U.S. Fed. Bureau of Prisons*, 258 F. Supp. 3d 159, 165 (D.D.C. 2017) (internal citations and quotation marks omitted). EPIC is not eligible for attorney’s fees under either provision.

1. EPIC has not obtained relief through a judicial order

EPIC is not eligible for an award of attorney fees because the Court’s orders in this case did not “change[] the legal relationship between [the plaintiff] and the defendant” or provide EPIC with any judicial “relief on the merits.” *Judicial Watch, Inc. v. FBI*, 522 F.3d 364, 367 (D.C. Cir. 2008) (citation and internal quotation marks omitted). The Court merely entered a

series of orders directing the parties to file a joint status report on a particular date. The only other order entered was the grant of Facebook’s motion to intervene, an issue that EPIC lost.

EPIC wrongly claims (*see* Memorandum of Points and Authorities In Support of Plaintiff’s Motion for Partial Summary Judgment On Attorney’s Fees and Costs (“Mem.”) at 11) that it substantially prevailed because the Court’s June 30, 2018 Minute Order “obligated the FTC to produce records by a date certain.” That Order did no such thing. Although the parties’ July 26, 2018 Joint Status Report included a proposed order with dates for the FTC’s processing and production of responsive records, the Court did *not* enter that proposed order. Instead, on June 30, 2018, it only “ORDERED that the parties shall file another joint status report by October 20, 2018.” Such “orders requir[ing] the [agency] to do no more than join with the plaintiff in filing status reports updating the court” on actions taken “do not affect a ‘court-ordered change in the legal relationship between the plaintiff and the defendant[,]’” and thus do not make the plaintiff eligible for a fee award under FOIA. *Summers v. DOJ*, 569 F.3d 500, 505 (D.D.C 2009) (quoting *Oil, Chem. & Atomic Workers Int’l Union v. DOE*, 288 F.3d 452, 458 (2002)). EPIC’s insistence that the June 30, 2018 Minute Order required production by a date certain “does not make it so.” *Conservation Force v. Jewell*, 160 F. Supp. 3d 194, 204 (D.D.C. 2016) (rejecting plaintiff’s *ipse dixit* that court’s order was “a production order”).

2. This Lawsuit Did Not Substantially Cause The Release Of Records

To prevail under the catalyst theory, a plaintiff must establish that the “lawsuit substantially caused the requested records to be released.” *ACLU v. U.S. Dep’t of Homeland Sec.*, 810 F. Supp. 2d, 267, 275 (D.D.C. 2011) (quoting *Weisberg v. DOJ*, 745 F.2d 1476, 1496 (D.C. Cir. 1984)). “The mere filing of the complaint and subsequent release of the documents is insufficient to establish causation.” *Weisberg*, 745 F.2d 1476, 1496. Instead, the “causation

inquiry must take into account “whether the agency upon actual and reasonable notice of the request, made a good faith effort to search out material and to pass on whether it should be disclosed.” *Weisberg*, 745 F.2d at 1496 (quoting *Cox v. U.S. Dep’t of Justice*, 601 F.2d 1, 6 (D.C. Cir. 1979)). Additional relevant factors include “the time-consuming nature of the search and decisionmaking process,” *id.*, “whether the scope of request caused delay in disclosure, and whether the agency was burdened by other duties that delayed its response.” *ACLU*, 810 F. Supp. 2d at 267, 275 (quoting *Frye v. EPA*, No. 90-3041, 1992 WL 237370, at 2 (D.D.C. Aug. 31, 1992)). “It is the plaintiff’s burden to present evidence establishing a direct causal nexus in order to be eligible for attorney’s fees under the FOIA.” *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Justice*, 750 F.2d 117, 121 (D.C. Cir. 1984).

EPIC’s submission falls far short of satisfying its burden. It argues (Mem. 14) that the FTC “had not processed any category of EPIC’s FOIA Request or produced responsive records” prior to EPIC’s filing of its Complaint on April 20, 2018. But this is factually incorrect. Within a week of receiving EPIC’s May 20, 2018, FOIA request (along with multiple other similar FOIA requests), the FTC began to search for records responsive to *each* of EPIC’s request specifications. Stearns Decl. ¶¶ 10, 13. Four days before EPIC filed its lawsuit, the FTC made an interim release of the requested Facebook Assessments. *Id.* ¶ 17. The next day, the FTC informed EPIC that the FTC was availing itself of FOIA’s 10-working day extension because of the need to search and collect records from other offices and consult with other agency components. *Id.* ¶ 18. And the following day, the FTC informed EPIC that it was in the process of re-reviewing redactions made to the Facebook Assessments released on April 16 to determine whether additional information could be released. *Id.* ¶ 21. This brief history makes plain that the FTC was not resisting the release of these records, but rather, it was working methodically to

respond to EPIC's and other pending requests for the Facebook-related records. EPIC, however, short-circuited the FTC's methodical administrative processing by peremptorily filing suit before the extended 30-working days provided by FOIA had run.

EPIC's suggestion that the FTC's inability to complete its processing of EPIC's FOIA request sooner or provide "a date certain for a determination" (Mem. at 14) support an inference of causation is meritless. An agency may delay response until after the filing of a lawsuit for any number of reasons that have "nothing to do with the filing of the lawsuit but instead with administrative delays due to backlogs of FOIA requests, the volume of responsive records requiring processing, the necessity of inter-agency searches and responses, or a combination of these factors." *Dorsen*, 15 F. Supp. 3d at 118-19. The D.C. Circuit has accordingly held, if "an unavoidable delay accompanied by due diligence in the administrative process was the actual reason for the agency's failure to respond to a request, then it cannot be said that the complainant substantially prevailed in [its] suit." *Church of Scientology*, 653 F.2d at 588 (quoting *Cox*, 601 F.2d at 6) (internal citations omitted).

To the degree that there was a delay in producing records, it was relatively short and due to a number of factors that had nothing to do with any recalcitrance of the part of the FTC. As demonstrated above, the FTC's FOIA unit needed to conduct searches within and engage in consultation with numerous other agency components. In addition, the FTC was obligated to provide notice to and consult with Facebook and PwC, the submitters of confidential business information in the requested records. Stearns Decl. ¶ 22. The FTC provided that notice before EPIC filed its Complaint, *id.* ¶ 23, but the required consultations took time. The FTC proceeded diligently, and promptly released responsive records on a rolling basis as documents were located and the necessary confidentiality and other withholding determinations were made. *Id.*

¶¶ 26-31. After doing so, the FTC worked diligently over several months to ensure that EPIC was satisfied with the production— responding to various questions and by continuing to engage with Facebook and PwC in an attempt to narrow the issues regarding their confidentiality claims (ultimately without success).¹ *See* p. 5, *supra*. These facts defeat EPIC’s catalyst theory claim for attorney fee eligibility.

As support for its argument, EPIC cites (Mem. 13) *EPIC v. DHS*, 811 F. Supp. 2d 216 (D.D.C. 2011). EPIC’s reliance on that case, however, is misplaced. There, seven months had elapsed between EPIC’s submission of its initial FOIA request and its commencement of litigation. *Id.* at 232. During that lengthy time, the agency did not produce any documents, did not “seek to take advantage of the statutory mechanisms available to extend its response time,” and “d[id] not [even] claim to have conducted any substantive searches for records” until prompted by EPIC’s Complaint. *Id.* at 233. The FTC’s response to EPIC’s FOIA request has little in common with the defendant’s FOIA response in that case.

EPIC is also mistaken in relying (Mem. 13) on *EPIC v. DHS*, 218 F. Supp. 3d 27 (D.D.C. 2016). There, the agency did not communicate anything to EPIC for four months after initially acknowledging receipt of EPIC’s request, *conceded* that EPIC’s filing of a Complaint caused it to accelerate its search for responsive records, and did not even begin to discuss how to narrow the FOIA request until a year after receiving it. *Id.* at 42-43. Again, that course of conduct bears no resemblance to the FTC’s diligent processing of EPIC’s request.²

¹ EPIC speculates that, had it not filed suit, “Facebook might have succeeded” in preventing the release of even more information. Such naked speculation does not satisfy EPIC’s burden to show causation.

² The other cases that EPIC cites (Mem. at 13) are also distinguishable. In *Judicial Watch, Inc. v. Dep’t of Justice*, 878 F. Supp. 2d 225, 232-33 (D.D.C. 2012), the agency reversed course during the litigation by releasing records that it had previously asserted were exempt from

Accordingly, since the agency was already engaged in diligent efforts to respond to EPIC's request before it filed this suit, and the same results would have been obtained through the administrative process, *see Weisberg*, 848 F.2d at 1270, EPIC's Complaint did not cause the agency to respond to its request.

B. EPIC Is Not Entitled To Attorney's Fees

Even if EPIC could be said to have prevailed and thus is eligible for an award of attorney's fees, EPIC must also show that it is entitled to them. *Church of Scientology v. Harris*, 653 F.2d at 590. The entitlement inquiry examines (1) the public benefit derived from the disclosure; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) "whether the agency's opposition to disclosure had a reasonable basis in law and whether the agency had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior." *See Davy v. CIA*, 550 F. 3d 1155, 1159 (D.C. Cir. 2008). Ultimately, the decision on whether a plaintiff is entitled to attorneys' fees "rests in the sound discretion of the district court." *Church of Scientology*, 653 F.2d at 590.

"Although none of the foregoing four factors is solely dispositive, the failure to satisfy the fourth element of an unreasonable withholding may foreclose a claim for attorney fees or costs." *See Maydak v. U.S. Dep't of Justice*, 579 F. Supp. 2d 105, 109 (D.D.C. 2008) (alterations and quotation marks omitted). Here, there is no close call on the fourth factor, and therefore, the first three factors are far outweighed by the evidence that the FTC worked diligently to produce

disclosure; there has been no such reversal here. In *Nat'l Sec. Counselors v. CIA*, 189 F. Supp. 3d 73, 80 (D.D.C. 2016), the agency "d[id] not present any evidence" to countervene the inference of causation warranted by the agency's post-Complaint production of documents after years of nonresponsiveness; here, the FTC has presented ample evidence of its pre-Complaint diligence. And *Am. Oversight v. Dep't of Justice*, 375 F. Supp. 3d 50 (D.D.C. 2019), did not even involve application of the catalyst theory.

the documents in question. EPIC does not claim that the FTC wrongly withheld any responsive documents or opposed disclosure of responsive documents. EPIC's complaint (Mem. at 19) about the modest delays in the FTC's processing and production of responsive records does not entitle it to a fee award. To begin, EPIC improperly short-circuited the administrative process by filing suit before the extended 30-day deadline for the FTC's response had run. EPIC appears to be under the misimpression that an agency's failure to meet statutory deadlines automatically entitles it to attorney's fees. If that were so, FOIA requesters could be incentivized continually to make complex requests for voluminous records in order to generate substantial attorneys' fees. Neither Congress nor the courts have countenanced such a scheme. Moreover, as amply demonstrated above, the FTC did not engage in obdurate behavior, and EPIC has failed to demonstrate any recalcitrance on the part of the FTC. Thus, EPIC is not entitled to attorney's fees.

For these reasons and based upon the Defendant's Response to Plaintiff's Statement of Material Facts, Plaintiff's Motion for Partial Summary Judgment on Attorney's Fees and Costs should be denied. A proposed order accompanies this filing.

Dated: December 13, 2019

Respectfully Submitted,

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**UNITED STATES DISTRICT COURT
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Defendant.)	

**FTC’S RESPONSE TO PLAINTIFF’S STATEMENT OF
MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to Local Rule 7(h)(1), Defendant the Federal Trade Commission (“FTC”) hereby responds to Plaintiff Electronic Privacy Information Center’s (“EPIC”) Statement of Material Facts, with references to supporting evidence:

EPIC’S Statement Of Fact No. 1

On March 20, 2018, EPIC submitted a Freedom of Information Act (“FOIA”) request to the Federal Trade Commission (“FTC”) seeking records, in the possession of the FTC, about Facebook that was required by the 2011 consent order. Compl. ¶ 25; Answer ¶¶ 25–28. EPIC sought five categories of records:

1. The 2013 Facebook Assessments;
2. The 2015 Facebook Assessments;
3. The 2017 Facebook Assessments;
4. All records concerning the person(s) approved by the FTC to undertake the Facebook Assessments; and
5. All records and communications between the FTC and Facebook regarding the Facebook Assessments.

FTC’S Response to EPIC’S Statement Of Fact No. 1

Undisputed.

EPIC'S Statement Of Fact No. 2

In a letter dated March 29, 2017, the FTC FOIA Office acknowledged receipt of EPIC's FOIA request and granted EPIC's request for expedited processing and a fee waiver. Compl. ¶ 29; Answer ¶ 29. The FTC assigned EPIC's FOIA request reference number FOIA-2018-0066. *Id.*

FTC'S Response to EPIC'S Statement Of Fact No. 2

Undisputed.

EPIC'S Statement Of Fact No. 3

On April 17, 2018, the FTC sent an e-mail to EPIC stating that it was unable to respond to EPIC's FOIA request within the statutory deadline. Compl. ¶ 30; Answer ¶ 30.

FTC'S Response to EPIC'S Statement Of Fact No. 3

Disputed, because this statement does not fully and accurately characterize the FTC's communication. The FTC's April 17, 2018, email to EPIC stated that the FTC was unable to respond to EPIC's request within the 20-working day deadline, but that EPIC's request presented "unusual circumstances" that warranted an extension of the deadline under FOIA, 5 U.S.C. § 552(a)(6)(B)(iii). Stearns Decl. ¶ 8; Exhibit C.

EPIC'S Statement Of Fact No. 4

On April 20, 2018, EPIC filed suit in connection to the above-referenced FOIA request. Prior to EPIC's lawsuit, the FTC did not release responsive records and did not issue a determination required under the FOIA.

FTC'S Response to EPIC'S Statement Of Fact No. 4

Undisputed, as to the date that EPIC filed this suit. The remainder of the statement is disputed. On April 16, 2018, the FTC released records that were partially responsive to categories 1-3 of EPIC's request, posting to the FTC's online reading room the 2013, 2015, and 2017 Facebook Assessments with redactions, as released in response to prior FOIA requests. Stearns Decl. ¶ 17. In a telephone conversation on April 18, 2018, FTC FOIA staff told EPIC

that the FTC was reprocessing those records to determine whether the exemptions the FTC previously invoked to protect confidential commercial information still applied. *Id.* ¶ 21.

EPIC’S Statement Of Fact No. 5

On May 24, 2018, the FTC filed its Answer and argued that EPIC “failed to exhaust its administrative remedies” and that EPIC’s claims that the agency failed to process its FOIA request was “moot.” Answer 7.

FTC’s Response to EPIC’s Statement of Fact No. 5

Undisputed.

EPIC’s Statement of Fact No. 6

On June 5, 2018, the Court ordered the parties to “meet, confer, and file a joint proposed schedule for briefing or disclosure by June 26, 2018.”

FTC’s Response to EPIC’s Statement of Fact No. 6

Undisputed.

EPIC’s Statement of Fact No. 7

One day prior to the June status report deadline, the FTC sent EPIC a draft status report that did not proposed [sic] schedule for disclosure of records. Instead, the draft status report indicated that the agency will upload the first three categories of EPIC’s FOIA request to the agency’s *Frequently Request Records: Facebook* webpage on June 26, 2018. In the filed status report, the FTC “requested additional time to establish a schedule for processing of the request and disclosure of relevant records” responsive to the other categories of EPIC’s FOIA request.

FTC’s Response to EPIC’s Statement of Fact No. 7

Disputed. The draft status report the FTC sent EPIC proposed a date for the disclosure of records responsive to the first three categories of EPIC’s FOIA request: June 26, 2018 (and the FTC released those records on that date). Further disputed, to the extent the quoted language mischaracterizes the June 26, 2018, Joint Status Report. The cited paragraph stated, in full: “The FTC has requested additional time to establish a schedule for processing of the request and disclosure of relevant records. Accordingly, the Parties ask the Court to schedule a subsequent joint status report for July 26, 2018.” ECF No. 7 at 2.

EPIC's Statement of Fact No. 8

In the June 26, 2018 status report, the parties agreed that the FTC would “establish a schedule for processing of the request” by July 26, 2018. ECF No. 7. The Court reviewed the June 26, 2018 Joint Status Report and ordered the parties to file another status report on July 26, 2018.

FTC's Response to EPIC's Statement of Fact No. 8

Disputed, to the extent that the quoted language mischaracterizes the June 26, 2018, Joint Status Report. The cited paragraph stated, in full: “The FTC has requested additional time to establish a schedule for processing of the request and disclosure of relevant records.

Accordingly, the Parties ask the Court to schedule a subsequent joint status report for July 26, 2018.” ECF No. 7 at 2.

EPIC's Statement of Fact No. 9

On July 25, 2018, EPIC contacted the FTC to propose a production schedule. In an email, EPIC stated that it “propose the following production schedule: The FTC shall process and release all non-exempt records responsive to EPIC's FOIA request by Monday, August 27, 2018.” EPIC also proposed “that the parties file another status report 14 days after production (September 10, 2018), allowing EPIC and the agency to confer on whether there are any remaining issues in dispute.”

FTC's Response to EPIC's Statement of Fact No. 9

The FTC cannot locate this email and therefore cannot confirm or dispute this statement; however, it is immaterial to EPIC's eligibility for or entitlement to attorney's fees.

EPIC's Statement of Fact No. 10

On July 26, 2018, the FTC responded to EPIC's e-mail with a counterproposal including an “interim production on 9/10/18 and a final production on 10/10/18.” EPIC agreed to the modified production schedule and the parties incorporated the schedule into the July 26, 2018 Joint Status Report. ECF No. 8. The parties also submitted a proposed order with the status report that referenced the production schedule explicitly. ECF No. 8-1.

FTC's Response to EPIC's Statement of Fact No. 10

Undisputed.

EPIC's Statement of Fact No. 11

The court reviewed the parties' status report with the agreed upon production schedule and issued a Minute Order on July 30, 2018, ordering the parties to "file another joint status report by October 20, 2018."

FTC's Response to EPIC's Statement of Fact No. 11

Disputed, to the extent that it suggests the Court's July 30, 2018, Minute Order adopted the proposed production schedule. That Order did not require production but only "ORDERED that the parties shall file another joint status report by October 20, 2018."

EPIC's Statement of Fact No. 12

On September 10, 2018, the FTC produced copies of the Facebook privacy assessments as well as 152 pages of records responsive to category 4 of EPIC's FOIA request.

FTC's Response to EPIC's Statement of Fact No. 12

Undisputed.

EPIC's Statement of Fact No. 13

On October 12, 2018, the FTC produced 175 partially redacted pages of records responsive to category 5 of EPIC's FOIA request.

FTC's Response to EPIC's Statement of Fact No. 13

Undisputed.

EPIC's Statement of Fact No. 14

On October 18, 2018, counsel for the FTC contacted EPIC and stated that it was preparing to complete the final production for responsive records for release. The FTC Counsel told EPIC that Facebook opposed the release of some of the processed records and the company was considering filing an intervention in the case. Facebook did not file a motion to intervene at that time.

FTC's Response to EPIC's Statement of Fact No. 14

The FTC cannot locate a record of this communication and therefore cannot confirm or dispute this statement; however, it is immaterial to EPIC's eligibility for or entitlement to attorney's fees.

EPIC's Statement of Fact No. 15

On October 19, 2018, the FTC produced 277 partially redacted pages of records responsive to category 5 of EPIC's FOIA request. This production was the third and final production.

FTC's Response to EPIC's Statement of Fact No. 15

Undisputed.

Dated: December 13, 2019

Respectfully Submitted,

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United States Attorney

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By: _____ /s/
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EPIC,)
)
)
Plaintiff,)
)
v.)
) Civil Action No. 18-942
FEDERAL TRADE COMMISSION,)
)
Defendant.)

DECLARATION OF DIONE JACKSON STEARNS

I, Dione Jackson Stearns, declare the following to be a true and correct statement of facts:

1. I am Assistant General Counsel for Information and Legal Support with the Federal Trade Commission (“FTC”). In that capacity, my responsibilities include: (1) acting as a liaison with offices and bureaus of the FTC in responding to requests and litigation filed under both the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (2006), amended by the OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, and the Privacy Act of 1974 (“PA”), 5.U.S.C. § 552a (2006); (2) review of FOIA/PA requests for access to records located in this office and the FTC’s Bureaus and Offices, and the case files arising therefrom; (3) review of correspondence related to FOIA/PA requests; (4) review of searches conducted in response to FOIA/PA requests; (5) location of responsive records; and (6) preparation of responses thereto by the FTC to ensure that determinations to withhold or release responsive records are made in accordance with the provisions of both the FOIA and the PA, as well as the relevant FTC

regulations (16 C.F.R. §§ 4.8 *et. seq*). Previously, I served five years as Attorney Advisor for the Executive Office for United States Attorneys (“EOUSA”) FOIA Privacy Act staff. In that position, I was responsible for reviewing FOIA/PA requests for access to records located in EOUSA and the 94 United States Attorney’s offices located throughout the country, determining whether to withhold or release responsive records, and serving as agency counsel in litigation cases filed under the FOIA/PA in accordance with the provisions of both the FOIA and the PA.

2. As FTC’s Assistant General Counsel for Information and Legal Support (the “FOIA Unit”), I have authority to release and/or withhold records requested under the FOIA/PA, and to explain the rationale for FTC’s disclosure determinations. The statements I make in this declaration are based on my review of the official files and records of the FTC, my own personal knowledge, and/or information acquired by me through the performance of my official duties.

3. Due to the nature of my official duties, I am familiar with procedures followed by the FTC in responding to Plaintiff’s FOIA request, 2018-00666, which is the subject of this lawsuit.

4. This declaration explains the procedures that were followed in responding to Plaintiff’s April 20, 2018 request, referenced in count I. This declaration is drafted in support of the FTC’s Opposition of EPIC’s Motion for Partial Summary Judgment.

OVERVIEW OF FOIA PROCESSING AT THE COMMISSION

5. The FTC FOIA Unit operates in an electronic environment, which means that all FOIA requests from receipt of the initial request through the final decision are processed in the FOIA Unit. To do so, the FTC uses FOIAXpress, which is an internal server-based application for electronic processing and tracking of FOIA requests. This software allows the FTC to

electronically store, retrieve, redact, and print documents for delivery to FOIA requestors. It is capable of tracking and reporting workflow, statistics, and correspondence, as well as generating fee calculations and invoices. When the FTC receives a FOIA request, it is immediately scanned or uploaded into FOIAXpress and then reviewed by the FOIA Unit. Subsequently, an initial search is conducted to identify the likely office to contain responsive records, which is separate from the FOIA office processing the request. Once the proper office or offices are identified, the FOIA Unit sends requests for documents forms to the offices to provide the responsive records to the FOIA Unit for central processing and response to the requester.

PRE-COMPLAINT RESPONSE TO EPIC'S EPICS FOIA REQUEST

6. Enid Zhou, on behalf of Electronic Privacy Information Center ("EPIC"), submitted to the FTC a FOIA request dated March 20, 2018. Plaintiff's request sought the following records:

- (1) The 2013 Facebook Assessments;
- (2) The 2015 Facebook Assessments;
- (3) The 2017 Facebook Assessments
- (4) All records concerning the person(s) approved by the FTC to undertake the Facebook Assessments; and
- (5) All records of communications between the FTC and Facebook regarding the Facebook Assessments.

In that same letter, Plaintiff requested expedited treatment and a Public Interest Fee Waiver.

Exhibit A.

7. Upon receipt of EPIC's FOIA request, I assigned it to FOIA attorney Jonathan Hill for processing.

8. At the time EPIC submitted its request, the FOIA Unit had approximately 100 open and outstanding FOIA requests that preceded EPIC's request. These requests were in various stages of processing and review on final release determinations. In compliance with 5 U.S.C. § 552(a)(6)(D), agencies are permitted to have FOIA procedures for "multitrack processing" of requests with varying degrees of difficulty. Typically, the degrees of difficulty of processing requests fall into three tracks -- expedited, simple, and complex. The FOIA Unit employs a first-in, first-out processing procedure within each track, thus responding to relatively simple requests more quickly than requests involving complex and/or voluminous records. Requests that are granted expedited processing are processed "as soon as practicable" based on the simplicity or complexity of the records requested.

9. From March 19, 2018 to March 27, 2018, the FOIA Unit received seven FOIA requests, including the underlying FOIA request at issue (FOIA-2018-00666), seeking access to Facebook assessments and communications.

10. On March 28, 2018, Mr. Hill sent a request for documents to the FTC's Enforcement Division an office separate from the FOIA office processing the request. In the email, Mr. Hill notified the office to search promptly for responsive records and send any documents to the FOIA Unit, the central FOIA processing office.

11. On March 29, 2018, the FTC acknowledged receipt of EPIC's March 20, 2019 FOIA request and assigned FOIA request number, 2018-00666 to it. The FTC also granted EPIC's request expedited processing and a fee waiver. **Exhibit B.**

12. Based on the initial review of EPIC's FOIA request and the fact that this request contained confidential information that would require third-party submitter notification, the FOIA Unit categorized EPIC's FOIA request as expedited complex and proceeded to do its due diligence to process the request as soon as practicable.

13. By email dated April 4, 2018, Mr. Hill sent a request for documents to additional employees in Enforcement regarding "Facebook FOIA requests" and provided the following "four specifications" that were identified across the Facebook-related requests:

Spec. 1. The initial and biennial assessments and reports provided by Facebook or any independent third-party professional pursuant to the Decision and Order in *In re Facebook, Inc.* (C-4365);

Spec. 2. All records concerning any person approved or rejected by the FTC to conduct such assessments;

Spec. 3. All communications not included in Spec. 2 between the FTC and Facebook (and its representatives, e.g. attorneys) or its third-party assessors concerning the consent agreement or the assessments (including presentations, meeting minutes/notes, memos, and briefing materials); and

Spec. 4. All materials relied upon to prepare the assessments, whether prepared by or on behalf of Facebook (*see* Sec. VI(E) of the Decision and Order).

14. Also on April 4, 2018, Mr. Hill contacted the Division of Privacy and Identity Protection ("DPIP") staff and asked them to search for the requested records, drawing their attention in particular to the pending requests for all communications between the FTC and Facebook or its third-party assessors.

15. By email dated April 5, 2018, Reenah Kim, Enforcement Division, emailed Mr. Hill and advised him that she had uploaded all the assessment materials for Spec 1 on DPIP's internal drive for review. In that email, Ms. Kim stated that she would turn to the other specifications the following week.

16. In a second email on April 5, 2018, Mr. Hill sent an RFD, outlining the specifications stated above, and identified the Division of Privacy and Identification Protection Office (“DPIP”) offices as potentially having responsive documents, include those relevant to request communications between the FTC and Facebook or its third-party assessors.

17. On April 16, 2018, Hill requested that the FTC WebTeam post to the FTC’s website the 2013, 2015, and 2017 Facebook Privacy Assessments released in response to prior FOIA requests, which were also responsive to portions of EPIC’s and other then-pending Facebook-related requests. That same day, the FTC released the Facebook Privacy Assessments with heavy redactions and posted the records in the FOIA reading room, at <https://www.ftc.gov/about-ftc/foia/frequently-requested-records/facebook>.

18. On April 17, 2018, the FTC advised Plaintiff by email that the FTC is unable to respond to Plaintiff’s request within the 20-day working day deadline due to “unusual circumstances.” As a result, The FTC invoked a ten-day extension to process Plaintiff’s FOIA request by referencing the following:

- The need to search for and collect requested records from field facilities or other establishments that are separate from the office processing the request; and
- 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 ... having substantial subject matter interest therein.

Exhibit C.

19. According to the FOIA, if the required extension exceeds ten days, the agency must allow the requester an opportunity to modify his or her request, or to arrange

for an alternative period for completion of the agency's processing. Each agency is required to make available its FOIA Public Liaison to aid the requester in this regard and to "assist in the resolution of any disputes." Additionally, the FOIA Improvement Act of 2016 mandates that when agencies extend the time limit by more than ten additional working days they must notify the requester of the right to seek dispute resolution services from the Office of Government Information Services (OGIS).

20. In compliance with the FOIA, that FTC's April 17, 2019 email to EPIC identified the FTC's Public Liaison, Richard Gold, and advised Plaintiff of its right to seek dispute resolution services from OGIS. Finally, the email informed EPIC that that the FTC would continue to process its FOIA request, which sought access to five enumerated items. **Exhibit C.**

21. On April 18, 2018, EPIC contacted FOIA Public Liaison, Rich Gold, asking whether EPIC could bifurcate the request because EPIC did not believe that 'unusual circumstances' applied to" items (1)-(3) of its request. That same day, EPIC contacted the FOIA Unit via telephone and reiterated its request to bifurcate the records and process items (1)-(3) first. The FTC advised EPIC that the three Facebook Assessments, as released from prior FOIA requests, had been posted on the FTC's website, and that the FTC was re-reviewing and reprocessing those records in light of the recent FOIA requests to determine if previously redacted information could now be disclosed.

22. On April 20, 2018, two days after the April 18, 2018 phone call and ten days before May 1, 2018—the day the ten-day extension expired—EPIC filed a lawsuit in the United States District Court for the District of Columbia and commenced this litigation.

SUBMITTER NOTICE REQUIREMENT

22. Under Executive Order 12,600, 15 U.S.C. § 57b-2(c), and 16 C.F.R. 4.10(e) and (g), whenever a submitter's records contain confidential commercial information, it is necessary for the FTC's FOIA Unit to provide the submitter with pre-disclosure notification. The purpose of the pre-disclosure notification is to provide submitters the chance to give their input regarding the potential confidentiality of any of their records, and to explain why disclosure of those records reasonably could be expected to cause substantial harm to the submitter's competitive interests.

23. Before making the final disclosure determination for Facebook privacy assessments records responsive to EPIC's and other similar pending FOIA requests, Mr. Hill followed the pre-disclosure notification process to submitters of confidential business information contained in responsive records. On April 19, 2018, Mr. Hill sent a submitter notice to Facebook via email notifying it of the pending FOIA requests seeking access to the privacy assessments that Facebook, through PricewaterhouseCoopers ("PwC"), the auditor who prepared the Facebook assessments, had designated confidential. The FTC asked that they identify information Facebook deemed to be confidential business information and to substantiate the basis for nondisclosure of this information.

POST-COMPLAINT PROCESSING OF EPIC'S EPICS FOIA REQUEST

24. On April 23, 2018, the FTC continued to receive responses to document requests and access to responsive documents from FTC employees in the FTC's Enforcement Division and Division of Privacy and Identity Protection.

25. On May 2, 2018 and May 3, 2018, the FTC sent a request for documents to the Commissioners Office's, the FTC's Front office, and the Director's office seeking records

responsive to the pending Facebook requests. Throughout the month of May, the FOIA unit continued to receive responses from the various FTC offices regarding responsive records.

26. Facebook provided comments on the FTC's proposed redactions records responsive to category 1-3 of EPIC's request up to the middle of June 2018. Following the consultations with the submitting parties, the FTC incorporated the results of their review into a set of documents that the agency produced.

27. On June 26, 2018, the FTC released 194 partially redacted pages of Facebook records responsive to categories 1-3 of EPIC's requests as well as numerous other pending Facebook FOIA requests.

28. Throughout September, the FTC continued to discuss with Facebook and Price Waterhouse Cooper their objections to the release of some responsive records responsive to Category 4 and 5 of EPIC's request.

29. On September 10, 2018, the FTC produced to EPIC a comprehensive set of records responsive to categories 1-4 of its FOIA request: the Facebook Assessment records previously released on June 26, 2018, and an additional 152 partially redacted pages of records responsive to category 4 of EPIC's request.

30. On October 12, 2018, the FTC made a second release of 175 partially redacted pages of records to EPIC that were responsive to specification 5, communications between the FTC and Facebook.

31. On October 19, 2018, the FTC made a final release of 277 partially redacted records responsive to category 5 of EPIC's request, completing the FTC's production.

ADMINISTRATIVE APPEAL EXHAUSTION

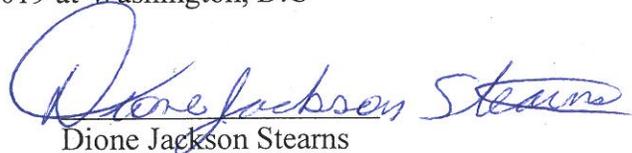
32. EPIC did not file an administrative appeal prior to commencing the present court action. I have both reviewed the official FTC files and personally confirmed with the Appellate staff by telephone and email communication that there is no record of EPIC filing an appeal.

CONCLUSION

33. Each step in the handling of EPIC's FOIA requests has been entirely consistent with the FTC's procedures adopted to insure an equitable response to all persons seeking access to records under the FOIA. In summation, the FTC has properly responded to EPIC's FOIA request.

I declare under penalty of perjury that the foregoing is true and correct and that Exhibits A through O attached hereto are true and correct copies.

Executed on the 13th day of December 2019 at Washington, D.C



Dione Jackson Stearns
Assistant General Counsel
Federal Trade Commission

EXHIBIT A



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VIA EMAIL

March 20, 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

FOIA 2018-00666



Dear Ms. Mackey:

This letter constitutes an urgent request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Federal Trade Commission (“FTC”).

EPIC seeks the Facebook assessments, reports (“Facebook Assessments”), and related records required by the 2012 FTC Consent Order.¹

Documents Requested

- (1) The 2013 Facebook Assessments;
- (2) The 2015 Facebook Assessments;
- (3) The 2017 Facebook Assessments;
- (4) All records concerning the person(s) approved by the FTC to undertake the Facebook Assessments; and
- (5) All records of communications between the FTC and Facebook regarding the Facebook Assessments.

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.² EPIC had conducted extensive research and documented the instances of Facebook overriding the users’ privacy settings to reveal personal information and to disclose, for commercial benefit, user data, and the

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

personal data of friends and family members, to third parties without their knowledge or affirmative consent.³

In response to a complaint from EPIC and consumer privacy organizations, the FTC launched an extensive investigation and issued a Preliminary Order against Facebook in 2011 and then a Final Order in 2012.⁴ 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.”⁵

According to the FTC press statement, the FTC complaint listed several instances in which Facebook allegedly made promises that it did not keep:

- “In December 2009, Facebook changed its website so certain information that users may have designated as private – such as their Friends List – was made public. They didn’t warn users that this change was coming, or get their approval in advance.”
- “Facebook represented that third-party apps that users’ installed would have access only to user information that they needed to operate. In fact, the apps could access nearly all of users’ personal data – data the apps didn’t need.”
- “Facebook told users they could restrict sharing of data to limited audiences – for example with ‘Friends Only.’ In fact, selecting ‘Friends Only’ did not prevent their information from being shared with third-party applications their friends used.”
- “Facebook had a ‘Verified Apps’ program & claimed it certified the security of participating apps. It didn’t.”
- “Facebook promised users that it would not share their personal information with advertisers. It did.”
- “Facebook claimed that when users deactivated or deleted their accounts, their photos and videos would be inaccessible. But Facebook allowed access to the content, even after users had deactivated or deleted their accounts.”
- “Facebook claimed that it complied with the U.S.- EU Safe Harbor Framework that governs data transfer between the U.S. and the European Union. It didn’t.”⁶

³ *FTC Facebook Settlement*, EPIC.org, <https://epic.org/privacy/ftc/facebook/>.

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

⁵ 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>.

⁶ *Id.*

The FTC press statement further states that under the proposed settlement Facebook is:

- “barred from making misrepresentations about the privacy or security of consumers’ personal information;”
- “required to obtain consumers’ affirmative express consent before enacting changes that override their privacy preferences;”
- “required to prevent anyone from accessing a user’s material more than 30 days after the user has deleted his or her account;”
- “required to establish and maintain a comprehensive privacy program designed to address privacy risks associated with the development and management of new and existing products and services, and to protect the privacy and confidentiality of consumers’ information; and”
- “required, within 180 days, and every two years after that for the next 20 years, to obtain independent, third-party audits certifying that it has a privacy program in place that meets or exceeds the requirements of the FTC order, and to ensure that the privacy of consumers’ information is protected.”⁷

The Reporting Requirements of the 2012 Consent Order

The reporting requirements that the FTC imposed on Facebook are set out in more details in the text of the Final Order. According to the 2012 Final Order of the Federal Trade Commission:

[The] Respondent [Facebook] shall, no later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive privacy program that is reasonably designed to (1) address privacy risks related to the development and management of new and existing products and services for consumers, and (2) protect the privacy and confidentiality of covered information. Such program, the content and implementation of which must be documented in writing, shall contain controls and procedures appropriate to Respondent’s size and complexity, the nature and scope of Respondent’s activities, and the sensitivity of the covered information, including:

- A. the designation of an employee or employees to coordinate and be responsible for the privacy program.
- B. the identification of reasonably foreseeable, material risks, both internal and external, that could result in Respondent’s unauthorized collection, use, or disclosure of covered information and an assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this privacy risk assessment should include consideration of risks in each area of

⁷ *Id.*

relevant operation, including, but not limited to: (1) employee training and management, including training on the requirements of this order, and (2) product design, development, and research.

- C. the design and implementation of reasonable controls and procedures to address the risks identified through the privacy risk assessment, and regular testing or monitoring of the effectiveness of those controls and procedures.
- D. the development and use of reasonable steps to select and retain service providers capable of appropriately protecting the privacy of covered information they receive from Respondent and requiring service providers, by contract, to implement and maintain appropriate privacy protections for such covered information.
- E. the evaluation and adjustment of Respondent's privacy program in light of the results of the testing and monitoring required by subpart C, any material changes to Respondent's operations or business arrangements, or any other circumstances that Respondent knows or has reason to know may have a material impact on the effectiveness of its privacy program.⁸

Moreover, the Final Order stated:

Respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. A person qualified to prepare such Assessments shall have a minimum of three (3) years of experience in the field of privacy and data protection. All persons selected to conduct such Assessments and prepare such reports shall be approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, in his or her sole discretion. Any decision not to approve a person selected to conduct such Assessments shall be accompanied by a writing setting forth in detail the reasons for denying such approval. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) years after service of the order for the biennial Assessments. Each Assessment shall:

- A. set forth the specific privacy controls that Respondent has implemented and maintained during the reporting period;
- B. explain how such privacy controls are appropriate to Respondent's size and complexity, the nature and scope of Respondent's activities, and the sensitivity of the covered information;

⁸ 2012 Consent Order, *supra* note 1, at 5–6.

- C. explain how the privacy controls that have been implemented meet or exceed the protections required by Part IV of this order; and
- D. certify that the privacy controls are operating with sufficient effectiveness to provide reasonable assurance to protect the privacy of covered information and that the controls have so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by Respondent until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.⁹

Cambridge Analytica Breach

On March 16, 2018, Facebook admitted the unlawful transfer of 50 million user profiles to the data mining firm Cambridge Analytica, which harvested the data obtained without consent to influence the 2016 U.S. presidential election.¹⁰ Relying on the data provided by Facebook, Cambridge Analytica was able to collect the private information of approximately 270,000 users and their extensive friend networks under false pretenses as a research-driven application.¹¹

This is in clear violation of the 2012 Consent Order, which states that Facebook “shall not misrepresent in any manner, expressly or by implication ... the extent to which [Facebook] makes or has made covered information accessible to third parties; and the steps [Facebook] takes or has taken to verify the privacy or security protections that any third party provides.”¹²

Under the Final Consent Order, Facebook’s initial assessment was due to the FTC on April 13, 2013, and the subsequent reporting deadlines were in 2015 and 2017. Cambridge Analytica engaged in the illicit collection of Facebook user data from 2014 to 2016, encompassed by the reporting period of the requested assessments.

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

⁹ *Id.* at 6–7.

¹⁰ Press Release, Facebook, Suspending Cambridge Analytica and SCL Group from Facebook (Mar. 16, 2018), <https://newsroom.fb.com/news/2018/03/suspending-cambridge-analytica/>.

¹¹ *Id.*

¹² 2012 Consent Order, *supra* note 1, at 3–4.

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 supervision of Facebook and its enforcement of the 2012 Consent Order.

The “urgency” to inform the public about this activity is clear given that on March 18, 2018, two former FTC officials who crafted the consent decree stated that Facebook may have violated the decree and could be liable in civil fines.¹³ The FTC’s failure to enforce the 2012 Consent Order has not only jeopardized consumer privacy but has allowed a controversial firm to interfere in the 2016 Presidential election.

Additionally, release of this information is urgent because both U.S. and British lawmakers are demanding Facebook chief Mark Zuckerberg to testify publicly and explain how the information of 50 million users ended up in the possession of a foreign data analysis firm.¹⁴ In a joint letter to Facebook, Senate Commerce Committee Chairman Senator John Thune (R-S.D.), Senator Roger Wicker (R-Miss.) and Senator Jerry Moran (R-Kan.) wrote, “the possibility that Facebook has either not been transparent with consumers or has not be able to verify that third party app developers are transparent with consumers is troubling.” Senator Edward Markey (D-Mass.) said “in light of these allegations, and the ongoing Federal Trade Commission (FTC) consent decree that requires Facebook to obtain explicit permission before sharing data about its users, the Committee should move quickly to hold a hearing on this incident, which has allegedly violated the privacy of tens of millions of Americans.”¹⁵ On March 19, 2018, Sen. Ron Wyden (D-OR.) sent a letter to Facebook demanding details on the extent of Facebook’s misuses in its user’s private information stating:

The troubling reporting on the ease with which Cambridge Analytica was able to exploit Facebook’s default privacy settings for profit and political gain throws into question not only the prudence . . . of Facebook’s business practices . . . but also raises serious concerns about the role Facebook played in facilitating and permitting the covert collection and misuse of consumer information.¹⁶

¹³ Craig Timberg & Tony Romm, *Facebook May Have Violated FTC Privacy Deal, Say Former Federal Officials, Triggering Risk of Massive Fines*, Washington Post (Mar. 18, 2018), <https://www.washingtonpost.com/news/the-switch/wp/2018/03/18/facebook-may-have-violated-ftc-privacy-deal-say-former-federal-officials-triggering-risk-of-massive-fines/>.

¹⁴ Craig Timberg & Tony Romm, *U.S. and British Lawmakers Demand Answers from Facebook Chief Executive Mark Zuckerberg*, Washington Post (Mar. 18, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2018/03/18/u-s-and-british-lawmakers-demand-answers-from-facebook-chief-executive-mark-zuckerberg/>.

¹⁵ Letter from Edward J. Markey, Senator of Massachusetts, to Hon. John Thune, Chairman, Comm. on Commerce, Sci., and Transp., et. al. (Mar. 19, 2018), <https://www.markey.senate.gov/imo/media/doc/Facebook%20Cambridge%20Analytica.pdf>.

¹⁶ Letter from Ron Wyden, Senator of Oregon, Ranking Member of Comm. on Fin., to Mark Zuckerberg, Chief Exec. Officer, Facebook (Mar. 19, 2018), <https://www.wyden.senate.gov/imo/media/doc/wyden-cambridge-analytica-to-facebook.pdf>.

The Massachusetts Attorney General has also opened an investigation into Facebook's involvement with Cambridge Analytica.¹⁷ The Department of Justice's Special Counsel Robert Mueller has demanded emails of Cambridge Analytica employees who worked for the Trump team as part of his investigation into the interference of the 2016 Presidential election.¹⁸ And the British Information Commissioner has called for the release of additional information.¹⁹

Second, EPIC is an organization "primarily engaged in disseminating information" to the public because it is a representative of the news media. 16 C.F.R. § 4.11(a)(1)(i)(G). As the Court explained in *EPIC v. DOD*, "EPIC satisfies the definition of 'representative of the news media'" entitling it to preferred fee status under the FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

In submitting this request for expedited processing, 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 considerations 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

¹⁷ Jennifer Hansler, *Massachusetts AG to investigate Facebook, Cambridge Analytica*, CNN (Mar. 18, 2018), <https://www.cnn.com/2018/03/18/politics/massachusetts-ag-cambridge-analytica/index.html>.

¹⁸ Rebecca Ballhaus, *Meuller Sought Emails of Trump Campaign Data Firm*, Wall Street Journal (Dec. 15, 2017), <https://www.wsj.com/articles/mueller-sought-emails-of-trump-campaign-data-firm-1513296899>.

¹⁹ 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/>.

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 consideration, 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 enforcement of its own 2012 Consent Order against Facebook.

On the second consideration, disclosure “is likely to contribute to an understanding of these operations or activities” because the FTC has not published any of the biennial Assessments that Facebook is required to prepare. 16 C.F.R. § 4.8(2)(i)(B). The FTC has relied on consent orders containing independent assessments to resolve privacy violations by several major companies, including Facebook, MySpace, and Google. Therefore, the transparency and accountability surrounding these settlements is important, and the public has an interest in the prompt evaluation of the biennial assessment’s effectiveness.

On the third consideration, 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.²⁰ EPIC consistently publishes critical documents obtained through the FOIA and through litigation on its robust website for educational purposes.²¹ Moreover, EPIC publishes an award-winning email and online newsletter that always highlights critical documents obtained through the FOIA.²²

On the fourth consideration, the disclosure will provide a “significant” contribution to public understanding. 16 C.F.R. § 4.8(2)(i)(D). Since the 2012 Consent Order, the public has been left in the dark about whether the FTC has been appropriately enforcing its 2012 Consent Order and investigating any potential violations by Facebook. The release of this information would significantly contribute to the public understanding of whether Facebook is complying with the original order and whether the FTC has been fulfilling its function in safeguarding online privacy.

(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.

²⁰ *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

²¹ EPIC.org, <https://www.epic.org/>.

²² *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 Sunny Kang

Sunny Kang

EPIC International Consumer Counsel

EXHIBIT B

From: [Hill, Jonathan](#)
To: ["Enid Zhou"](#)
Subject: RE: FOIA Request Submission
Date: Thursday, March 29, 2018 5:24:00 PM
Attachments: [FTC FOIA 2018-00666.tr 032918.pdf](#)

Ms. Zhou,

This acknowledges receipt of your FOIA request. For your records, the reference number is 2018-00666. Please see the attached determination on your expedited treatment and public interest fee waiver requests.

You may check the status of your FOIA request by visiting <http://www.ftc.gov/about-ftc/foia/foia-reading-rooms/track-your-foia-request>. This report is updated at the end of each month.

Thank you,

Jonathan Hill

Attorney, Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
(202) 326-2684 (T)
(202) 326-2477 (F)

From: Enid Zhou <zhou@epic.org>
Sent: Tuesday, March 20, 2018 4:44 PM
To: FOIA <FOIA@ftc.gov>
Subject: FOIA Request Submission

Dear FOIA Officer:

Please see attached for EPIC's FOIA request to the FTC. Thank you.

Sincerely,

Enid Zhou
EPIC Open Government Fellow
1718 Connecticut Ave, N.W.
Suite 200
Washington, DC 20009 | (202) 483-1140 x104
FOIA@epic.org, zhou@epic.org

EXHIBIT C

From: Hill, Jonathan
To: "Enid Zhou"
Subject: RE: FOIA Request Submission
Date: Tuesday, April 17, 2018 4:15:00 PM

Ms. Zhou,

I write to inform you that we will be unable to respond to your FOIA request described below 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:

- (+) 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; and
- (+) 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 have any questions regarding your request, or if you would like to narrow your request to reduce the necessary response time, please contact me.

Thank you,

Jonathan

From: Hill, Jonathan
Sent: Thursday, March 29, 2018 5:25 PM
To: 'Enid Zhou' <zhou@epic.org>
Subject: RE: FOIA Request Submission

Ms. Zhou,

This acknowledges receipt of your FOIA request. For your records, the reference number is 2018-00666. Please see the attached determination on your expedited treatment and public interest fee

waiver requests.

You may check the status of your FOIA request by visiting <http://www.ftc.gov/about-ftc/foia/foia-reading-rooms/track-your-foia-request>. This report is updated at the end of each month.

Thank you,

Jonathan Hill

Attorney, Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
(202) 326-2684 (T)
(202) 326-2477 (F)

From: Enid Zhou <zhou@epic.org>
Sent: Tuesday, March 20, 2018 4:44 PM
To: FOIA <FOIA@ftc.gov>
Subject: FOIA Request Submission

Dear FOIA Officer:

Please see attached for EPIC's FOIA request to the FTC. Thank you.

Sincerely,

Enid Zhou
EPIC Open Government Fellow
1718 Connecticut Ave, N.W.
Suite 200
Washington, DC 20009 | (202) 483-1140 x104
FOIA@epic.org, zhou@epic.org

EXHIBIT D

From: [Enid Zhou](#)
To: [Hill, Jonathan](#)
Subject: FOIA reference no: 2018-00666
Date: Thursday, April 19, 2018 9:42:36 AM

Dear Jonathan,

Thank you for your assistance regarding EPIC's FOIA request, reference no 2018-00666. Per our phone conversation on April 18, 2018 at approximately 4:45pm, we discussed bifurcating EPIC's FOIA request by prioritizing the records in category one, as we do not believe the "unusual circumstances" exception applies to these records. The records are: the 2013, 2015, and 2017 Facebook Assessments and initial report.

Prior to our phone conversation, I spoke with FOIA Public Liaison Richard Gold to discuss the same issues I raised with you. He confirmed with me that he will look into this issue and confirm today whether the "unusual circumstances" exception do not apply to the reports, which will result in these records being processed under the statutory deadline. I also want to confirm that agency has already indicated that the processing of EPIC's FOIA request will be expedited.

Sincerely,

Enid Zhou
EPIC Open Government Fellow
1718 Connecticut Ave, N.W.
Suite 200
Washington, DC 20009 | (202) 483-1140 x104
FOIA@epic.org, zhou@epic.org

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION)	
CENTER,)	
)	
Plaintiff,)	
)	Civil Action No. 18-0942 (TJK)
v.)	
)	
FEDERAL TRADE COMMISSION,)	
)	
Defendant.)	

ORDER

Upon consideration of Plaintiff’s Motion for Partial Summary Judgment on Attorney’s Fees and Costs, and for the reasons set forth by Defendant in opposition, it is this ____ day of _____, 20___, ordered that the Plaintiff’s motion should be and is hereby DENIED.

UNITED STATES DISTRICT JUDGE

W. MARK NEBEKER
Assistant United States Attorney
555 4th Street, N.W.
Washington, DC 20530

MARC ROTENBERG, ESQ.
ALAN JAY BUTLER, ESQ.
ELECTRONIC PRIVACY INFORMATION CENTER
1519 New Hampshire Avenue, N.W.
Washington, DC 20036