



VIA EMAIL
FOIA@fcc.gov

June 14, 2016

Federal Communications Commission
445 12th Street, S.W., Room 1-A836
Washington, D.C. 20554

Dear FOIA Officer,

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, implemented as 47 C.F.R. 0.461, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Federal Communications Commission (“FCC”). We request “News Media” status and a fee waiver.

EPIC seeks records relating to communications between the FCC and various parties relating to privacy regulations on broadband internet access service providers (“BIAS provider” or “ISP”) or edge providers since January 1, 2015.

I. Documents Requested

1. All communications since January 1, 2015 regarding broadband or edge provider privacy regulations between the FCC and technology companies or their representatives, including but not limited to:
 - a. Google
 - b. Facebook
 - c. Apple
 - d. Yahoo
 - e. Microsoft
 - f. LinkedIn
 - g. Twitter
 - h. Amazon
 - i. Snapchat

2. All communications since January 1, 2015 regarding broadband or edge provider privacy regulations between the FCC and broadband internet access service providers, including but not limited to:
 - a. AT&T
 - b. Verizon

- c. Comcast
 - d. Charter
3. All communications, including any attached memos, white papers, and other documents, since January 1, 2015 regarding broadband or edge provider privacy regulations between the FCC and the Office of the President, President’s advisory boards or councils, or any White House Office.

II. Background

In March 2015, the Federal Communications Commission (“FCC”) released the Open Internet Order, which reclassified Broadband Internet Access Service Providers (“BIAS Providers” or “ISPs”) as common carrier telecommunications services subject to regulation under Title II of the Communications Act. This reclassification authorized the FCC to mandate open Internet practice and apply privacy requirements contained in section 222 on BIAS Providers. But since existing implementations of the privacy requirements were generated for telephone and voice regulations, the FCC forbore their application pending a new rulemaking.

Following the Open Internet Order, little public communication was held regarding the upcoming Broadband Privacy rules, despite the rule being characterized as strict and significant.¹ The public communications were as follows:

- On April 28, 2015, the FCC held a public workshop on broadband consumer privacy.²
- On November 6, 2015, the FCC denied a petition that would require exerting ancillary jurisdiction over edge providers.³ This decision was “a win for many Silicon Valley companies whose business models rely on monetizing Internet users’ personal data.”⁴
- On November 16, 2015, the FCC signed a Memorandum of Understanding with the Federal Trade Commission (“FTC”) regarding joint enforcement of privacy concerns.⁵
- On March 31, 2016, the FCC voted to approve FCC Chairman Tom Wheeler’s Notice of Proposed Rulemaking for Broadband Privacy (“Broadband Privacy NPRM”).⁶

The Broadband Privacy NPRM prompted strong responses from broadband providers. AT&T claimed the FCC is placing a “thumb on the scale in favor of Google” by excluding

¹ See, e.g., Grant Gross, *FCC Votes for Strict New Broadband Privacy Rules*, PCWORLD, (Mar. 31, 2016, 1:59 PM), <http://www.pcworld.com/article/3050584/security/fcc-votes-for-strict-new-broadband-privacy-rules.html>.

² *Public Workshop on Broadband Consumer Privacy*, FED. COMM. COMM’N, (April 28, 2015), <https://www.fcc.gov/news-events/events/2015/04/public-workshop-on-broadband-consumer-privacy>.

³ Order, *In the Matter of Consumer Watchdog Petition for Rulemaking*, FED. COMM. COMM’N, (Nov. 6, 2015), Docket RM-11757, https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1266A1.pdf.

⁴ Brian Fung and Andrea Peterson, *The FCC Says it Can’t Force Google and Facebook to Stop Tracking Their Users*, THE WASHINGTON POST, (Nov. 6, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/11/06/the-fcc-says-it-cant-force-google-and-facebook-to-stop-tracking-their-users/>.

⁵ *FTC and FCC Sign Memorandum of Understanding for Continued Cooperation on Consumer Protection Issues*, FED COMM. COMM’N, (Nov. 16, 2015), https://www.ftc.gov/system/files/documents/cooperation_agreements/151116ftcc-mou.pdf.

⁶ *FCC Released Proposed Rules to Protect Broadband Consumer Privacy*, FED. COMM. COMM’N, (April 1, 2016), <https://www.fcc.gov/document/fcc-releases-proposed-rules-protect-broadband-consumer-privacy>.

internet companies.⁷ Moody’s reported allowing Internet companies to be regulated by the FTC offers them a “distinct competitive advantage” in online advertising.⁸ Seven trade associations submitted a pre-emptive letter to Chairman Wheeler requesting “that the FCC acts in a manner consistent with the strong current national privacy framework applied by the FTC to other companies in the Internet ecosystem.”⁹ Critics claim the regulations unnecessarily favor Google and other Internet companies through asymmetrical privacy regulations.¹⁰ This outrage prompted the House of Representatives Subcommittee on Communications and Technology to hold a hearing entitled “FCC Overreach: Examining the Proposed Privacy Rules.”¹¹

EPIC has a particular interest in protecting consumer privacy, and has played a leading role in defending consumer privacy interests at the FCC for almost twenty years.¹² EPIC believes the FCC can and should do more to protect consumers with the Broadband Privacy NPRM, but it is unclear what information the FCC relied upon in preparing the NPRM. Unlike past practices, the FCC did not issue a Notice of Inquiry (“NOI”) to aid in understanding the complexities of privacy regulation.¹³ This suggests the FCC received information from some source. Ensuring the FCC’s sources sufficiently considered consumers is paramount to EPIC’s purpose as an institution.

III. Expedited Processing

EPIC’s FOIA request should be granted expedited processing. A FOIA request warrants expedited processing where (1) it is made by an organization “primarily engaged in disseminating information” and (2) it covers information about which there is an “urgency to inform the public about an actual or alleged federal government activity.”¹⁴ This request satisfies both requirements.¹⁵

⁷ Bob Quinn, *Privacy Regulation: Symmetry or Asymmetry?*, AT&T PUBLIC POLICY BLOG, (March 9, 2016, 1:51 PM), <http://www.attpublicpolicy.com/government-policy/privacy-regulationsymmetry-or-asymmetry/>.

⁸ *A Phishy Plan to Protect Privacy*, THE WALL STREET JOURNAL, (April 11, 2016, 7:26 PM), <http://www.wsj.com/articles/a-phishy-plan-to-protect-privacy-1460417214>.

⁹ Letter from Trade Associations to Chairman Wheeler, (Feb. 11, 2016), <http://www.ctia.org/docs/default-source/fcc-filings/021116-privacy-letter.pdf>.

¹⁰ See, e.g., Kate Cox, *Broadband Industry: It’s Unfair if Facebook can Collect Your Data, but AT&T Can’t*, CONSUMERIST, (March 29, 2016), <https://consumerist.com/2016/03/29/broadband-industry-its-unfair-if-facebook-can-collect-your-data-but-att-cant/>.

¹¹ *FCC Overreach: Examining the Proposed Privacy Rules*, HOUSE OF REP. SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY, <https://energycommerce.house.gov/hearings-and-votes/hearings/fcc-overreach-examining-proposed-privacy-rules>.

¹² See *US West v. FCC – the Privacy of Telephone Records*, EPIC, <https://epic.org/privacy/litigation/uswest/> (describing efforts by EPIC and others to defend the FCC’s CPNI rule) (last accessed June 14, 2016).

¹³ See, e.g., *NOI to Examine Use of Bands Above 24 GHz for Mobile Broadband*, FED. COMM. COMM’N, (Oct. 17, 2014), <https://www.fcc.gov/document/noi-examine-use-bands-above-24-ghz-mobile-broadband>, see also Gus Hurwitz, *On Broadband Privacy, the FCC Doesn’t Know What It Doesn’t Know*, TECHPOLICYDAILY, (April 25, 2016), <http://www.techpolicydaily.com/internet/on-broadband-privacy-the-fcc-doesnt-know-what-it-doesnt-know/>.

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

¹⁵ EPIC was granted expedited processing on a very similar FOIA request submitted on April 20, 2016. Because this FOIA request centers on a similar time-sensitive issue—the rapidly closing broadband privacy reply comment period—expedited processing should be similarly granted here.

EPIC is an organization “primarily engaged in disseminating information.”¹⁶

There is an “urgency to inform the public” about communications regarding the broadband privacy rulemaking.¹⁷ The public’s window of opportunity to submit reply comments on the proposed privacy rule closes on June 27, 2016.¹⁸ The public must be informed if the FCC prepared the commission with sufficient regard to consumer wellbeing prior to this deadline.

As per 47 C.F.R. 0.461(h)(2), I certify the compelling need mentioned above is true and correct to the best of my knowledge and belief.

IV. Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes.¹⁹ Based on EPIC’s status as a “news media” requester, EPIC is thus entitled to receive the requested records without being assessed search or review fees.²⁰

In addition, because disclosure of the requested communications will “contribute significantly to public understanding of the operations or activities of the government,” all duplication fees should be waived.²¹ Here, the requested communications between the FCC and the technology companies, ISPs, or White House clearly concern “the operations or activities of the government.”²² Further, the disclosure of those communications will “likely to contribute to an understanding of government operations or activities,” by offering unfiltered insight into the relationship between the large technology companies, the White House, and an independent federal agency undertaking a significant rulemaking. Lastly, because the requested communications would be of interest to all consumers and commercial firms with an interest in communications privacy, this request will “contribute to public understanding as opposed to the individual understanding of the requester or a narrow segment of interested persons.”²³

This statement certifies the information received will not be used to further the commercial interests of EPIC.

V. Conclusion

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), I will anticipate your determination on our request within ten business days.

¹⁶ *Elec. Priv. Info. Ctr. v. Dept. of Def.*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003) (stating EPIC is a news media organization for the purposes of FOIA requests) (hereinafter “EPIC”); *see also Am. Civ. Liberties Union v. U.S. Dept. of J.*, 321 F. Supp. 2d 24, n.5 (D.D.C. 2004).

¹⁷ 47 C.F.R. 0.461(h)(3)(ii).

¹⁸ *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, WC Docket No. 16-106 (rel. April 1, 2016)

¹⁹ *EPIC*, 241 F. Supp. at 15.

²⁰ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²¹ 5 U.S.C. § 552(a)(4)(A)(iii).

²² *See* 47 C.F.R. § 0.470(e)(2)(i).

²³ *See* 47 C.F.R. § 0.470(e)(2).

For questions regarding this request, Mr. Tran can be contacted at 202-483-1140 x123 or FOIA@epic.org.

Respectfully Submitted,

Filippo Raso
EPIC IPIOP Clerk

John Tran
EPIC FOIA Counsel

cc Managing Director