



May 16, 2012

**SENT VIA E-MAIL TRANSMISSION**

Gary Schonman, Special Counsel  
Investigations and Hearings Division  
Federal Communications Commission  
445 12th Street S.W., Room 4-C330  
Washington, D.C. 20554

**Re: Consumer Watchdog's Response to Google Inc.'s Objections to Freedom of Information Act Request No. 2012-301**

Dear Mr. Schonman,

This letter responds to Google Inc.'s ("Google") objections to the above-referenced FOIA request filed on behalf of Consumer Watchdog on May 2, 2012 pursuant to the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and corresponding Federal Communications Commission ("FCC") regulations, 47 C.F.R. §§ 0.441 – 0.470, for records relating to the Notice of Apparent Liability for Forfeiture adopted and released on April 13, 2012 in the proceeding *In the Matter of Google Inc.*, File No. EB-10-IH-4055 ("Notice").<sup>1</sup>

Google filed objections to Consumer Watchdog's FOIA request on May 7, 2012 in a letter to the FCC ("May 7, 2012 Letter"), relying in part on an earlier FCC ruling to support its objections.<sup>2</sup>

On April 13, 2012, the same day that the Notice was released, the FCC ruled on requests from Google for confidential treatment of certain information Google provided in the course of the FCC's investigation of Google's collection of Wi-Fi data through its Street View project ("Bureau Ruling").<sup>3</sup> The FCC asserted two grounds for treating certain information as confidential: (1) personal privacy under 5 U.S.C § 552(b)(7)(C) ("FOIA Exemption 7(C)"), and (2) commercially sensitive information under 5 U.S.C § 552(b)(4) ("FOIA Exemption 4").<sup>4</sup>

**FOIA Exemption 7(C): Personal Privacy**

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<sup>1</sup> On April 18, 2012, Consumer Watchdog filed a FOIA request with the FCC for the unredacted Notice, which has since become publicly available. Consumer Watchdog obtained a copy of the unredacted notice and has closed its request with the FCC. (FOIA Request, Control No. 2012-283).

<sup>2</sup> Letter from E. Ashton Johnston to Gary Schonman, Special Counsel, Investigations and Hearings Division, Enforcement Bureau, FOIA Request Control No. 2012-301 (May 7, 2012) ("May 7, 2012 Letter").

<sup>3</sup> Letter from Theresa Cavanaugh, Chief, Investigations and Hearings Division, Enforcement Bureau, to E. Ashton Johnston, Esq., File No. EB-10-IH-4055 (Apr. 13, 2012) ("Bureau Ruling").

<sup>4</sup> *Id.* at 2, 4.

FOIA Exemption 7(C) exempts from public disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy.”<sup>5</sup>

In its May 7, 2012 Letter, Google states that “[t]he Bureau has granted Google’s request for confidential treatment pursuant to Exemption 7(C) of certain material provided by Google in connection with this matter, finding that ‘personal information in Google’s responses and the supporting documents is and should be exempt from disclosure.’ ”<sup>6</sup> Google claims that the Bureau agreed to withhold from disclosure the “names, job titles, and the like” of “those involved in the investigation.”<sup>7</sup>

Google’s selective quoting and broad interpretation of the Bureau Ruling protect more information than what the Bureau expressly exempted in its ruling. While the Bureau Ruling does state that “certain personal information in Google’s responses and the supporting documents is and should be exempt from disclosure,” Google fails to mention the next two sentences, which state that the Bureau “will *redact* information that *identifies Google employees*. This information includes *names, non-public email addresses, and telephone numbers*.”<sup>8</sup> The Bureau Ruling does not specifically state that “job titles” qualify as personally identifying information exempt from disclosure under FOIA Exemption 7(C). Also, the Bureau Ruling exempts information identifying Google employees, whereas Google claims that information identifying “those involved in the investigation” is protected.

Google makes general objections to Consumer Watchdog’s FOIA Request Nos. 1 through 29 on the grounds that documents and information contained in the requests are protected from disclosure under FOIA Exemption 7(C). Based on the Bureau Ruling, the names, non-public email addresses, and telephone numbers of Google employees are protected from disclosure under FOIA Exemption 7(C), and should be redacted from Google’s responses and supporting documents provided in the course of the FCC investigation. No response or document should be withheld on the basis of FOIA Exemption 7(C).

#### FOIA Exemption 4: Commercially Sensitive Information

FOIA Exemption 4 protects from public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”<sup>9</sup> Exemption 4 “may be invoked ... if it can be shown that public disclosure is likely to cause substantial harm to [the person who has provided the information’s] competitive position.”<sup>10</sup> Information that is likely to cause “mere embarrassment in the marketplace or reputational injury” does not warrant protection from disclosure under FOIA Exemption 4.<sup>11</sup>

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<sup>5</sup> 5 U.S.C. § 552(b)(7)(C) (“FOIA Exemption 7(C)”).

<sup>6</sup> May 7, 2012 Letter at 3.

<sup>7</sup> *Id.* at 1.

<sup>8</sup> Bureau Ruling at 4, italics added.

<sup>9</sup> 5 U.S.C. § 552(b)(4) (“FOIA Exemption 4”).

<sup>10</sup> *National Parks and Conservation Association v. Morton* 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>11</sup> *United Technologies Corp. v. U.S. Dept. of Defense*, 601 F.3d 557, 564 (D.C. Cir. 2010).

Under FOIA Exemption 4, the Bureau “will treat as confidential non-public, proprietary information related to Google’s use of Street View cars to collect: (1) street level images; and (2) information about Wi-Fi networks, such as MAC addresses and signal strengths, that Google collected for the purpose of mapping the location of wireless access points for use in providing location based services.”<sup>12</sup> The Bureau found that this information is used in Google’s products and services and, if disclosed, would “likely cause substantial harm to Google’s competitive position.”<sup>13</sup> If requested information does not fall under one of the two categories identified by the Bureau, Google must explain how the information would cause substantial harm to its competitive position in order to invoke FOIA Exemption 4.

To the extent that Google’s objections to Consumer Watchdog’s FOIA Request Nos. 1 through 29 are based on FOIA Exemption 4, the only information that may be withheld as “commercially sensitive” under FOIA Exemption 4 is the information specifically enumerated under (1) and (2) of the Bureau Ruling, above.

Google has agreed to disclosure of the following information that the Bureau specifically determined is not commercially sensitive under FOIA Exemption 4:

- Information submitted by Google related to the collection of payload data broadcast from open and unencrypted Wi-Fi networks via Street View Cars,
- Materials related to the fact of routine software-related actions by Google employees, and
- Information that Google has publicly disclosed or that is otherwise publicly available.<sup>14</sup>

A publicly available United States Patent Application (“Patent Application”) filed by Google on January 28, 2010, titled “Wireless Network-based Location Approximation,” contains detailed information about Google’s collection of information about Wi-Fi networks for its location based services,<sup>15</sup> and other information specifically enumerated under (1) and (2) of the Bureau Ruling, above. Insofar as any of the information deemed confidential by the Bureau is contained in the Patent Application, the information is not protected from disclosure under FOIA Exemption 4 because it is publicly available in the Patent Application accessible on the U.S. Patent and Trademark Office website.

### Responses to Google’s Individual Objections to FOIA Requests

Listed below are Consumer Watchdog’s May 2, 2012 FOIA requests, followed by Google’s May 7, 2012 objections, and Consumer Watchdog’s responses to each objection:

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<sup>12</sup> Bureau Ruling at 2.

<sup>13</sup> *Id.*

<sup>14</sup> May 7, 2012 Letter at 2 – 3.

<sup>15</sup> See United States Patent Application, No. 20100020776 (filed Jan. 28, 2010) (“Patent Application”).

1. **Letter of Inquiry from P. Michele Ellison, Chief, FCC Enforcement Bureau, to Google (Nov. 3, 2010).**
2. **Supplemental Letter of Inquiry from Theresa Cavanaugh, Acting Chief, Investigations and Hearings Division, FCC Enforcement Bureau, to Google. (Mar. 30, 2011).**

Google does not object to Request Nos. 1 and 2.<sup>16</sup> The letters described in Request Nos. 1 and 2 should be produced.

3. **Demand Letter from P. Michele Ellison to Richard S. Whitt, Director and Managing Counsel for Telecom and Media Policy, Google, and E. Ashton Johnston, Counsel to Google. (Aug. 18, 2011).**
4. **Final Supplemental Letter of Inquiry from Theresa Cavanaugh to Google Inc. (Oct. 21, 2011).**

Google objects to Request Nos. 3 and 4 on the grounds that the letters contain “confidential personal information” which must be “withheld from disclosure to the same extent and for the same reasons that it must be withheld in the underlying source documents...”<sup>17</sup> Google claims that “[t]he Bureau has already ruled that personal information found in those source documents should not be disclosed.”<sup>18</sup>

As stated above, the names, non-public email addresses, and telephone numbers of any Google employees contained in the letters described in Requests No. 3 and 4 are exempt from disclosure under FOIA Exemption 7(C) and should be redacted accordingly.

Google’s objection to Request Nos. 3 and 4 is ambiguous with regard to whether commercially sensitive information is contained within Request Nos. 3 and 4.

5. **Responses of Google Inc. to Letter of Inquiry (Dec. 10, 2010), including enclosures Google Documents 11-1 through 11-5.**
6. **Second Supplement to Responses of Google Inc. to Letter of Inquiry (Dec. 20, 2010).**
7. **Responses of Google Inc. to Supplemental Letter of Inquiry (Apr. 14, 2011).**
8. **All versions of the design document produced by Google in response to Letter of Inquiry, including, but not limited to, the October 26, 2006 and the August 23, 2007 versions.**
9. **Letter from E. Ashton Johnson to Theresa Cavanaugh, including all attachments (June 3, 2011).**

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<sup>16</sup> May 7, 2012 Letter at 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

#### **10. Letter from Richard S. Whitt to P. Michele Ellison (Sept. 7, 2011).**

Google objects to “information that the Bureau already has determined is not subject to disclosure”<sup>19</sup> contained in Requests No. 5 through 10. This includes the two categories of commercially sensitive information the Bureau determined to be exempt under FOIA Exemption 4, plus certain personally identifying information about Google employees protected under FOIA Exemption 7(C).<sup>20</sup> Google refers to Exhibits A and B to the Bureau Ruling, which Consumer Watchdog does not possess. Consumer Watchdog requests production of Exhibits A and B to the Bureau Ruling.

Additionally, Google objects to information in Requests No. 5 through 10 that is “subject to Google’s pending Application for Review,” filed April 27, 2012, “until the issues raised in the Application are fully and fairly resolved.”<sup>21</sup> Consumer Watchdog does not possess the Application for Review, which, according to Google, “only seeks to protect from disclosure commercial information that was provided in voluntary interviews and any personally identifying information in materials that Google provided to the FCC.”<sup>22</sup>

Google provides no description, explanation, or identification of either type of information -- commercial information provided in voluntary interviews, or personally identifying information in materials provided to the FCC -- that is supposedly at issue in its Application for Review. The May 7, 2012 Letter is unclear as to whether the Application for Review requests confidential treatment of commercial information within one of the two categories identified by the Bureau, or whether Google is requesting something more.

The May 7, 2012 Letter states that the Bureau will release “materials that relate to the collection of payload [data] or other matters that are not of competitive significance” in response to Request Nos. 5 through 10.<sup>23</sup> Information related to the collection of payload data is only one category of information subject to disclosure in Request Nos. 5 through 10.

The Bureau Ruling provides examples of information contained within documents produced by Google that the Bureau will not treat as confidential: background material that does not contain any non-public proprietary information in Google Document 11-1, comments to the software code (not the code itself) that relate to information Google did not retain in Google Document 11-3, acknowledgments that Google engaged in “wardriving” from Google Document 11-7, and comments and documents related to the collection of payload data.<sup>24</sup> In addition, the Bureau “will not treat as confidential similar information in Google’s narrative responses to the initial and supplemental [Letters of Inquiry].”<sup>25</sup> Thus, all such information must be included in the response to Request Nos. 5, 6, and 7.

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<sup>19</sup> May 7, 2012 Letter at 2.

<sup>20</sup> See Bureau Ruling at 2, 4.

<sup>21</sup> May 7, 2012 Letter at 2.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Bureau Ruling at 3.

<sup>25</sup> *Id.*

Request No. 8 seeks the design document(s) described in the unredacted Notice.<sup>26</sup> Information contained in the design document(s) related to the collection of data for the purpose of mapping the location of wireless access points for use in providing location based services, while deemed confidential in the Bureau Ruling, is not protected under FOIA Exemption 4 to the extent that such information is included in Google's publicly available Patent Application for Wireless Network-based Location Approximation.<sup>27</sup>

**11. Interview with [name redacted] Google Inc., in Mountain View, Cal. (Sep. 28, 2011).**

**12. Interview with [name redacted], Stroz Friedberg LLC, in Washington D.C. (Sep. 20, 2011).**

**13. Telephone Interview with [name redacted], Google Inc., in Mountain View, Cal. (Oct. 6, 2011).**

**14. Interview with [name redacted], Google Inc., in Mountain View, Cal. (Sep. 28, 2011).**

Google "objects to the disclosure of any records related to interviews with Google or Stroz Friedberg LLC employees"<sup>28</sup> that are responsive to Request Nos. 11 through 14. Google states, "the Bureau has determined that these interviews will be treated as confidential, to the same extent as other materials provided by Google."<sup>29</sup>

Google fails to mention that the Bureau will "*for the time being* continue to provide *limited* confidentiality for the statements made in the interviews."<sup>30</sup> Google would not consent to the interviews being recorded or transcribed, but nevertheless "made a general request for confidential treatment" of the interviews.<sup>31</sup> Google appears not to have ever provided the Bureau with a statement of reasons for withholding the information as required under 47 C.F.R. § 0.459(b).<sup>32</sup>

The Bureau will treat statements made in the interviews as confidential to the same extent as other information, and specifically found FOIA Exemption 4 does not protect statements related to the collection of payload data and "information disclosed in the interviews regarding routine actions by Google employees."<sup>33</sup> Here, the Bureau does not limit disclosure of information about routine actions by Google employees to information about "*routine software-related* actions by Google employees."<sup>34</sup>

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<sup>26</sup> See Notice, pp. 10-11.

<sup>27</sup> See Patent Application.

<sup>28</sup> May 7, 2012 Letter at 3.

<sup>29</sup> *Id.*

<sup>30</sup> Bureau Ruling at 4, italics added.

<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> May 7, 2012 Letter at 1, italics added.

It is clear that the Bureau's confidential treatment of information related to the interviews is temporary and contingent on Google providing the statement of reasons for withholding required by FCC regulations.

The Bureau Ruling applies FOIA Exemption 7(C) to protect personally identifiable information of Google employees, but not to information about employees of Stroz Friedberg LLC. Thus, FOIA Exemption 7(C) does not apply to Request No. 12.

Google states that its Application for Review explains that "commercial information that was provided voluntarily and that is not customarily disclosed to the public is categorically protected from public disclosure by Exemption 4."<sup>35</sup> Google once again fails to identify the type of commercially sensitive information that was voluntarily provided. Furthermore, Google provides no support or explanation for its claim that "the information that those individuals provided was information that Google customarily protects from disclosure."<sup>36</sup>

Google objects to Request Nos. 11 through 14 on the grounds that "any materials developed by Commission staff are Commission work papers that are generally not available for public disclosure," citing 47 C.F.R. § 0.457(e). However, the Bureau Ruling does not cite 47 C.F.R. § 0.457(e) as a basis for withholding information related to interviews of Google and Stroz Friedberg employees, and makes no assertions about any materials or work papers developed from the interviews. The Bureau refers to "statements made in the interviews" but does not provide any further details about the statements.<sup>37</sup>

**15. Declaration of [name redacted] (Dec. 9, 2010).**

**16. Declaration of [name redacted] (Aug. 30, 2011).**

**17. Declarations of nine Google employees who worked on the Street View project provided by Google to the FCC (Sep. 7, 2011).**

Google objects to Request Nos. 15 through 17 on the same grounds as it objects to Request Nos. 5 through 10. See Consumer Watchdog's response to Google's objections to Request Nos. 5 through 10, above.

**18. Interview with [name redacted], Google Inc., in Washington D.C. (Sep. 20, 2011).**

Google objects to Request No. 18 on the same grounds as it objects to Request Nos. 11 through 14. See Consumer Watchdog's response to Google's objections to Request Nos. 11 through 14, above.

**19. All declarations dated August 30, 2011 and August 31, 2011 cited in the Notice, p. 16, fn. 124.**

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<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *See* Bureau Ruling at 4.

Google objects to Request No. 19 on the same grounds as it objects to Request Nos. 5 through 10. See Consumer Watchdog's response to Google's objections to Request Nos. 5 through 10, above.

**20. Telephone Interview with [name redacted], Google Inc., in Mountain View, Cal. (Oct. 6, 2011).**

Google objects to Request No. 20 on the same grounds as it objects to Request Nos. 11 through 14. See Consumer Watchdog's response to Google's objections to Request Nos. 11 through 14, above.

**21. Declaration of [name redacted] (Aug. 31, 2011).**

**22. All declarations dated August 30, 2011 and August 31, 2011 cited in the Notice, p. 18, fn. 138.**

**23. Google Documents 11-1 to 11-20, plus all attachments to Google Documents 11-1 to 11-20.**

**24. Evidence Google provided to the FCC showing that the data collection resulted from a deliberate software design decision by one of the Google employees working on the Street View project.**

Google objects to Request Nos. 21 through 24 on the same grounds as it objects to Request Nos. 5 through 10. See Consumer Watchdog's response to Google's objections to Request Nos. 5 through 10, above.

The Bureau ruled that Google Document 11-14 is not confidential, "except for the names of individuals and the references to [redacted word] and wxbug.com."<sup>38</sup>

Google is unable to make any specific objections to Request No. 24.<sup>39</sup> Google has requested the opportunity to review any materials responsive to Request No. 24 prior to the FCC's disclosure to Consumer Watchdog.<sup>40</sup>

Revised Requests Nos. 25 Through 29

Pursuant to telephone conversations with Gary Schonman and William Knowles-Kellet of the FCC, Consumer Watchdog has revised Request Nos. 25 through 29 as follows:

**25. The entire record of documents *In the Matter of Google Inc.*, File No. EB-10-IH-4055, excluding all drafts of documents in the file that are not final versions.**

**26. Substantive documents (i.e., memos and emails) that the FCC or the Enforcement**

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<sup>38</sup> Bureau Ruling at 3.

<sup>39</sup> May 7, 2012 Letter at 4.

<sup>40</sup> *Id.*



**Bureau received from other Federal agencies, particularly the FTC and DOJ, as part of this investigation;**

**27. (a) Substantive documents (i.e., memos and e-mails) sent from the FCC or the Enforcement Bureau to other Federal agencies, particularly the FTC and DOJ, as part of this investigation; and (b) Internal substantive documents (i.e., memos and e-mails) created by the FCC or the Enforcement Bureau as part of this investigation, excluding all substantive internal e-mails;**

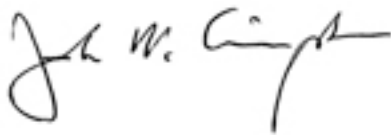
**28. Substantive communications from the FCC and the Bureau to Google, Inc. related to this investigation; and**

**29. Substantive communications from Google, Inc. to the FCC and the Enforcement Bureau related to this investigation.**

Google has not yet been provided with revised Request Nos. 25 through 29, but will presumably request that the Bureau provide Google with an opportunity to review materials produced in response to Request Nos. 25 through 29 prior to their disclosure. Consumer Watchdog will respond to any relevant objections at that time.

This information is of timely value, so please communicate questions by telephone rather than by mail. I look forward to your reply. You may reach me at (310) 392-0522 ext. 317, or at [john@consumerwatchdog.org](mailto:john@consumerwatchdog.org).

Sincerely,



John Simpson  
Privacy Project Director



Laura Antonini  
Staff Attorney

cc: E. Ashton Johnston, Counsel to Google Inc.  
Joseph A. Bissonnette, Counsel to Google Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2012, a true and correct copy of the foregoing Response to Google Inc.'s Objections to Freedom of Information Act Request No. 2012-301 to each of the following parties as indicated below.

*Via e-mail*

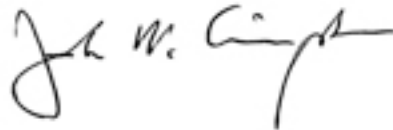
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John Simpson