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May 7, 2012

By Hand Delivery and E-mail

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Google Inc., File No. EB-IH-10-4055

Dear Ms. Dortch:

Pursuant to my telephone conversation on May 4, 2012 with Gary Schonman, Special Counsel, Enforcement Bureau, and Larry Schecker, Special Counsel, Office of General Counsel, enclosed please find a copy of Google Inc.'s April 27, 2012, Application for Review in the above-referenced matter; the enclosed copy reflects the removal of Google's request for confidential treatment of the document. Also enclosed is a file-stamped copy of the original Application for Review.

Please contact me should you have any questions regarding this matter.

Respectfully submitted,

E. Ashton Johnston

Counsel to Google Inc.

cc: Gary Schonman (via e-mail)
Larry Schecker (via e-mail)

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	File No. EB-10-IH-4055
Google Inc.	)	

To: The Commission

APPLICATION FOR REVIEW

Google Inc. ("Google" or the "Company"), pursuant to Sections 0.459(g) and 1.115 of the Commission's rules, 47 C.F.R. §§ 0.459(g), 1.115, respectfully seeks review by the Commission of the Enforcement Bureau ("Bureau") rulings on Google's requests for confidential treatment of certain materials that are or may be in the record of the above-referenced proceeding.[1]

I. INTRODUCTION AND SUMMARY

Google voluntarily provided a substantial amount of information to the Bureau to facilitate its 17-month investigation into Google's collection of payload data transmitted over unencrypted Wi-Fi networks. The Bureau's investigation concluded by finding that Google had not violated the Communications Act. Google did not seek confidential treatment of all the materials it provided to the Bureau, but limited its requests to certain information that is lawfully

[1] Letter from Theresa Z. Cavanaugh, Chief, Investigations and Hearings Division, Enforcement Bureau, to Richard Whitt, Director/Managing Counsel, Telecom and Media Policy, Google Inc., Aparna Sridhar, Telecom Policy Counsel, Google Inc., and E. Ashton Johnston, Esq. (Apr. 13, 2012) ("Bureau Letter"); Letter from Theresa Z. Cavanaugh, Chief, Investigations and Hearings Division, Enforcement Bureau, to Richard Whitt, Director/Managing Counsel, Telecom and Media Policy, Google Inc., Aparna Sridhar, Telecom Policy Counsel, Google Inc., and E. Ashton Johnston, Esq. (Apr. 25, 2012).

entitled to protection under the Freedom of Information Act ("FOIA"), including proprietary commercial information and personal information.

As the Commission is aware, the Bureau recently issued a Notice of Apparent Liability ("Notice"), including factual recitals purportedly based on the information Google provided. At the same time, the Bureau separately ruled on Google's confidentiality requests, granting them in part and denying them in part. Having considered the Bureau's rulings, and consistent with its interest in transparency, Google is seeking only a limited review of those rulings. Specifically, Google asks that the Commission order the Bureau to maintain as confidential: (1) notes of voluntarily provided interviews, to the extent such notes exist; and (2) personally identifying information regarding Google employees. Concurrent with this submission, Google is releasing publicly an unredacted version of the Notice consistent with this request.

II. BACKGROUND

In November 2010, Google received a Letter of Inquiry ("LOI") from the Bureau seeking documents and information for the purpose of determining whether Google had violated Section 705 of the Communications Act of 1934, as amended, 47 U.S.C. § 605. During the course of its investigation, the Bureau requested "access" to a Company employee "for the purpose of an in-person informational meeting to discuss technical issues." In response to that request and discussions that followed, on September 20, September 28, and October 6, 2011, Google voluntarily made available five employees and one outside consultant to the Bureau for informational interviews in connection with its investigation (the "Voluntary Interviews"). Google specifically requested confidential treatment for each interview.

On April 13, 2012, the Bureau issued its letter ruling on various requests for confidential treatment submitted by Google during the course of the Bureau's investigation (the "Bureau

Letter"). (On April 25, 2012, the Bureau issued an amended ruling revising certain of the rulings.) These rulings include Exhibit A, a "summary of [the Bureau's] determinations with respect to each document" covered by Google's requests, and Exhibit B, "copies of documents that we find are confidential in part, with the confidential parts redacted." Bureau Letter at 4. The Voluntary Interviews are not cited in either Exhibit A or Exhibit B.

The Bureau agrees with Google that information related to Google's use of Street View cars to collect street level images and network-identifying information about Wi-Fi networks for the purpose of mapping the location of wireless access points for use in providing location-based services is confidential under FOIA Exemption 4 because "Google has used this information in its products and services ... we recognize that Google operates in a competitive environment, [and] ... disclosure of this information would likely cause substantial harm to Google's competitive position." Bureau Letter at 2. The Bureau also agrees that personally identifying information (names, job titles, and the like) should remain confidential pursuant to FOIA Exemption 7. Bureau Letter at 4.

The Bureau acknowledges Google's requests for confidential treatment of the Voluntary Interviews, and indicates that it will "for the time being continue to provide limited confidentiality for the statements made in the interviews, consistent with" its approach to other materials provided by Google. Bureau Letter at 4. That approach is embodied in the Bureau ruling that concluded that Exemption 4 protection does not apply with respect to three categories of information: (1) "information related to Google's use of Street View cars to collect payload data," disclosure of which the Bureau found "poses no threat of harm to Google's competitive position" because it "had no commercial utility to Google," Bureau Letter at 2-3; (2)

"information related to the fact of routine software-related actions by Google employees," *id.* at 3; and (3) "information Google has publicly disclosed or that is otherwise publicly available." *Id.*

III. STANDARD OF REVIEW

The Commission should grant an application for review when it is shown, *inter alia*, that action taken pursuant to delegated authority is in conflict with a statute, regulations, case precedent, or established Commission policy; the action involves a question of law or policy which has not previously been resolved by the Commission; or prejudicial procedural error. 47 C.F.R. § 1.115(b)(2). As shown herein, each of the above factors provides a basis for the Commission to reverse the Bureau's determinations for which review is sought, and remand to the Bureau for further action.

IV. ARGUMENT

A. The Voluntary Interviews Are Protected Under FOIA

FOIA Exemption 4 provides a statutory basis for withholding from public inspection "matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). *Accord* 47 C.F.R. §§ 0.459(b)(3)-(5). Exemption 4 benefits persons who supply information to agencies by safeguarding them from competitive disadvantages that could result from disclosure, and also benefits agencies by encouraging cooperation from parties from whom they seek to collect information. *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767-70 (D.C. Cir. 1974).

The Voluntary Interviews covered a range of topics related to Google's business activities, and concerned topics not covered by the three categories of information the Bureau found not subject to Exemption 4 protection. However, only a portion of the information that the Bureau may have in its possession about the Voluntary Interviews has been made available to

Google. *See, e.g.,* Notice at ¶¶ 7, 11, 24, 25, 35, 36, 37, 38, 39 (citing Voluntary Interviews). Indeed, given the Commission's treatment of its internal materials, Google has no way of knowing if any additional information about those interviews beyond that presented in the Notice even exists. Based on the presumption that records related to the Voluntary Interviews do exist, and Google's concerns regarding both the confidentiality of those records and their accuracy, Google seeks to ensure that they are not publicly disclosed.[2]

1. Information from the Voluntary Interviews Is Commercial

While Google has no way of knowing what, if any, information the Bureau has in its possession that was gleaned from the Voluntary Interviews, it does know that everything covered in those interviews was related to the details of Google's business activities. For purposes of FOIA Exemption 4, "commercial" is to be given its ordinary meaning and interpreted broadly, and information is commercial so long as the submitter has a "commercial interest" in it. *Pub. Citizen Health Research Group*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Wash. Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982), and *Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403 (D.C. Cir. 1980)). Thus, "commercial" means "[anything] pertaining or relating to or dealing with commerce." *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). Thus, there can be no dispute that all information provided during the Voluntary Interviews meets the standard for "commercial information."

Information is commercial "even if the provider's ... interest in gathering, processing, and reporting the information is noncommercial." *Critical Mass Energy Project v. NRC*, 830 F.2d 278, 281 (D.C. Cir. 1987), *vacated en banc on other grounds*, 975 F.2d 871, 880 (D.C. Cir.

[2] Because Google proceeded with the interviews on a voluntary basis, it was not necessary to "identify specific statements in the course of the interviews." *See* Bureau Letter at 4. Moreover, given lack of access to the interview materials, Google is concerned they may contain information protected under FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C).

1992). Thus, the test for whether disclosure of information provided in the Voluntary Interviews is commercial is not dependent on whether the information had "commercial utility to Google." *See* Bureau Letter at 2.

2. The Interviews Were Voluntary

Once it is established that information is commercial, as information concerning the Voluntary Interviews plainly is, the next question is whether that information was provided on a voluntary or mandatory basis. Commercial information that was provided voluntarily and that is not customarily disclosed to the public by the submitter is categorically protected under Exemption 4. *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*); *accord Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 147-48 (D.C. Cir. 2001) (confirming two distinct standards are to be used in determining confidentiality under Exemption 4, depending on whether information is provided on a "mandatory" or a "voluntary" basis).[3] Information concerning the Voluntary Interviews clearly meets this standard.

Each individual that the Bureau interviewed appeared voluntarily. In addition, the information that those individuals provided was information that Google customarily protects from disclosure. Google does not typically make employees available to discuss confidential internal information of the nature that was the addressed during the Voluntary Interviews. The law is clear when an agency has not exercised its legal authority to obtain information, the submission is voluntary. *See Critical Mass*, 975 F.2d at 879.

[3] The Commission has made clear that it will examine the distinction between "required" and "voluntary" for Exemption 4 purposes on a case-by-case basis, in light of the evolving case law. *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, ¶69 (1998).

That the agency might have sought to compel attendance is of no moment. *See Critical Mass*, 975 F.2d at 880. An agency "must both possess *and* exercise the legal authority to obtain information for the resulting submission of information to be deemed 'mandatory.'" *Inner City Press/Cmty. on the Move v. Board of Governors of the Federal Reserve Sys.*, 463 F.3d 239, 247-48 (2nd Cir. 2006) (emphasis added). *See also Parker v. Bureau of Land Mgmt.*, 141 F. Supp. 2d 71, 78 n.6 (D.D.C. 2001) ("In addition to possessing the authority to compel submission, the agency must also exercise that authority in order for a submission to be deemed mandatory.").[4] That test is objective, and an agency's belief as to whether it considers a request to be mandatory does not control. *Center For Auto Safety* at 149. Neither Google nor any of the individuals was compelled to appear and speak with the Bureau – as the Bureau has acknowledged. *See* Notice at ¶32.

Information that the Bureau obtained through the Voluntary Interviews is thus categorically protected under Exemption 4.[5]

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[4] The court in *Parker* noted that "[s]uch a rule is consistent with the Court's ruling in *Center for Auto Safety*[,] [which] did not hold that whenever an agency has the authority to require certain information, the submission of such information should be deemed mandatory, but that in the absence of such authority, a submission cannot be considered mandatory." 141 F.Supp. 2d at 78 n.6 (citation omitted). *See also Center for Auto Safety*, 244 F.3d at 149-50 ("We cannot accept the Center's argument that if recipients do not assert that a submission is voluntary before submitting information in response to an agency's request, they have implicitly waived their entitlement to subsequently assert that the submission was not mandatory. *Critical Mass* emphasizes our concern with an agency's 'continuing ability to secure ... data on a cooperative basis.' Although NHTSA in this case purported to seek data pursuant to its statutory mandate, the response by the manufacturers was certainly 'cooperative' in the sense that they readily supplied the data without making legal objections.... Surely there is an important policy interest in minimizing resistance by a manufacturer to an agency's request for information; insisting that a respondent identify and air legal objections in response to any request in order to preserve its rights would tend to frustrate the 'cooperation' that *Critical Mass* values. Beyond that it would needlessly waste resources to require that respondents identify legal defects that have no practical bearing unless and until a FOIA dispute materializes." (citation omitted)).

[5] Assuming *arguendo* that the interviews were not voluntary, to the extent that information obtained in the interviews is confidential it still is protected from disclosure under Exemption 4. Although Google has no way of knowing what, if any, information the Bureau has in its possession that was gleaned from the Voluntary Interviews, the interview topics went beyond the limited scope of the Bureau's denial of FOIA protection. As the Commission has explained, commercial information that "gives a direct view into [the

B. Materials Concerning the Voluntary Interviews Are Protected Commission Work Papers

Any disclosure of the Bureau's interview materials also would be inconsistent with Section 0.457(e) of the Commission's rules, which states that Commission work papers generally will not be made available for public inspection. 47 C.F.R. § 0.457(e). While a limited exception exists for materials that would be "routinely available to a private party through the discovery process in litigation with the Commission," that exception plainly does not apply here. As the rule states, "such papers are privileged and not available to private parties though the discovery process, since their disclosure would tend to restrain the commitment of ideas to writing, would tend to inhibit communication among Government personnel, and would, in some cases, involve premature disclosure of their contents." 47 C.F.R. § 0.457(e).

C. Additional Information Must Be Protected Under Exemption 7(C)

In the instances listed below, the Bureau proposes, perhaps inadvertently, to unredact personally identifying information of the type the Bureau otherwise agreed is subject to protection under FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C). *See* Bureau Letter at 4. These are:

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submitter's] corporate structure and processes, revealing detailed information about specific [submitter] products as well as [submitter's] ... internal procedures for assuring regulatory compliance," is protected under Exemption 4. *In the Matter of National Association of Broadcasters, et al.*, Memorandum Opinion and Order, 24 FCC Rcd. 12320, ¶20 (2009). The Bureau "recognize[s] that Google operates in a competitive environment," Notice at 2, and the Voluntary Interviews revealed information about the operation of the Company's proprietary software and internal procedures. The Commission has held to be protected under Exemption 4 "information relating to [submitter's] business operations and plans. Disclosure of this type of information to [submitter's] competitors could damage [submitter's] competitive position by giving the competitors insight into [submitter's] business methods and strategies."). *In the Matter of Josh Wein, Warren Communications News, et al.*, Memorandum Opinion and Order, 24 FCC Rcd. 12347, ¶13 (2009). Such protection is afforded even where the business practice is routine. *See, e.g., In the Matter of MSNBC Interactive News, LLC*, Memorandum Opinion and Order, 23 FCC Rcd. 14518, ¶16 (2008). The interviews covered matters that are not in the public domain, but rather concern proprietary business methods and strategies.

(1) Name of Google employee submitted with Google Inc.'s Confidential Responses to Supplemental Letter of Inquiry, File No. EB-10-IH-4055 (Apr. 14, 2011), at p. 10 (Response to Supplemental Request No. 8), and subject to Google's Request for Confidential Treatment filed April 14, 2011.

(2) Names, titles, job descriptions, and other identifying information of Google employees (including employees who participated in the Voluntary Interviews). This information was submitted with Google Inc.'s Confidential Responses to August 18, 2011 Letter from Michele Ellison, Chief, Enforcement Bureau, File No. EB-10-IH-4055 (Sept. 7, 2011), and is subject to Google's Request for Confidential Treatment filed on September 7, 2011.

(3) Names and job titles of Google employees and counsel on p. 1 of Document 11-21, submitted with Request for Confidential Treatment, File No. EB-10-IH-4055 (Sept. 19, 2011).

Submitted as Attachment 1 hereto is a copy of the documents covered by (2) and (3) above, showing the appropriate redactions (in addition to those already granted by the Bureau).

V. CONCLUSION

Google respectfully requests the Commission to order the Bureau to maintain as confidential: (1) notes of voluntarily provided interviews, to the extent such notes exist; and (2) personally identifying information regarding Google employees, as set forth herein.

Respectfully submitted,

GOOGLE Inc.

By: 

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Counsel for Google Inc.

April 27, 2012