



FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau, Investigations and Hearings Division
445 12th Street, S.W., Room 4-C330
Washington, D.C. 20554

April 13, 2012

VIA OVERNIGHT DELIVERY (UPS)

Google, Inc.
ATTN: Richard Whitt, Director/Managing Counsel, Telecom and Media Policy
Aparna Sridhar, Telecom Policy Counsel
1101 New York Avenue, N.W., Second Floor
Washington, DC 20005

E. Ashton Johnston, Esq.
Lampert, O'Connor & Johnston, P.C.
1776 K Street NW, Suite 700
Washington, DC 20006

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

Dear Mr. Whitt, Ms. Sridhar and Mr. Johnston:

This letter responds to requests by Google, Inc. (Google or the Company) for confidential treatment of information Google provided to the Enforcement Bureau in response to the Bureau's investigation of Google's collection of Wi-Fi data in connection with its Street View project. On November 3, 2010, the Bureau issued a Letter of Inquiry (LOI) to Google instructing the Company to produce certain information.¹ Google accompanied its responses to the LOI with a very broad request for confidential treatment of the information it submitted.² In subsequent submissions to the Bureau and in response to a Supplemental LOI,³ Google repeated its broad requests for confidential treatment.⁴ By letter dated August 18, 2011,⁵ the Bureau directed, among other things, that Google conform its confidentiality requests to the Commission's rules.⁶ Thereafter, by letter dated September 7, 2011, Google revised its requests for confidential treatment and submitted a new set of redacted materials indicating the bases

¹ Letter from P. Michele Ellison, Chief, Enforcement Bureau, FCC, to Google, Inc. (Nov. 3, 2010).

² Letter from E. Ashton Johnston, Counsel for Google, to Marlene H. Dortch, Secretary, FCC (Dec. 10, 2010).

³ Letter from Theresa Z. Cavanaugh, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, to Google, Inc. (March 30, 2011).

⁴ See Letter from E. Ashton Johnston, Counsel for Google, to Marlene H. Dortch, Secretary, FCC (Dec. 14, 2010); Letter from E. Ashton Johnston, Counsel for Google, to Marlene H. Dortch, Secretary, FCC (Dec. 20, 2010); Letter from E. Ashton Johnston, Counsel for Google, to Marlene H. Dortch, Secretary, FCC (April 14, 2011); Letter from E. Ashton Johnston, Counsel for Google, to Marlene H. Dortch, Secretary, FCC (April 28, 2011); Letter from E. Ashton Johnston, Counsel for Google, to Theresa Z. Cavanaugh, Acting Chief, Investigations and Hearings Division, Enforcement Bureau (May 16, 2011); Letter from E. Ashton Johnston, Counsel for Google, to Theresa Z. Cavanaugh, Acting Chief, Investigations and Hearings Division, Enforcement Bureau (June 3, 2011).

⁵ Letter from P. Michele Ellison, Chief, Enforcement Bureau, to Google, Inc. (Aug. 18, 2011).

⁶ See 47 C.F.R. § 0.459.

upon which it believed that specific portions should be withheld from public disclosure.⁷ Google also requested confidential treatment of additional materials produced on September 19 and November 1, 2011.⁸ For the reasons that follow, we grant in part and deny in part Google's requests for confidential treatment.

Commercially Sensitive Information

Pursuant to the Commission's rules,⁹ our analysis of Google's requests for confidential treatment is governed by the Freedom of Information Act (FOIA).¹⁰ When we assess requests for confidential treatment based upon the alleged sensitivity of commercial information, we base our confidentiality determinations on Exemption 4 of the FOIA, which permits us to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential."¹¹ Under Exemption 4, compulsory submissions of commercial or financial materials are deemed to be confidential when disclosure would be likely to cause substantial harm to the competitive position of the submitter.¹² The harm must flow from the affirmative use of proprietary information by competitors.¹³ It is the submitter's responsibility to show that it actually faces competition and to explain the manner in which the information in question could be used by competitors to cause substantial competitive harm.

We may, in the exercise of our discretion, act upon requests for confidentiality in the absence of a FOIA request, and do so here.¹⁴ We find that certain information Google submitted to the Bureau satisfies the requirements under Exemption 4 and should be afforded confidential treatment to the extent the information is not publicly available. Specifically, we 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. Google has used this information in its products and services, and we recognize that Google operates in a competitive environment. Accordingly, we find that disclosure of this information would likely cause substantial harm to Google's competitive position.

On the other hand, we find that information related to Google's use of Street View cars to collect payload data does not qualify for protection under FOIA Exemption 4. Throughout this investigation, Google has consistently maintained that it never had any intended use for payload data and that it never used payload data in connection with any product or service.¹⁵ Because the payload data had no commercial utility to Google, we find that disclosure of information about collection of payload data

⁷ Letter from E. Ashton Johnston, Counsel for Google, to Marlene H. Dortch, Secretary, FCC (Sept. 7, 2011).

⁸ See Letter from E. Ashton Johnston, Counsel for Google, to Marlene H. Dortch, Secretary, FCC (Nov. 1, 2011); Letter from E. Ashton Johnston, Counsel for Google, to Marlene H. Dortch, Secretary, FCC (Sept. 19, 2011).

⁹ See 47 C.F.R. § 0.459(d)(2).

¹⁰ 5 U.S.C. § 552

¹¹ *Id.* § 552(b)(4).

¹² See, e.g., *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*).

¹³ See, e.g., *CAN Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 & n.158 (D.C. Cir. 1987); *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983).

¹⁴ See 47 C.F.R. § 0.459(d)(3).

¹⁵ See, e.g., LOI Response at 4-5.

poses no threat of harm to Google's competitive position. Disclosure of this information may cause commercial embarrassment, but that is not a basis for requesting confidential treatment under Exemption 4.¹⁶

We also find that information related to the fact of routine software-related actions by Google employees does not qualify for protection under Exemption 4. For example, the fact that Google employees reviewed, debugged, and pushed the software code used to collect data from Wi-Fi networks is not subject to Exemption 4. Companies that work with software commonly engage in these practices. Consequently, disclosure of the fact that Google reviewed, debugged, and pushed the code is not likely to cause substantial harm to Google's competitive position. We will, however, treat the code itself as confidential.

Finally, we find that information Google has publicly disclosed or that is otherwise publicly available is not subject to protection under FOIA Exemption 4. For example, information that Google has disclosed on its public policy blogs is not confidential. Similarly, translations of decisions by foreign authorities that are in the public domain are not the proper subject of a request for confidential treatment.

Thus, for example, with respect to documents that Google has produced, we will not treat as confidential the following information:

- the "Objective," "Background," and "Privacy Considerations" sections of Google Document 11-1. These sections do not contain any non-public proprietary information.
- the following comments in Google Document 11-3: "[d]iscard data we don't care about," and "[d]iscard just the body of encrypted frames." These are comments to the code, not the code itself, and they relate to information that Google did not retain.
- the following sentence from Google Document 11-7: "You've probably already investigated this, but we have all these people driving around . . .—is there any possibility we can also have them wardriving at the same time?" Google has publicly acknowledged that it engaged in wardriving.
- the following sentence from Google Document 11-13: "We store the whole body of all non-encrypted data frames. One of my to-do items is to measure how many HTTP requests we're seeing." This comment relates to collection of payload data.
- Google Document 11-14, except for the names of individuals and the references to [REDACTED] and wxbug.com. This document relates to collection of payload data.
- the following sentence from Google Document 18-46: "I'd like you to do a code review."

We likewise will not treat as confidential similar information in Google's narrative responses to the initial and supplemental LOIs. We find that disclosure of this information is not likely to cause substantial harm to Google's competitive position.

¹⁶ See, e.g., *United Technologies v. U.S. Dept. of Defense*, 601 F.3d 557, 567 (D.C. Cir. 2010) ("Exemption 4 does not guard against mere embarrassment or reputational injury"); cf. *FCC v. AT&T, Inc.*, 562 U.S. 1177, 131 S. Ct. 1177 (March 1, 2011) (rejecting corporation's claimed right to personal privacy under Exemption 7(c) to protect it from commercial embarrassment).

Richard Whitt
E. Ashton Johnston, Esq.
April 13, 2012
Page 4 of 4

In the course of conducting its investigation, the Bureau interviewed a number of Google employees, as well as an employee of Stroz Friedberg, the consulting firm that Google hired to review the Wi-Fi collection code. Google made a general request for confidential treatment at the beginning of the interviews, but has not made the specific request required by section 0.459.¹⁷ The interviews were neither recorded nor transcribed because Google refused to consent to any such records. Aside from objections based on the attorney/client privilege and the work product doctrine, Google did not identify specific statements in the course of the interviews that it believed were confidential, and perhaps because of the absence of any transcript or recording, has not done so afterward. Nevertheless, we will for the time being continue to provide limited confidentiality for the statements made in the interviews, consistent with the approach described herein with respect to documents and written narrative responses. Specifically, we find that statements related to Google's use of Street View cars to collect payload data pose no threat of harm to Google's competitive position, and thus such information does not qualify for protection under FOIA Exemption 4. In addition, we find that information disclosed in the interviews regarding routine actions by Google employees does not qualify for protection under FOIA Exemption 4.

Personal Privacy

FOIA provides that records or information compiled for law enforcement purposes are exempt from disclosure to the extent that the production of such records could reasonably be expected to "constitute an unwarranted invasion of personal privacy."¹⁸ Google relies on this exemption in asserting that certain materials relating to the identification of various Google employees should not be disclosed. We agree that certain personal information in Google's responses and the supporting documents is and should be exempt from disclosure. We will redact information that identifies Google employees. This information includes names, non-public email addresses, and telephone numbers.

Conclusion

Attached hereto as Exhibit A is a summary of our determinations with respect to each document, including written responses to the initial and supplemental LOIs that Google has produced. Also attached hereto as Exhibit B are copies of documents that we find are confidential in part, with the confidential parts redacted. If Google believes our decision with regard to its requests for confidential treatment is in error, it may file an application for review of this action within 10 business days of the date of this letter.¹⁹

Sincerely,

Theresa Z. Cavanaugh, Chief
Investigations and Hearings Division
Enforcement Bureau

cc: Michael Rubin, Esq.

¹⁷ Each request for confidential treatment must contain a statement of the reasons for withholding the materials from inspection, including among other things an identification of the specific information for which confidential treatment is sought and an explanation of how disclosure could result in substantial competitive harm. 47 C.F.R. § 0.459(b).

¹⁸ 5 U.S.C. § 552(b)(7)(C).

¹⁹ See 47 C.F.R. § 0.459(g).