

VIA EMAIL

April 16, 2020

Heather Hipsley
Chief FOIA Officer
Freedom of Information Act Request
Office of General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Email: FOIA@ftc.gov

Dear Ms. Hipsley:

This letter constitutes a 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”).

This week FTC Commissioner Noah Phillips "declined to say whether the commission is investigating the video conferencing company [Zoom], which has experienced a surge in both popularity and security and privacy concerns."¹ EPIC seeks all records in the possession of the agency regarding the FTC’s investigation of Zoom.

Documents Requested

All records concerning the FTC’s investigation of Zoom.

Background

Last year, EPIC filed a detailed complaint with the Federal Trade Commission about security flaws with Zoom.² EPIC warned the Commission that Zoom had “placed at risk the privacy and security of the users of its services.”³ EPIC also explained that Zoom had “exposed users to the risk of remote surveillance, unwanted videocalls, and denial-of-service attack.”⁴

¹ *Coronavirus Special Report ft. FTC Commissioner Noah Phillips April 14, 2020*, POLITICO (Apr. 14, 2020), <https://www.politico.com/video/2020/04/14/coronavirus-special-report-ft-ftc-commissioner-noah-phillips-april-14-2020-071990>.

² EPIC, *Complaint, Request for Investigation, Injunction, and Other Relief* (July 11, 2019), <https://epic.org/privacy/zoom/EPIC-FTC-Complaint-In-re-Zoom-7-19.pdf>; see also EPIC, *In re Zoom: Concerning Zoom's Ability to Bypass Browser Security Settings and Remotely Enable a User's Web Camera Without the Knowledge or Consent of the User*, <https://epic.org/privacy/ftc/zoom/>.

³ *Id.* at 1.

⁴ *Id.* at 16.

The FTC never announced any action against Zoom, and the problems have grown worse. As EPIC explained in a recent letter sent to the Commission, “[t]he need for strong safeguards is far greater today than when EPIC filed the original Zoom complaint last year.”⁵

Members of Congress have urged the Federal Trade Commission to pursue an investigation of Zoom’s business practices. Senator Sherrod Brown wrote to Chairman Simons, “I believe that the company is engaging in deceptive practices by inaccurately advertising end-to-end encryption of its virtual meetings and putting consumers’ information and privacy at risk.”⁶ Senator Bennet told POLITICO, “the Federal Trade Commission should immediately investigate whether the company’s policies have put user privacy and security needlessly at risk.”⁷ Senator Klobuchar “supports an FTC investigation into Zoom’s privacy and security issues and is concerned about how Zoom’s business practices appear to have put American’s data and privacy at risk.”⁸ Representatives Frank Pallone and Jan Schakowsky have also urged the FTC to pursue an investigation of Zoom.⁹ Senator Marsha Blackburn has said that Zoom’s security lapses could disrupt efforts to cope with the pandemic.¹⁰ And Senator Blumenthal has asked the FTC to investigate Zoom, stating “Zoom’s pattern of security failures & privacy infringements should have drawn the FTC’s attention & scrutiny long ago.”¹¹

FTC Chairman Joe Simons has testified before Congress that “any time you see a press report of a significant privacy issue, a potential privacy violation of our authority, it is safe to assume that we either are investigating it already or shortly after that media release, we will investigate it.”¹²

The public has the right to know the status of the FTC’s investigation of Zoom.

⁵ Letter from EPIC to Chairman Joseph J. Simons, Noah Joshua Phillips, Rohit Chopra, Rebecca Kelly Slaughter, and Christine S. Wilson, Fed. Trade Comm’n (Apr. 6, 2020), <https://epic.org/privacy/ftc/EPIC-FTC-Zoom-Apr2020.pdf>; Complaint, Request for Investigation, Injunction, and Other Relief, EPIC, In re: Zoom (July 11, 2019), <https://www.epic.org/privacy/ftc/zoom/EPIC-FTC-Complaint-In-re-Zoom-7-19.pdf>.

⁶ Letter from Senator Sherrod Brown, to Chairman Joseph J. Simons, Fed. Trade Comm’n (Apr. 3, 2020), <https://www.banking.senate.gov/imo/media/doc/Brown%20to%20FTC%20Zoom%204.03.20.pdf>.

⁷ Cristiano Lima, *Zoom's Legal Perils Mount as Democrats Call for FTC Probe*, Politico (Apr. 7, 2020), <https://www.politico.com/news/2020/04/07/zoom-legal-threats-democrats-ftc-probe-173966>.

⁸ *Id.*

⁹ *Id.*; see also Rep. Frank Pallone (@FrankPallone), Twitter (Apr. 10, 2020), <https://twitter.com/FrankPallone/status/1248650269707157504> (@zoom_us MUST take proactive measures to protect user privacy . . . @FTC should ensure Zoom is secure for Americans, especially due to its popularity during the #COVID19 pandemic.).

¹⁰ Cristiano Lima, *Washington to Zoom: Welcome to the Hot Seat*, Politico (Apr. 4, 2020), <https://www.politico.com/news/2020/04/04/washington-to-zoom-welcome-to-the-hot-seat-164120>.

¹¹ Senator Richard Blumenthal (@SenBlumenthal), Twitter (Apr. 7, 2020), <https://twitter.com/SenBlumenthal/status/1247510907992846337>.

¹² Oversight of the Federal Trade Commission: Hearing Before the Subcomm. on Consumer Prot., Product Safety, Ins., & Data Sec., 115th Cong. (2018) (statement of Joseph J. Simons, Chairman, Fed. Trade Comm’n), available at <https://www.commerce.senate.gov/2018/11/oversight-of-the-federal-trade-commission>.

Request for Expedition

EPIC is entitled to expedited processing of this request under the FOIA and the FTC's FOIA regulations because there is a "compelling need." 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 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 FTC investigation into Zoom is an "actual . . . Government activity." Records about FTC-related activities concerning the response to EPIC's Complaint, EPIC's letter, and queries from lawmakers in Congress are also government activities.

The "urgency" to inform the public about this activity is clear given that the significant privacy and security issues that have come to light with Zoom's system. EPIC and other consumer groups have called for investigation of Zoom's business practices and major news outlets have reported on the groups' criticisms. Members of Congress have called for an investigation and have had to implement their own restrictions given the insecurity in the Zoom system. The Commission has not provided the public with any information about its investigation into Zoom's business practices.

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, EPIC certifies that this explanation is true and correct to the best of its 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(e)(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 four factors 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 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 factor, 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). Information related to the FTC’s investigation into Zoom constitute a federal government activity.

On the second factor, disclosure “is likely to contribute to an understanding of these operations or activities” because lawmakers, security researchers, and consumer privacy advocates have called on the FTC to investigate Zoom. 16 C.F.R. § 4.8(2)(i)(B). The release of this information will contribute to the understanding of what the Commission is doing in response to these important privacy complaints.

On the third factor, 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.¹³ EPIC consistently publishes critical documents obtained through the FOIA and through litigation on its robust website for educational purposes.¹⁴ Moreover, EPIC publishes an award-winning email and online newsletter that always highlights critical documents obtained through the FOIA.¹⁵ EPIC’s FOIA work is also prominently featured in major media outlets.¹⁶

On the fourth factor, the disclosure will provide a “significant” contribution to public understanding. 16 C.F.R. § 4.8(2)(i)(D). The release of this information would significantly contribute to the public understanding of the status of the Zoom investigation. The Zoom investigation is of extreme public importance given the current increased reliance of individuals, businesses, schools, and government officials on the Zoom system to communicate safely and securely.

(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

¹³ EPIC, *About EPIC*, <http://epic.org/epic/about.html>.

¹⁴ EPIC.org, <https://www.epic.org/>.

¹⁵ EPIC, *EPIC Alert*, <https://www.epic.org/alert/>.

¹⁶ See EPIC, *EPIC in the News*, https://epic.org/news/epic_in_news.php/.

privacy, open government, and civil liberties. EPIC has no commercial interest in the requested records and has established there is significant public interest in the requested records.

For these reasons, EPIC's fee waiver request should be granted.

Conclusion

Thank you for your consideration of this request. EPIC anticipates your determination on its 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 contact Enid Zhou at 202-483-1140 x104 or Zhou@epic.org, cc: FOIA@epic.org.

Respectfully submitted,

/s Enid Zhou

Enid Zhou

EPIC Open Government Counsel

/s Alan Butler

Alan Butler

EPIC General Counsel

Cc: Senator Roger Wicker, Chairman, Senate Commerce Committee
Senator Maria Cantwell, Ranking Member, Senate Commerce Committee
Representative Frank Pallone, Chairman, House Commerce Committee
Representative Greg Walden, Ranking Member, House Commerce Committee