

February 12, 2008

BY FACSIMILE (202.326.2477)

Freedom of Information Act Appeal
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: Freedom of Information Act Appeal (FOIA-2008-00182 and FOIA-2008-00185)

This letter constitutes an appeal under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted to the Federal Trade Commission (the “FTC” or the “Commission”) by the Electronic Privacy Information Center (“EPIC”).

On December 14, 2007 and December 17, 2007, EPIC requested documents, *via* facsimile, as set forth in the letters attached as Appendices 1 and 2 (“EPIC’s FOIA Requests”). On December 17, 2007 and December 18, 2007, the FTC wrote to EPIC, acknowledged receipt of EPIC’s FOIA Requests, but did not make any determination regarding EPIC’s FOIA Requests. *See* 5 U.S.C. § 552(a)(6); *see also* Appendices 3 and 4.

EPIC hereby appeals the FTC’s failure to make timely determinations regarding EPIC’s FOIA Requests.

EPIC’s FOIA Requests relate to the FTC’s review of the Google-DoubleClick merger, and were filed shortly after EPIC learned of an apparent conflict of interest involving Chairman Deborah Platt Majoras and the Jones Day law firm (“Jones Day”). Immediately after learning of the conflict of interest, EPIC filed a complaint requesting that Chairman Majoras recuse herself from the FTC’s review of the Google-DoubleClick merger. Chairman Majoras declined to recuse herself.

Chairman Majoras’ husband, John M. Majoras, is a Jones Day partner, and “is the Firm’s global coordinator of competition law litigation.”¹ On the day EPIC requested Chairman Majoras’ recusal, Jones Day’s web site stated that “Jones Day is advising DoubleClick, Inc., the digital marketing technology provider, on the international and U.S. antitrust and competition law aspects of its planned \$3.1 billion acquisition by Google, Inc. ... The transaction is currently under review by the U.S.

¹ Professional Biography – Profile, John M. Majoras, <http://www.jonesday.com/jmmajoras/> (last visited Feb. 12, 2008).

Federal Trade Commission and European Commission.” Appendix 5. After EPIC requested Chairman Majoras’ recusal, Jones Day deleted the web page from its Internet site. The page has never been reposted.

EPIC later learned that two former FTC employees, Geoffrey Oliver and Michael S. McFalls, are employed by Jones Day as a partner and “of counsel,” respectively. Mr. McFalls has been characterized by Jones Day as providing professional representation in advising Doubleclick on “the international and U.S. antitrust and competition law aspects of its planned \$3.1 billion acquisition by Google, Inc.” Appendix 5. EPIC’s FOIA Requests also relate to Mr. Oliver’s and Mr. McFalls’ roles in the FTC’s Google-Doubleclick review.

Since EPIC’s FOIA Requests were filed, Chairman Majoras voted to approve the Google-Doubleclick merger without conditions.²

EPIC’s FOIA Requests include requests for expedited processing on the basis that they pertain to matters about which there is “urgency to inform the public about an actual or alleged federal government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(I)-(II) (2007).

EPIC reiterates its request for expedited processing in this appeal. The urgency to inform the public regarding an apparent conflict of interest in the FTC’s review of a multi-billion dollar merger is manifest. In addition, the public has demonstrated substantial interest regarding the subject of EPIC’s FOIA Requests. A Google search performed on February 1, 2008 returns 20,600 results for the search “google doubleclick ftc conflict of interest.” Appendix 6. These results include media coverage by The Washington Post, Information Week, News.com, and Wired.com.

Moreover, it appears that the Commission may soon face a similar decision if it is given merger review authority over the pending Microsoft acquisition of Yahoo.

² Statement of Federal Trade Commission Concerning Google/DoubleClick, December 20, 2007, <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

Thank you for your prompt response to this appeal. As the FOIA provides, I anticipate that you will produce responsive documents within 20 working days. If you have any questions, please feel free to contact me at (202) 483-1140 ext. 104.

Sincerely,

John Verdi, Esq.
Director, EPIC Open Government Project

/enclosures

Appendix 1
EPIC's December 14, 2007 FOIA Request to the FTC



December 14, 2007

1718 Connecticut Ave NW

Suite 200

Washington DC 20009

USA

+1 202 483 1140 [tel]

+1 202 483 1248 [fax]

www.epic.org

BY FACSIMILE — (202) 326-2477

Freedom of Information Act Request
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

RE: Freedom of Information Act Request

Dear Sir/Madam:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the Federal Trade Commission by the Electronic Privacy Information Center ("EPIC").

Part I

Participation of the Law Firm Jones Day in Matters Before the FTC Concerning the Proposed Google-DoubleClick Merger, Investigation of Privacy Consumer Complaints, and/or Enforcement of Consumer Privacy Laws

On December 12, 2007, two representatives of the Federal Trade Commission addressed the representation of Doubleclick by the law firm Jones Day in the proposed Google-DoubleClick merger review now pending before the Commission.

According to one news report:

We learned only yesterday that Jones Day is representing DoubleClick before the European Commission, not the (U.S.) Federal Trade Commission," said FTC spokeswoman Claudia Bourne Farrell. "Jones day has not appeared before the FTC on this matter. (Elinor Mills, *Groups ask FTC chair to recuse in Google-DoubleClick review*, CNET, Dec. 12, 2007.) (Attached as Appendix 1.)

According to a second news report:

FTC spokesperson Nancy Judy said Platt Majoras is reviewing the petition with the FTC's chief ethics officer. She added that Jones Day had not appeared before

the FTC on this matter, and that the agency only learned Tuesday that the firm was representing DoubleClick before the European Commission. (Wendy Davis, *FTC Chair's Potential Bias on Google-DoubleClick Deal Questioned*, Online Media Daily, Dec. 13, 2007) (Attached as Appendix 2.)

These statements were provided within a few hours of the time that EPIC and CDD filed a formal recusal motion before the Federal Trade Commission. These statements were flatly contradicted by a web page (attached as Appendix 3) that was posted on the Jones Day web site at the time the motion was filed, which has since been taken down.

We are seeking all agency records (including, but not limited to, electronic records) from August 16, 2004, to the present about the following:

1. all communications, policy memoranda, reports, legal assessments and other documents regarding the participation of the law firm Jones Day, any employee or agent of the law firm Jones Day, or any spouse of an employee of the law firm Jones Day regarding the Federal Trade Commission's investigation, review, consideration, or assessment of the proposed Google-DoubleClick merger. Such review specifically includes any documents, materials, and/or reports where the phrase "Jones Day" appears.
2. all communications, policy memoranda, reports, legal assessments and other documents regarding the participation of the law firm Jones Day, any employee or agent of the law firm Jones Day, or any spouse of an employee of the law firm Jones Day regarding the Federal Trade Commission's investigation, review, consideration, or investigation of consumer privacy complaints. Such review specifically includes any documents, materials, and/or reports where the phrase "Jones Day" appears.
3. all communications, policy memoranda, reports, legal assessments and other documents regarding the participation of the law firm Jones Day, any employee or agent of the law firm Jones Day, or any spouse of an employee of the law firm Jones Day regarding the Federal Trade Commission's investigation, review, consideration, or assessment the enforcement of consumer privacy law. Such review specifically includes any documents, materials, and/or reports where the phrase "Jones Day" appears.
4. all communications, policy memoranda, reports, legal assessments and other documents of FTC employee Claudia Bourne Farrell regarding the Google-DoubleClick merger, the investigation of consumer privacy complaints, or the enforcement of consumer privacy laws.
5. all communications, policy memoranda, reports, legal assessments and other documents of FTC employee Nancy Judy regarding the Google-DoubleClick

merger, the investigation of consumer privacy complaints, or the enforcement of consumer privacy laws.

Part II

FTC Determination of Recusal Petition in Google-DoubleClick Matter

On December 14, 2007, the Chairman issued a statement “Regarding Recusal Petition for Review of Proposed Acquisition of Hellman & Friedman Capital Partners V, LP (DoubleClick, Inc.) By Google, Inc.” In that statement, the Chairman indicated that she “contacted the FTC’s Ethics Official, and asked him to undertake a conflict of interest analysis.” She also indicated that she consulted “with the FTC’s Designated Agency Ethics Official, Deputy General Counsel Christian S. White, the General Counsel, [her] fellow Commissioners, and members of [her] staff . . .” (Attached as Appendix 4.)

We are requesting the “conflict of interest analysis” described above.

We are further requesting all documents related to this matter in the possession of: Deputy General Counsel Christian S. White, and FTC General Counsel William Blumenthal.

Request for Expedited Processing

This request warrants expedited processing because it pertains to a matter about which there is an “urgency to inform the public about an actual or alleged federal government activity,” and the request is made by “a person primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(I)-(II) (2007).

In accordance with *Al-Fayed v. CIA*, 254 F.3d 300, 306, (D.C. Cir. 2001), the documents should be produced as soon as practicable. First, the documents sought concern a merger review before the Federal Trade Commission of enormous consequence. Second, delay would significantly compromise the ability to assess the conflict of interest analysis and whether the Chairman should participate in the merger decision. Third, the request concerns the conduct of a government agency.

Request for “News Media” Fee Status

EPIC is a “representative of the news media” for fee waiver purposes, *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on our status as a “news media” requester, we are entitled to receive the requested records with only duplication fees assessed. Further, because disclosure of this information will “contribute significantly to public understanding of the operations or activities of the government,” any duplication fees should be waived.

Thank you for your prompt response to this request. As the FOIA provides, I anticipate you will provide responsive documents within twenty (20) working days. Should you have any questions, please call me at (202) 483-1140 ext. 123.

Sincerely,

A handwritten signature in cursive script that reads "Melissa Ngo" followed by a stylized monogram or initials in parentheses.

Melissa Ngo
EPIC Senior Counsel

Enclosures

Appendix 2

EPIC's December 17, 2007 FOIA Request to the FTC



December 17, 2007

BY FACSIMILE — (202) 326-2477

Freedom of Information Act Request
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

1718 Connecticut Ave NW

Suite 200

Washington DC 20009

USA

+1 202 483 1140 [tel]

+1 202 483 1248 [fax]

www.epic.orgRE: Freedom of Information Act Request

Dear Sir/Madam:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted to the Federal Trade Commission by the Electronic Privacy Information Center (“EPIC”).

Part I

Participation of Geoffrey Oliver in Review of Doubleclick Google Merger

We learned this morning that Geoffrey Oliver, the former head of the Anticompetitive Practices Division of the FTC’s Bureau of Competition became a partner of the Jones Day law firm and joined the Washington, DC office in October 2007. Please see Appendix 1 attached.

1. We are requesting all agency records, including memos, email, letters, references in schedule and appointment books, regarding Mr. Oliver’s participation in the review of the Google-Doubleclick matter while at the FTC,
2. We are further requesting all agency records that might address any potential conflicts of interest involving Mr. Oliver at any time he was employed at the FTC, including agency rules and guidelines that may have applied to Mr. Oliver.

Part II

Participation of Michael S. McFalls in FTC Matters

Mr. Michael S. McFalls is “of counsel” to the law firm of Jones Day, a former employee of the Federal Trade Commission, and has been characterized by Jones Day as providing “Professional Representation” in advising Doubleclick “on the international and U.S. antitrust and competition law aspects of its planned \$3.1 billion acquisition by Google Inc.” (Please see Appendix 2 attached).

1. We are requesting all agency records concerning Mr. McFalls, after January 1, 2007, including email, letters, references in schedule and appointment books, as well as any other indication of communication between Mr. McFalls and the Commission.

Request for Expedited Processing

This request warrants expedited processing because it pertains to a matter about which there is an “urgency to inform the public about an actual or alleged federal government activity,” and the request is made by “a person primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(I)-(II) (2007).


In accordance with *Al-Fayed v. CIA*, 254 F.3d 300, 306, (D.C. Cir. 2001), the documents should be produced as soon as practicable. First, the documents sought concern a merger review before the Federal Trade Commission of enormous consequence. Second, delay would significantly compromise the ability to assess the conflict of interest analysis and whether the Chairman should participate in the merger decision. Third, the request concerns the conduct of a government agency.

Request for “News Media” Fee Status

EPIC is a “representative of the news media” for fee waiver purposes, *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on our status as a “news media” requester, we are entitled to receive the requested records with only duplication fees assessed. Further, because disclosure of this information will “contribute significantly to public understanding of the operations or activities of the government,” any duplication fees should be waived.

Thank you for your prompt response to this request. As the FOIA provides, I anticipate you will provide responsive documents within twenty (20) working days. Should you have any questions, please call me at (202) 483-1140 ext. 123.

Sincerely,


Melissa Ngo
EPIC Senior Counsel

Attachments

Appendix 3

December 17, 2007 Letter From the FTC to EPIC



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

December 17, 2007

Melissa Ngo
EPIC Senior Counsel
1718 Connecticut Ave. NW, Suite 200
Washington, DC 20009

RE: FOIA-2008-00182
Jones Day

Dear Ms. Ngo:

This letter acknowledges the receipt of your Freedom of Information Act request dated December 14, 2007 for the documents listed below:

Jones Day

If you should have any questions regarding your request contact Caitlin Tobin at (202)326-3059. In any call or future correspondence concerning the request, please refer to the following case number FOIA-2008-00182.

Sincerely,

A handwritten signature in black ink, appearing to read "Troy Krouse".

Troy Krouse

Appendix 4

December 18, 2007 Letter From the FTC to EPIC



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

December 18, 2007

Melissa Ngo
EPIC Senior Counsel
1718 Connecticut Ave. NW, Suite 200
Washington, DC 20009

RE: FOIA-2008-00185
Jones Day & Geoffrey Oliver

Dear Ms. Ngo:

This letter acknowledges the receipt of your Freedom of Information Act request dated December 17, 2007 for the documents listed below:

Jones Day & Geoffrey Oliver

If you should have any questions regarding your request contact Caitlin Tobin at (202)326-3059. In any call or future correspondence concerning the request, please refer to the following case number FOIA-2008-00185.

Sincerely,

A handwritten signature in black ink, appearing to read "Troy Krouse".

Troy Krouse

Appendix 5 Jones Day Representation of Doubleclick Regarding Acquisition by Google



Experience Details

Client(s): DoubleClick Inc.

Representation: Acquisition by DoubleClick

Principal Professional(s): [Joe Sims](#), [Thomas Jestaedt](#), [Alexandre G. Verheyden](#), [Michael S. McFalls](#), [Chris Ahern](#)

Lead Practice(s): [Antitrust Mergers/Joint Ventures](#)

Industry(s): [Media](#)

Summary: Jones Day is advising DoubleClick Inc., the digital marketing technology provider, on the international and U.S. antitrust and competition law aspects of its planned \$3.1 billion acquisition by Google Inc. The proposed acquisition will combine DoubleClick's expertise in ad management technology with Google's internet search and content platform. The transaction is currently under review by the U.S. Federal Trade Commission (FTC) and European Commission.

RELATED SERVICES

- [Antitrust & Competition Law](#)

PROFESSIONAL REPRESENTATION

- [Joe Sims](#)
- [Thomas Jestaedt](#)
- [Alexandre G. Verheyden](#)
- [Michael S. McFalls](#)
- [Chris Ahern](#)

Appendix 6

February 1, 2008 Google Search For “google doubleclick ftc conflict of interest”

The screenshot shows a web browser window with the Google search engine interface. The search query is "google doubleclick ftc conflict of interest". The results page displays a list of search results, each with a title, a brief description, and a URL. The results include:

- The Jones Day, Google/DoubleClick & FTC conflict of interest: a ...**
In that position, his role raises conflicts of interest with cases involving the FTC, in my opinion. With an issue involving the future of the Internet and ...
www.democraticmedia.org/jcblog/?p=424 - 26k - [Cached](#) - [Similar pages](#)
- » Conflict of interest in FTC's DoubleClick hearing? | ZDNet ...**
Conflict of interest in FTC's DoubleClick hearing? ... a Republican, to recuse herself from consideration of the Google-DoubleClick deal, ...
government.zdnet.com/?p=3561 - 61k - [Cached](#) - [Similar pages](#)
- FTC Gives Google, DoubleClick Thumbs Up | WebProNews**
FTC Gives Google, DoubleClick Thumbs Up. By David A. Utter - Thu, ... conflict of interest, Jones Day scrubbed its site of all DoubleClick references. ...
www.webpronews.com/topnews/2007/12/20/ftc-gives-google-doubleclick-thumbs-up - 21k - [Cached](#) - [Similar pages](#)
- Google/DoubleClick v. FTC, Round 15627734234.7**
The conflict itself, however, is a point of controversy. ... Save & Share:
delicio.us:Google/DoubleClick.v.FTC.Round.15627734234.7 ...
www.marketingpiggrim.com/2007/12/googledoubleclick-v-ftc-round-156277342347.html - 36k - [Cached](#) - [Similar pages](#)
- EPIC - Privacy? Proposed Google/DoubleClick Merger**
(December 20), FTC Chair Dismisses Recusal Petition in Jones Day-DoubleClick Conflict of Interest Case, EPIC Files Expedited Open Government Request. FTC ...
epic.org/privacy/ftc/google/ - 127k - [Cached](#) - [Similar pages](#)
- Google-DoubleClick deal hit by deleted Web page controversy | The ...**
A political controversy over deleted documents and conflicts of interest could, ... of the Google-DoubleClick merger and had not appeared before the FTC. ...
www.news.com/8301-13578_3-9833512-38.html - 42k - [Cached](#) - [Similar pages](#)
- FTC's Majoras to Review Google-DoubleClick Deal - 12/14/2007 9:03 ...**
Groups Want FTC's Majoras Recused from Google-DoubleClick Review ... billion acquisition of DoubleClick, saying that there is a conflict of interest because ...
www.broadcastingcable.com/article/CA6513214.html - [Similar pages](#)
- FTC Chairman Denies Conflict in Google Case - washingtonpost.com**
Dec 15, 2007 ... FTC Chairman Denies Conflict in Google Case. Majoras Refuses to Recuse Herself. By Catherine Rampell. Washington Post Staff Writer ...
www.washingtonpost.com/wp-dyn/content/article/2007/12/14/AR2007121401735.html - [Similar pages](#)
- Groups Want FTC Chair Off Google-DoubleClick Deal | Epicenter from ...**
... recuse herself from reviewing the acquisition, citing a conflict of interest. ... Spokespeople from the FTC, Jones Day, Google and DoubleClick were not ...
blog.wired.com/business/2007/12/groups-want-ftc.html - 55k - [Cached](#) - [Similar pages](#)
- FTC Approves Google/DoubleClick Merger**
Dec 20, 2007 ... The Federal Trade Commission approved Google's acquisition of ... from the Google/DoubleClick review over a potential conflict of interest. ...
www.internetnews.com/bus-news/article.php/3717866 - 107k - [Cached](#) - [Similar pages](#)

At the bottom of the page, there is a navigation bar with the word "Goooooooooogle" in a stylized font, followed by a blue play button icon. Below this, there are numbered links from 1 to 10, and a "Next" link. The word "Done" is visible in the bottom left corner of the browser window.