



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

Office of Inspector General

September 29, 2021

MEMORANDUM

FROM:

Andrew Katsaros
Inspector General

TO COMMISSIONERS:

Lina M. Khan, Chair
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

SUBJECT:

Management Advisory on Controlling and Protecting Sensitive
FTC Information (M-21-04)

This advisory addresses issues related to the current processes for controlling and protecting sensitive FTC information—including their possible contribution to various media releases of nonpublic information and records (NPI). Since 2013, the Commission has addressed such issues and begun implementing responsive solutions in steps. In this advisory, we acknowledge the progress that the Commission has made—while noting persistent vulnerabilities that have created opportunities for continued NPI release incidents.

I. Introduction

In calendar year 2021, several national and relevant trade publications have obtained—without FTC permission—and published FTC NPI. For example, in March 2021, Politico published an article, *How Washington Fumbled the Future*,¹ about the FTC’s decision to close the 2011–2013 antitrust investigation of Google. In conjunction with the article, Politico published 142 pages of unredacted nonpublic FTC memoranda obtained without the FTC’s permission (the “Politico memos”). The Politico memos consisted of recommendations that FTC staff had submitted to the Commission in 2012 about the Google matter. While the FTC had previously disclosed many of the Politico memos to

¹ Leah Nylén, *How Washington Fumbled the Future*, POLITICO, Mar. 16, 2021, <https://www.politico.com/news/2021/03/16/google-files-ftc-antitrust-investigation-475573>.

Congress, the Department of Justice, and accidentally to the Wall Street Journal in 2015,² at least three of the Politico memos had never been disclosed outside of the FTC.³

Not even two months before the Politico article, the Capitol Forum, on January 22, 2021, published a story, *FTC Policy: OPP Set to Circulate Status Report on 6(b) Tech Acquisition Investigation by Jan. 29 When Key Republicans Plan to Step Down*. The story cited a “source familiar with the matter” and quoted large excerpts of the weekly report that FTC Office of Policy and Planning (OPP) Director Bilal Sayyed had sent to more than 60 FTC employees just hours earlier. In particular, the article quoted a portion of the weekly report about Sayyed’s intent to issue a status report by January 29, 2021, Sayyed’s last day at the FTC.

Although the NPI disclosures during 2021 are of great concern, this is not a new issue for the FTC.⁴ Between December 2018 and July 2019—as the FTC completed its privacy investigation of Facebook and neared a settlement—national publications such as the Washington Post, New York Times, and Wall Street Journal published more than sixteen articles with NPI about FTC deliberations in the Facebook matter, attributing such information to sources “familiar” or with “knowledge” of such deliberations. Examples include the following:⁵

² In 2015, the FTC, in response to a FOIA request, mistakenly released to the Wall Street Journal a nonpublic August 8, 2012, memo from the Anti-Competitive Practices Group to the Commission. The Wall Street Journal published the memo in its March 19, 2015 article, *Inside the U.S. Antitrust Probe of Google*, <https://www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274>.

³ As we drafted this memorandum, the Information, a subscription-based tech news website, published an article stating that “three people familiar with the situation” confirmed that FTC then-Acting Chairwoman Slaughter planned to appoint Eytayo St. Matthew-Daniel as FTC Bureau of Competition Director.

⁴ In 2013, Congress asked FTC OIG to investigate concerns about NPI disclosures that occurred during 2011 and 2012 related to the FTC’s investigation of Google (see p. 4).

⁵ See e.g., Tony Romm, *Facebook Deceived Users about the Way It Used Phone Numbers, Facial Recognition, FTC to Allege In Complaint*, WASHINGTON POST, July 23, 2019 (“The Federal Trade Commission plans to allege that Facebook misled users about its handling of their phone numbers as part of a wide-ranging complaint that accompanies a settlement ending the government’s privacy probe, *according to two people familiar with the matter.*”)(emphasis added); Tony Romm, *Facebook Will Have to Pay a Record-Breaking Fine for Violating Users’ Privacy. But the FTC Wanted More*, WASHINGTON POST, July 22, 2019 (“A Washington Post review of the 16-month investigation—described by 10 people familiar with the matter—shows that the FTC stopped short of some even tougher punishments it initially had in mind.”); Cecilia Kang, *FTC Approves Facebook Fine of About \$5 Billion*, N.Y. TIMES, July 12, 2019 (“The Federal Trade Commission has approved a fine of roughly \$5 billion against Facebook for mishandling users’ personal information, *according to three people briefed on the vote.*”)(emphasis added); Tony Romm, *FTC Votes to Approve \$5 Billion Settlement with Facebook in Privacy Probe*, WASHINGTON POST, July 12, 2019 (“[A]ccording to a person familiar with the matter but not authorized to speak on the record,” the FTC voted to approve a \$5 billion settlement with Facebook); Nancy Scola, *New Privacy Oversight on the Table for Facebook, Zuckerberg*, POLITICO, May 1, 2019 (A “source close to the talks . . . who requested anonymity because the discussions are ongoing,” stated that the Facebook settlement may require Facebook to create a privacy officer position); Cecilia Kang, *Facebook Set to Create Privacy Positions as Part of FTC Settlement*, N.Y. TIMES, May 1, 2019 (stating that, “according to two people with knowledge of the talks,” the FTC was negotiating, as part of the settlement with Facebook, that Facebook create a new position focused on strengthening its privacy practices); Mike Isaac and Cecilia Kang, *Facebook Expects to Be Fined Up to \$5 Billion by FTC. Over Privacy Issues*, N.Y. TIMES, Apr. 24, 2019 (“Two people with knowledge of the situation, who were not

- In one particularly egregious case, a December 30, 2018, New York Times article attributed “to someone who read the memo” details from nonpublic notes prepared by an FTC official on potential outcomes of the Facebook matter.⁶
- Likewise, on January 18, 2019, the Washington Post and the New York Times ran stories with information from a December 13, 2018, closed Commission meeting about the Facebook matter. The Washington Post article attributed the information to “three people familiar with the deliberations but not authorized to speak on the record”⁷ and the New York Times attributed the information to “two people familiar with the inquiry . . . who would speak only on the condition of anonymity because the investigation is not public.”⁸

Just as the Facebook investigation was wrapping up in the summer of 2019, another leak occurred when the Washington Post and Bloomberg published several articles with FTC NPI about the FTC’s YouTube investigation.⁹

Although troublesome for any agency, unauthorized disclosure of the FTC’s NPI—such as how the FTC plans to handle an investigation—has the potential to affect financial markets and influence companies’ decisions. In our reviews of recent unauthorized disclosures of NPI, we did not uncover direct evidence that FTC bureau staff were

authorized to speak publicly,” stated that “[o]fficials at the agency have not reached a final decision on Facebook” and, “[i]n recent weeks, the agency’s chairman, Joseph Simons, sent strict orders to all commission offices and staff in the consumer protection, enforcement and privacy bureaus to not discuss the Facebook case.”); Tony Romm, *Facebook CEO Mark Zuckerberg Said to Be Under Close Scrutiny in Federal Privacy Probe*, WASHINGTON POST, Apr. 19, 2019 (attributing information about discussions between the FTC and Facebook about holding Facebook CEO Mark Zuckerberg accountable “to two people familiar with the discussions”); Nancy Scola, *Facebook’s FTC Worries Go Beyond a Massive Fine*, POLITICO, Apr. 2, 2019 (“According to sources close to the commission, FTC Chairman Joe Simons, a Trump nominee, is said to be eager for Democratic support for the Facebook settlement, and Rohit Chopra, one of the FTC’s two Democrats, has explicitly called for the agency to go beyond fines to force ‘structural remedies’ on misbehaving companies.”)(emphasis added); Tony Romm, *The U.S. Government and Facebook Are Negotiating a Record, Multibillion-dollar Fine for the Company’s Privacy Lapses*, WASHINGTON POST, Feb. 14, 2019 (attributing the information to “two people familiar with the probe”).

⁶ Nicholas Confessore & Cecilia Kang, *Facebook Data Scandals Stoke Criticism That a Privacy Watchdog Too Rarely Bites*, N.Y. TIMES, Dec. 30, 2018.

⁷ Tony Romm & Elizabeth Dwoskin, *U.S. Regulators Have Met to Discuss Imposing a Record-Setting Fine against Facebook for Privacy Violations*, WASHINGTON POST, Jan. 18, 2019.

⁸ Cecilia Kang, *F.T.C. Is Said to Be Considering Large Facebook Fines*, N.Y. TIMES, Jan. 18, 2019.

⁹ Tony Romm & Elizabeth Dwoskin, *FTC Approves Settlement with Google over YouTube Kids Privacy Violations*, WASHINGTON POST, July 19, 2019 (attributing the information to “two people familiar with the matter who were not authorized to discuss it on record”); Ben Brody, *FTC Said to Ask About Disabling YouTube Ads for Kids’ Privacy*, BLOOMBERG, July 8 2019 (including information from a source “who requested anonymity to talk about discussions that aren’t public” about then FTC Chairman Joseph Simons asking children’s privacy advocates about “whether having video creators on YouTube disable ads could resolve concerns the site is violating laws to protect kids” and about a July 1, 2019 phone call where Chairman Simons and Commissioner Noah Phillips suggested that YouTube wouldn’t need to move all children’s content to a different platform); Tony Romm, Elizabeth Dwoskin & Craig Timberg, *YouTube Under Federal Investigation over Allegations It Violates Children’s Privacy*, WASHINGTON POST, June 19, 2019 (attributing the information to “four people, who spoke on the condition of anonymity because such probes are supposed to be confidential”).

involved in their release. However, the nature of the releases alerted us to issues with FTC's system of maintaining NPI, which unnecessarily makes the FTC more vulnerable to unauthorized disclosures.

Likewise, the FTC lacks a formal, comprehensive communications and training strategy regarding NPI. Because the FTC does not routinely remind Commissioners and staff of the limits on disclosure and their responsibilities, the agency faces an increased risk of unauthorized NPI disclosures.

II. Background

Laws, Regulations, and Policies Related to the Release of FTC NPI

U.S Office of Government Ethics (OGE) regulations define NPI as

information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know:

- (1) Is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute, Executive order or regulation;
- (2) Is designated as confidential by an agency; or
- (3) Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.¹⁰

NPI includes information submitted to the FTC and information related to the FTC's investigations and actions, internal FTC deliberations, and internal FTC personnel rules and practices.¹¹

Federal law and regulations prohibit FTC employees, with limited exceptions, from disclosing NPI outside of the FTC.¹² In addition to facing disciplinary action for unauthorized disclosures of NPI, FTC employees also may face criminal prosecution for certain unauthorized disclosures.¹³

¹⁰ 5 C.F.R. § 2635.703(b).

¹¹ See 6 C.F.R. § 4.10, FTC Nonpublic Material.

¹² 15 U.S.C. § 18a(h) (prohibiting the FTC, with certain exceptions, from publicly disclosing information obtained from Hart-Scott-Rodino Act filings and submissions); 15 U.S.C. § 46(f) (prohibiting the FTC from making public, other than to law enforcement for a law enforcement purpose, "any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential"); 15 U.S.C. § 50 (making it a misdemeanor for FTC employees to make unauthorized disclosures of NPI); 15 U.S.C. § 57b-2 (prohibiting public disclosure of material received by the Commission in an investigation); 18 U.S.C. § 1905 (making it a misdemeanor for Federal employees to make unauthorized disclosure of confidential information and requiring termination of such employees); 5 C.F.R. § 2635.703 (prohibiting Federal employees from allowing the "improper use of nonpublic information to further [their] own private interest[s] or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.").

¹³ 15 U.S.C. § 50; 18 U.S.C. §§ 641, 1905.

FTC OIG 2013 Investigation

In 2011 and 2012, numerous media articles reported NPI about the Google investigation, with several outlets attributing the information to “FTC attorneys” or “sources within the FTC.” In response, on January 3, 2013, the then-Chairman of the former House Committee on Oversight and Government Reform sent a letter to the FTC OIG, requesting that the FTC OIG investigate whether the Commission or its employees shared NPI about the Google investigation with the public or the media. Due to the FTC OIG’s limited resources, the U.S. Postal Service OIG (USPS OIG) conducted the investigation on the FTC OIG’s behalf. USPS OIG was unable to identify the source of the specific leaks, noting that there were many potential sources both inside and outside the FTC. USPS OIG, however, identified the following systemic risks in FTC policies, regulations, business practices, and perceptions that it believed left the FTC highly susceptible to disclosure of NPI:

- the FTC's policy allowing for communications between staff not formally trained to deal with media inquiries and the media regarding matters of public record;
- the FTC’s business practice of making its closed-door Commission meetings accessible to all employees—both in the headquarters office, where the meetings are held, and via videoconference to the regions and Constitution Center;
- the FTC’s 45-day auto-deletion policy for all un-archived email;
- the FTC’s storage of key documents related to ongoing investigations, including the Google investigation, on a network drive that was accessible to all employees; and
- a difference in perspective among the Commissioners regarding the meaning of NPI and what information could be shared with the media.

FTC Response to 2013 Report on Investigation

On August 9, 2013, then-FTC Chair Edith Ramirez sent a letter to then-FTC Inspector General Scott Wilson outlining the following steps that the FTC would take in response to USPS OIG’s investigation:

1. Remind everyone at Commission meetings¹⁴ of the nonpublic nature of the meetings and the importance of protecting the confidentiality of Commission discussions.
2. Use portable electronic badge readers to track attendees at Commission meetings.
3. Advise staff that the FTC tracks who has accessed formal staff recommendations available on the FTC's intranet, in order to disincentivize staff to access such information for purposes of improper disclosure.
4. Have the General Counsel meet with Commissioners periodically to remind them of their responsibility not to (a) improperly disclose statutorily-protected or

¹⁴ Referring to meetings where all current Commissioners are present.

privileged information and (b) create an impression that they have prejudged a pending matter.

5. Implement a policy whereby Commissioners and their staff will inform the Office of Public Affairs (OPA) when they have press contacts about a matter after the staff recommends that the Commission either issue a complaint or resolve the matter.

The Commission implemented and continues to adhere to steps 1 and 2. Regarding virtual Commission meetings, the Commission limits who receives an invitation to attend and confirms the identity of every participant in the virtual meeting. With respect to step 3: while the FTC has, from time to time, advised staff that the FTC tracks who has accessed formal staff recommendation on the FTC intranet, the FTC does not systematically and periodically provide this advisement to staff. Regarding step 4, the FTC Office of General Counsel (OGC) informally reminds Commissioners about the prohibitions on NPI disclosure but does not schedule periodic meetings to train them on this topic. With respect to step 5, the FTC has not adopted a policy regarding Commissioners notifying OPA about press contacts after the staff recommends the issuance of a complaint or resolution of a matter.

III.OIG Findings

A. FTC Employees Have Multiple Methods Available for Accessing NPI, Increasing the Agency's Vulnerability to Unauthorized Disclosures

The FTC maintains a culture and practice of sharing NPI widely across the agency, which increases the risk of unauthorized disclosure. Regular intra-agency email correspondence and case files stored on shared network drives contribute to these issues.

Weekly bureau report emails. One particular area of concern is each bureau's weekly report emails, issued with status updates on their activities and cases. These emails, sent to as many as 100 people in the agency, often include NPI and describe the bureau's case strategy.

For example, the Bureau of Competition (BC) sent to 111 FTC staff members its March 12, 2021, weekly report email—which did not include the warning against disclosure typically associated with sensitive messages. The email included an attachment containing pre-decisional information and a discussion of planned civil investigative demands (CIDs) and investigation strategy. Many of the individuals receiving this message either no longer work at the FTC or work in other program areas. When we asked BC about these weekly emails, the bureau had no explanation for why so many individuals needed to receive them. BC has informed us that, following the March 12, 2021, email, it reviewed the weekly report recipient list and began limiting it to those individuals that need the information.

Likewise, then-OPP Director Bilal Sayyed emailed his January 22, 2021, weekly report to more than 60 FTC employees. As mentioned previously, information contained in the email signaled Sayyed's intent to issue a status report about an OPP study of tech giants (i.e., Alphabet, Amazon, Apple, Facebook, Microsoft) by January 29, 2021, as well as an update on OPP's artificial intelligence work. This incident highlights the lack of institutional selectivity regarding who in the FTC receives sensitive information.

Case files stored on shared drives. Another area of concern is the informal storage of case files on FTC shared network drives, a systemic issue with implications broader than access to NPI. For example, BC maintains on its shared drive a Merger Screening Committee (MSC) folder, where BC staff assigned to a case place relevant documents for the MSC to review prior to meeting to recommend opening investigations. Instead of emailing the documents to the MSC—which is comprised of a rotating group of individuals from various bureaus and the Chair's attorney advisors—BC sends MSC members a link to the folder. Although the individuals who sit on the MSC for a specific case no longer need the documents after the MSC meeting, BC does not delete the documents from the folder. In fact, the folder contains an archive of documents dating back to 2009. In addition, BC does not restrict MSC members' access to the folder after the meeting, even though the individuals may not be on the MSC for the next meeting. Similarly, all BC staff have access to this folder because BC attorneys assigned to a case need to be able to place relevant documents in the folder.

The broad access to this folder afforded to BC staff and former and current MSC members—combined with the large library of documents in the folder—indicates that many employees have unnecessary access to NPI, which increases the risk of unauthorized disclosure. Most of these documents end up being submitted to the FTC's Matter Record Search (MaRs) system¹⁵ (which has the ability to track document access) once an investigation is opened. However, even when documents have been submitted to MaRs, their storage in the MSC folder allows employees to access these documents undetected. Beyond the issue of unnecessarily broad access to NPI, this process would be improved with updated controls over access, tracking, and supervision.

With respect to the Bureau of Consumer Protection (BCP), we learned that BCP affords its employees access to nearly all case files, which it maintains in the Bureau's shared drive. A BCP official explained that BCP affords its employees such broad access because many legal issues in BCP cases cut across the Bureau and the related documents often prove useful in future cases.

We highlight two notable exceptions to this practice. First, BCP restricts access to case files containing personally identifiable information (PII) to those individuals working on the case. Additionally, BCP case team members occasionally take the

¹⁵ The MaRs system allows FTC employees to search and retrieve copies of documents approved or authorized by the Commission, as well as staff recommendations, motions, meeting transcripts, and minutes.

affirmative step of limiting access to case file access when there is specific concern about the release of NPI. For example, BCP limited access to the 2018 Facebook investigation case files to case team members due to concerns about additional releases of NPI.

Based on our analysis and discussions with agency officials, we concluded that the FTC would benefit from more effective document management systems, which could (1) reduce the risk of the disclosure of NPI and (2) assist case file organization and search functions. For example, it was noted that BCP often has version control issues because multiple people can edit a document at the same time.

We also note that the FTC bureaus lack comprehensive policies and procedures related to securing and sending information. With respect to the weekly emails, FTC bureaus have not provided formal guidance on how recipient lists are maintained or whether NPI is appropriate for such messages. The agency has not issued guidance on how email encryption could be used to restrict weekly report emails from being copied or forwarded. Also, the FTC has not established procedures related to file maintenance, such as how and where files should be maintained (e.g., more easily trackable web-based as opposed to network storage), whether files may be stored in more than one location, and what permissions should accompany those files.

In our conversations, FTC leadership has explained how the practice of sharing information widely and allowing employees of each bureau high levels of access to that bureau's NPI stems from an agency culture that aims to include all employees in the broader team and agency mission. While the desire to create an inclusive mission-based culture is commendable, the risk of unauthorized disclosures increases as the information is shared more widely.

We recognize that the FTC is aware of and shares these concerns—and has made progress in reducing the risk of leaks, such as reminding employees not to disclose NPI, including information on disclosure of NPI in its ethics training, and reviewing the recipient lists for some of the weekly report emails. Informal guidance that BC provided to us, for example, addresses the handling of its matters and represents an excellent resource for its staff to consult when addressing these issues. Nevertheless, the implementation of more widely-applicable policies and practices related to sharing and maintaining NPI would assist the FTC in reducing unauthorized disclosures while preserving its inclusive mission-based culture.

B. The FTC Lacks a Comprehensive Communication, Training, and Review Strategy Covering the Prohibition of Disclosing NPI

The FTC has provided ad hoc reminders and trainings in reaction to discrete instances, or potential instances, of unauthorized disclosure of NPI. However, the FTC does not institute regularly scheduled training or communications to staff defining NPI, explaining the restrictions on its release, and reviewing the safeguards that it has put in place. For example, in response to the OIG's 2013 investigation,

Chairwoman Ramirez committed to advising staff that the “FTC tracks who has accessed formal staff recommendations available on the FTC’s intranet in order to disincentivize staff to access such information for purposes of improper disclosure.” Nevertheless, the FTC has not implemented a systematic way to ensure that all staff receive this advisement.

We recognize that the agency has issued some communications and conducted some training related to NPI disclosure. For example, following the March 16, 2021, Politico article, the Acting General Counsel sent a March 18 memorandum to all employees—reminding them of the “shared responsibility to protect the confidentiality of our non-public investigations and deliberative process” and instructing them not to “share information on these matters with anyone outside the agency, including former FTC employees.” In March 2019, as Facebook-related leaks persisted, OGC also provided confidentiality refresher training to some senior staff, as well as all Commissioners and their staff, on their obligations to maintain and preserve NPI. Additionally, in the process of reviewing Commissioners’ proposed public statements, OGC informally reminds Commissioners that they are prohibited from disclosing NPI unless the full Commission agrees to disclosure.

These isolated messages demonstrate the need for a more comprehensive communications and training strategy covering the prohibition of disclosing NPI. Developing such a strategy covering the sharing and maintenance of NPI could help the FTC minimize the risk of NPI disclosure and create consistency of practices across all bureaus.

Recommendations

We recommend that the FTC Chair work with appropriate leadership to

1. develop policies and practices within the bureaus related to limiting the sharing and maintenance of NPI;
2. incorporate the use of encrypted messaging and password protection for the delivery of documents and communications that it considers most sensitive; and
3. develop a more comprehensive strategy for communications and training related to prohibitions of NPI disclosures.

In its response (attached) to a draft of this Management Advisory, the FTC Chair concurred with the three OIG recommendations.

Please submit to us an action plan that addresses the recommendations in this report within 60 calendar days. This advisory will be posted on our public website pursuant to section 8M of the Inspector General Act of 1978, as amended (5 U.S.C App., § 8M).

We greatly appreciate the courtesies extended to the OIG by the FTC throughout the development of this product. If you have any questions concerning this advisory, please feel free to contact me at (202) 326-3527.

Attachment



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

September 27, 2021

MEMORANDUM

FROM: Lina M. Khan
Chair *Lina Khan*

TO: Andrew Katsaros
Inspector General

SUBJECT: Management's Response to Draft Management Advisory on Controlling and Protecting Sensitive FTC Information

The Federal Trade Commission (FTC) appreciates the Office of the Inspector General's (OIG) work to identify potential risks to the FTC.

The draft Management Advisory describes potential control risks identified during a review of processes for controlling and protecting nonpublic FTC information and records (NPI). The draft Advisory provides the following recommendations:

1. Develop policies and practices within the bureaus related to limiting the sharing and maintenance of NPI.
2. Incorporate the use of encrypted messaging and password protection for the delivery of documents and communications that it considers most sensitive.
3. Develop a more comprehensive strategy for communications and training related to prohibitions of NPI disclosures.

The FTC agrees with these recommendations and is committed to ensuring appropriate management controls are in place and operating as intended. FTC management will work to implement Corrective Action Plans (CAPs) that address OIG's recommendations. The CAPs will be developed within 60 days of the issuance of the Final OIG Audit Report regarding this matter.

FTC management would like to thank the Inspector General for the professionalism of the OIG staff during this audit.