

Congress of the United States

Washington, DC 20515

August 17, 2023

The Honorable Lina Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Dear Chairwoman Khan:

As the Ranking Member of the Senate Committee on Commerce, Science, and Transportation, Chairman of the House Committee on the Judiciary, and Chairman of the House Committee on Oversight and Accountability, we write regarding the Federal Trade Commission's ("FTC") failure to preserve agency records. By deleting documents, the FTC likely violated federal law. It also impeded Congressional oversight of the FTC's recent, unprecedented actions, including its proposed rule banning non-compete clauses.¹ Congress and the public deserve an explanation of why the FTC improperly destroyed records, what records it improperly destroyed, and what steps will be taken to ensure it never happens again.

Federal law imposes important recordkeeping requirements on the FTC. The Federal Records Act ("FRA") requires the head of every federal agency to "make and preserve records" concerning the agency's "functions, policies, decisions, procedures, and essential transactions."² It further requires agency heads to "establish and maintain" a "records scheduling" process, pursuant to which the agency must identify the records it has, determine how long each type of record is valuable, and, when there is no longer a need for them at the agency, request authority to either legally destroy the records or transfer them to the National Archives.³ The FRA explains that such recordkeeping is necessary to "furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities."⁴

It turns out the FTC has struggled to comply with the law. In a February 2022 memorandum, the FTC Office of Inspector General ("OIG") "alert[ed] FTC leadership" to two key issues with the FTC's records management processes: the agency (1) was not adhering to the National Archives and Records Administration ("NARA") records scheduling requirements and (2) had not set up "automated practices for properly storing and timely disposing of records in a

¹ Non-Complete Clause Rule (NPRM), 16 Fed. Reg. 910 (Jan. 9, 2023).

² 44 U.S.C. § 3101.

³ *Id.* § 3102.

⁴ *Id.* § 3101.

uniform manner across the agency.”⁵ The OIG found it “[p]articularly noteworthy” that “the Bureau of Competition and the Bureau of Consumer Protection do not use a comprehensive case management system for their case files” and that FTC management had “no plans” to store files on the FTC’s cloud platform, rather than various shared drive folders.⁶ In response to the OIG’s findings, you stated that you were “committed to ensuring appropriate management controls are in place and operating as intended.”⁷

Despite these warnings and your assurances, the FTC in all likelihood improperly deleted records. In February of this year, for example, Chairman Jordan requested documents and information regarding the FTC’s proposed rule to ban non-compete clauses—a rule that, as Chairman Jordan’s letter explained, “exceeds [the Commission’s] delegated authority and imposes a top-down, one-size-fits-all approach that violates basic American principles of federalism and free markets.”⁸ Three months later, the FTC informed House Judiciary Committee staff that it had “deleted material likely responsive to the Committee’s requests,” including records of the employee on detail from the Consumer Financial Protection Bureau who led the FTC’s rulemaking.⁹

To date, the FTC has not adequately addressed concerns about its record retention policy. The agency has not explained how documents were deleted related to a rulemaking that the FTC should have known would face litigation, FOIA requests, and Congressional oversight. In addition, the FTC has not explained how federal records from senior advisors at the FTC could be deleted, regardless of whether there were litigation or other holds placed on the documents.

The FTC’s deletion of documents responsive to a Congressional inquiry underscores the OIG’s conclusion in 2022 that “the FTC has not prioritized records management nor embedded it as a value in the agency’s culture.”¹⁰ Moreover, it suggests that the agency is not committed to complying with the law, and that it may continue to delete records that are relevant to ongoing investigations. This is not how a federal agency should be run.

⁵ Andrew Katsaros, *Management Advisory on FTC Records Management*, FTC (Feb. 28, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC%20OIG%20management%20advisory_records%20mgmt%2022-02-28.pdf.

⁶ *Id.*

⁷ Lina Khan, *Management’s Response to Draft Management Advisory on FTC Records Management*, FTC (Feb. 23, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC%20OIG%20management%20advisory_records%20mgmt%2022-02-28.pdf.

⁸ Ltr. from Chairman Jordan to Chair Khan et al. (Feb. 14, 2023), <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023-02-14-jdj-dei-tm-sf-to-ftc.pdf>.

⁹ Brianna Herlihy, *FTC Deleted Documents on Controversial Rule with ‘Severe Consequences’ to Economy: Rep Jim Jordan*, FOX NEWS (Jun. 5, 2023), <https://www.foxnews.com/politics/ftc-deleted-documents-controversial-rule-severe-consequences-economy-rep-jim-jordan>.

¹⁰ Lina Khan, *Management’s Response to Draft Mismanagement Advisory on FTC Records Management*, FTC (Feb. 23, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC%20OIG%20management%20advisory_records%20mgmt%2022-02-28.pdf

We seek information from the FTC regarding these issues as well as the Commission's efforts to address them and comply with federal law. Please provide written answers and relevant documents in response to the following questions no later than August 31, 2023:

1. What records has the FTC deleted relating to the Congressional inquiries listed below? In providing a response, for each inquiry, please indicate: (i) the employee(s) whose records were deleted, including each employee's name, title and dates of employment; (ii) the format of the deleted records (email, Microsoft Word files, etc.); (iii) the number of deleted records; (iv) the date range of the deleted records; (v) why these records were deleted; (vi) who deleted these records; and (vii) efforts the FTC has taken, if any, to recover those records.
 - a. April 27, 2022 letter from then Ranking Member Comer regarding Illumina's acquisition of GRAIL;
 - b. October 19, 2022 letter from then Ranking Member Comer regarding unpaid consultants and experts;
 - c. February 14, 2023 letter from Chairman Jordan regarding the non-compete clause rule;
 - d. March 1, 2023 letter from House Energy and Commerce Committee Chair Cathy McMorris Rodgers and Subcommittee Chairman Gus Bilirakis regarding Commissioner Wilson's resignation;
 - e. April 5, 2023 letter from Chairman Jordan regarding merger review;
 - f. April 12, 2023 subpoena from Chairman Jordan regarding the FTC's investigation of Twitter (and related letters from Chairman Jordan and Ranking Member Cruz);
 - g. June 1, 2023 letter from Chairman Comer regarding Commissioner Wilson's resignation and the Commission's abuse of power and disregard for the rule of law, due process, and federal ethics laws;
 - h. June 8, 2023 letter from Chairman Jordan regarding Illumina's acquisition of GRAIL;
 - i. June 19, 2023 letter from Ranking Member Cruz regarding FTC staff morale;
 - j. June 28, 2023 letter from Chairman Jordan and Chair McMorris Rodgers regarding recusal;
 - k. July 12, 2023 letter from Chairman Jordan and Chair Rodgers regarding mismanagement;

1. July 28, 2023 letter from Chairman Jordan regarding improper ex parte communications; and
 - m. July 28, 2023 letter from Chairman Jordan regarding obstruction of oversight.
2. What federal records has the agency deleted since February 28, 2022? In responding, please indicate (i) the employee(s) whose records were deleted, including each employee's name, title and dates of employment, (ii) the format of the deleted records (email, Microsoft Word document, etc.), (iii) the number of deleted records, (iv) the date range of the deleted records, (v) why these records were deleted, (vi) who deleted these records, (vii) when the FTC became aware that these records had been deleted, and (viii) whether the deletion of these records was conducted in accordance with the FRA and NARA's general records schedule.
3. List each proposal created by the Office of the Secretary to bring the FTC into compliance with NARA requirements and/or to create a uniform record keeping system across the FTC. For each proposal, provide (i) the date the proposal was created, (ii) the date the proposal was sent to the Office of the Chair, (iii) the date the proposal was adopted, adopted with modifications, or rejected by the Commission; (iv) if modified or rejected, the reasons why the proposal was modified or rejected, (v) the action by which the proposal was adopted, adopted with modifications, or rejected, including a copy of the document memorializing the action, and (vi) a copy of the proposal.
4. As the head of the FTC, federal law requires that you notify NARA of any "actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in custody of the agency."¹¹ Have you notified NARA of the deletion of records identified in response to Questions 1 and 2?
5. What steps, if any, has the FTC taken to recover the deleted records identified in response to Questions 1 and 2?
6. What steps, if any, has the FTC taken to prevent the improper deletion of agency records since it learned that it had deleted records responsive to Chairman Jordan's February 14, 2023 letter?
7. In its 2022 memorandum, the OIG made several observations of the agency's shortcomings regarding records management and made several recommendations for improvements to the FTC's document management practices, which you agreed to implement.¹²

¹¹ 44 U.S.C. § 3602.

¹² Andrew Katsaros, *supra* note 5.

- a. What procedures are currently in place at the FTC to prevent the destruction of records that should be preserved?
 - b. When did the FTC put the procedures described in response to Question 6(a) in place?
 - c. Does the FTC have a comprehensive file management system in place?
 - d. Has the FTC moved all of its records to cloud storage?
 - e. Who oversees the maintenance records of the FTC's Bureau of Competition and Office of Policy Planning?
 - f. Has the FTC dedicated any additional staff and/or technology resources for managing records since the OIG memorandum was released? If so, how many staff has it added? What kind of technology has it added?
8. According to the 2022 OIG memorandum, the FTC was required to submit an action plan to the OIG that addressed the recommendations contained in the report within 60 days. Please produce a copy of this action plan.
9. Please produce the records schedule currently in place at the FTC.

Sincerely,



Ted Cruz
Ranking Member
Committee on Commerce,
Science, and Transportation



Jim Jordan
Chairman
Committee on the Judiciary



James Comer
Chairman
Committee on Oversight and
Accountability