



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

Office of Inspector General

September 30, 2015

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515-6143

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
2471 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515-6143

Dear Chairman Chaffetz and Ranking Member Cummings:

On June 17, 2014, the Chairman of the Committee on Oversight and Government Reform (Committee) sent a letter requesting that the Federal Trade Commission (FTC) Office of Inspector General (OIG) examine alleged collaboration between the FTC and Tiversa, Inc. (Tiversa) in Tiversa's dissemination of false data about data security breaches. The letter said the Committee was investigating the activities of Tiversa, a company that provided information to the FTC in an enforcement action against LabMD, Inc. (LabMD), a medical testing laboratory. The Chairman stated he was particularly concerned about allegations that the FTC had used false data from Tiversa in the FTC's case against LabMD. The Chairman specifically asked the OIG to investigate:

1. FTC procedures for receiving information that it uses to bring enforcement actions, and whether FTC employees have improperly influenced how the agency receives information;
2. The role of FTC employees, including, but not limited to, the two employees referenced in the June 17 letter, in the FTC's receipt of information from Tiversa through the Privacy Institute, and whether the Privacy Institute or Tiversa received any benefit for this arrangement; and

- any benefit for this arrangement; and
3. The reasons for the FTC's issuance of a civil investigative demand (CID) to the Privacy Institute instead of Tiversa directly.

A. Background

In 2009, the FTC issued a CID to the Privacy Institute to produce copies of documents containing personally identifiable and sensitive information about consumers that was publicly available on peer-to-peer (P2P) file sharing networks. According to Robert Boback, Chief Executive Officer (CEO) of Tiversa, Tiversa created the Privacy Institute for the purpose of receiving the CID on behalf of Tiversa so the CID would not negatively affect negotiations with a public company regarding the potential acquisition of Tiversa.¹ However, during the Committee's investigation, Mr. Boback's financial advisor said he understood the Privacy Institute's purpose was to accept bids from companies that were interested in potentially purchasing Tiversa. Regardless of the purpose for the creation of the Privacy Institute, the FTC, at the request of Tiversa, agreed to issue the CID to the Privacy Institute for the information Tiversa had provided to the Institute.

In response to the CID, the FTC obtained from Tiversa, through the Privacy Institute, a 1,718-page LabMD spreadsheet containing personally identifiable information, medical information, and billing information on thousands of people (1718 File) that was made publicly available on a P2P network. Tiversa represented to the FTC that it downloaded this file in February 2008 from an IP address in Atlanta, Georgia, demonstrating that LabMD had not adequately protected the information.²

In November 2013, Tiversa provided the FTC another document containing four additional IP addresses on which it found the 1718 File. Tiversa produced this document in response to a subpoena the FTC issued in its administrative proceeding against LabMD. According to Mr. Boback, the Tiversa employee who generated this document, Richard Wallace, was subsequently terminated for performance reasons. Following his termination, Mr. Wallace informed Committee staff that he had fabricated the document on behalf of Tiversa. In Mr. Boback's June 7, 2014, testimony during a deposition taken as part of the FTC's administrative proceeding, LabMD attorney William Sherman asked questions about a purported visit by an FTC attorney to Tiversa Headquarters prior to an earlier November 2013 deposition. Mr. Sherman's questions suggested that the FTC attorney may have suggested that Tiversa find the 1718 File somewhere other than the LabMD work station in Atlanta, Georgia, and that Tiversa subsequently provided the document containing four additional IP addresses.³

¹ Robert J. Boback's Deposition Testimony, *In the Matter of LabMD*, FTC Docket 9357, June 7, 2014.

² On January 2, 2015, the Committee staff issued a Staff Report prepared for the Chairman, *Tiversa, Inc.: White Knight or Hi-Tech Protection Racket?* (Staff Report), that included a September 5, 2013, e-mail from Mr. Boback to other Tiversa employees stating, "The IP of the download was found to be in Georgia, which after a Google search, is where we found LabMD's office to be located."

³ *Id.* at 67-72.

According to Mr. Boback, after Tiversa provided the document containing four additional IP addresses, Tiversa identified and informed the FTC of three more IP addresses on which the 1718 File was found, for a total of seven IP addresses.⁴ In addition, in an October 14, 2014, *Notice of Information Pertinent to Richard Edward Wallace's Request for Immunity*, Tiversa provided two e-mails dated in November 2012 in which Mr. Wallace identified the four IP addresses, among others, contained in Tiversa's November 2013 submission to the FTC. The Staff Report concluded that Tiversa demonstrated a lack of good faith in failing to provide these November 2012 e-mails to the FTC or the Committee sooner.

In 2013, the FTC brought an enforcement action against LabMD under Section 5 of the FTC Act alleging that LabMD engaged in unfair acts or practices for failing to provide reasonable and appropriate security for consumers' personal information. In its June 17, 2014, letter and in subsequent discussions with the OIG, Committee staff alleged that the FTC may have had an inappropriate arrangement with Tiversa and Mr. Boback, and that the FTC did not exercise due diligence in examining the credibility of the evidence obtained from Tiversa, particularly evidence against LabMD.

B. OIG Communications with Committee

In response to the June 17, 2014, request from the Chairman for an OIG investigation, the Acting Inspector General and an OIG investigator met with majority staff and minority staff, respectively, on June 18 and June 25, 2014. Committee staff informed the OIG that they intended to conclude investigative activity and refer the allegations to the OIG for further investigation. The Committee staff's representation that they would cease investigative activity factored strongly in the OIG's decision to initiate investigative activity. Committee staff also said they would provide the OIG documents related to their inquiry to that point, including (b) (7)(E)

(b) (7)(E)

(b) (7)(E)

(b) (7)(E)

The OIG repeated its request for records from the Committee staff on July 24, 2014, and January 14, 2015; however, the OIG has not received these or other investigative records from the Committee.

C. OIG Investigation

Beginning in June 2014 and concluding shortly after I joined the FTC OIG in late March 2015, the OIG examined the allegations made in the Chairman's June 17, 2014, letter regarding the FTC's relationship with Tiversa and the Privacy Institute.⁵ To examine these allegations, the OIG obtained from the FTC (b) (7)(E)

(b) (7)(E)

⁴ *Id.* at 78.

⁵ The OIG did not examine whether the FTC had authority to take action against LabMD under Section 5 of the FTC Act, which provides that "unfair or deceptive acts or practices in or affecting commerce...are...declared unlawful." (15 U.S.C. § 45(a)(1)).

(b) (7)(E)



The OIG also reviewed (b) (7)(E)



The OIG also reviewed (b) (7)(E) FTC orders involving consumer protection issues entered from January 1, 2007 to present, with particular emphasis on approximately 50 consent orders that relate to information security, such as the unauthorized disclosure of customer information. We compared the proposed consent order proffered to LabMD to these other orders and found that the proffered LabMD consent order was substantially similar to the others. The only significant difference between the proffered LabMD consent order and other information security orders related to the notice requirement: the LabMD proffered order required the company to notify all affected consumers about the data breach and to provide notice to each affected individual's health insurance company. While some other consent decrees included a similar requirement to notify affected consumers, most did not. Those that did all involved notice where the affected consumers were readily identifiable.

In documents related to the FTC's case against LabMD, LabMD attorney William Sherman asked about a purported visit to the Tiversa headquarters prior to November 21, 2013, by an FTC attorney, who allegedly suggested that Tiversa find evidence that the 1718 File was located on other IP addresses than the workstation at LabMD in Atlanta, Georgia. However, travel records for every FTC attorney involved in this case show no travel in 2012 or 2013 to or near Pittsburgh, PA, which is where Tiversa's world headquarters is located.

(b) (7)(E)



In addition, the OIG found no evidence in (b) (7)(E) that any FTC attorney directed or suggested that Tiversa find evidence that the 1718 File was found on other IP addresses. The OIG also found no evidence that any FTC employee, including the two employees referenced in the June 17 letter, improperly influenced how the agency receives information, nor that Tiversa or the Privacy Institute received any benefit from the FTC for responding to the FTC's CID or otherwise providing information to the FTC. Moreover, the OIG found that one of the referenced employees, an FTC attorney in the Bureau of Consumer Protection, began assisting with the LabMD case after Tiversa was no longer involved, and that this attorney played no role in receiving information from Tiversa through the Privacy Institute or otherwise.

The Staff Report alleges FTC wrongdoing with respect to the relationship between the FTC and Tiversa, the Privacy Institute, and Mr. Boback. The Staff Report suggests that information obtained exclusively by the Committee indicates that the FTC was misled as to how Tiversa came to possess LabMD's file, and that Tiversa lacked good faith and credibility when it failed to produce relevant documents in response to subpoenas issued by the Committee and the FTC. The Staff Report also challenges the FTC for failing to scrutinize the credibility of the information received from Tiversa through the Privacy Institute. The Committee has not provided the OIG with the evidence it developed during its investigation regarding these and other findings. Based on our investigative activities, the OIG found that the FTC handled evidence received from Tiversa in the same manner it had handled other evidence about data security breaches – the FTC required that Tiversa, through the Privacy Institute, certify the information provided in response to the CID under penalty of perjury. Moreover, evidence shows the FTC staff, and then the Commission, had sufficient grounds for concern that LabMD was failing to provide reasonable security for sensitive information when the staff sent its voluntary access request to LabMD, seeking information that would help to determine if LabMD had violated laws.

We note that LabMD litigated cases against the FTC in the U.S. District Court for the Northern District of Georgia and the U.S. Court of Appeals for the Eleventh Circuit. Both courts denied LabMD's motion for preliminary relief for lack of jurisdiction.

The FTC's administrative proceeding against LabMD is still pending before the FTC's Administrative Law Judge. In addition, Tiversa and LabMD are suing each other civilly in the Court of Common Pleas of Allegheny County, Pennsylvania. Before these courts, LabMD has raised allegations about the FTC's failure to independently verify the information received from Tiversa; the veracity of evidence, including the 1718 File, Tiversa e-mails, and other documents; the IP address on which the LabMD document was originally found; the credibility of witnesses, including Mr. Boback and Mr. Wallace; and the actions of Tiversa in allegedly misleading the FTC. Tiversa has raised allegations of defamation and other tortious conduct.

D. Conclusion

Our investigative activities to date did not substantiate allegations that any FTC employee improperly influenced how the agency receives information, suggested or collaborated with

Tiversa in producing additional evidence that the 1718 File was found on other IP addresses, or abused its authority or misused its discretion in assessing the credibility of information provided by Tiversa.

LabMD's allegations about the FTC's investigation are currently being adjudicated before the FTC's Administrative Law Judge, who is charged with making appropriate findings based on the record made in that proceeding. LabMD has also raised these issues in its private litigation with Tiversa in the Court of Common Pleas of Allegheny County, Pennsylvania. That court will, of course, have ample opportunity to address all the issues that are properly presented in that proceeding. Accordingly, the OIG is concluding its investigative activity of this matter at this time. The OIG reserves the right to further investigate these allegations in the future.

If you have any questions regarding our inquiry or conclusions, please contact Odies H. Williams IV, Counsel to the Inspector General, at 202-326-3527.

Sincerely,

A handwritten signature in black ink, appearing to read "Roslyn A. Mazer", with a long horizontal flourish extending to the right.

Roslyn A. Mazer
Inspector General