

U.S. ANTITRUST AGENCIES REMIND PARTIES OF DUTY TO PRESERVE RECORDS ASSOCIATED WITH COLLABORATION TOOLS AND EPHEMERAL MESSAGING PLATFORMS

On January 26, 2024, the Antitrust Division of the U.S. Department of Justice (the “DOJ”) and the U.S. Federal Trade Commission (the “FTC”) (collectively, the “Agencies”) announced that they were updating their standard language regarding parties’ records preservation obligations to include the coverage of “collaboration tools and ephemeral messaging platforms” like Slack, Microsoft Teams, and Signal.¹ According to the Agencies’ press release, this updated language will appear in their standard preservation letters and specifications for all second requests, voluntary access letters, and compulsory legal processes, including grand jury subpoenas.

The Agencies maintain that collaboration tools and ephemeral messaging platforms have always been included within parties’ obligations to preserve records, but “[t]hese updates ... will ensure that neither opposing counsel nor their clients can feign ignorance when their clients or companies choose to conduct business through ephemeral messages,” said Manish Kumar, the Deputy Assistant Attorney General at the DOJ.² He further warned: “Failure to produce such documents may result in obstruction of justice charges.” The Agencies also noted that the FTC had previously “successfully moved for civil spoliation sanctions and may refer cases to criminal prosecutors ... in appropriate circumstances.”³

The announcement follows a series of matters in recent years where the Agencies have accused companies or individuals under investigation or in litigation of

¹ Press Release, Federal Trade Commission, FTC and DOJ Update Guidance That Reinforces Parties’ Preservation Obligations for Collaboration Tools and Ephemeral Messaging (Jan. 26, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-doj-update-guidance-reinforces-parties-preservation-obligations-collaboration-tools-ephemeral>.

² *Id.*

³ *Id.*

intentionally subverting evidentiary disclosure requirements or destroying evidence through the increased usage of these ephemeral messaging platforms.

THE NOLAND CASE

Cited in the Agencies' announcement is a case where four individuals under investigation by the FTC for allegedly operating a pyramid scheme used Signal and Proton Mail (two privacy-focused communication platforms with client-side encryption) to destroy evidence.⁴

Signal is a messaging app that makes recovery of a message impossible when the sender and recipient both delete the message, or the recovery of all messages impossible when the application is deleted. Signal also has a feature that can automatically delete messages after a set period of time.⁵

Proton Mail is an email client that makes recovery of an email impossible when the sender and recipient both delete it.

Upon learning that they were under investigation, the defendants switched their communication methods from WhatsApp and iOS messaging to Signal and Proton Mail. Although a federal court ordered the defendants to turn over their mobile devices for imaging, they deleted the Signal App from their mobile devices and their emails on Proton Mail before complying, thereby rendering them unrecoverable despite efforts from forensic specialists.⁶ The district court granted the FTC's motion for spoliation sanctions under Rule 37(e)(2) of the Federal Rules of Civil Procedure, leading to an adverse inference instruction against the defendants.⁷

THE GOOGLE CASES

The Agencies and private plaintiffs have also accused some of the Big Tech firms of similar conduct in investigations and litigation. For example, in February 2023, the DOJ filed for sanctions against Google for "engag[ing] in spoliation in violation of Rule 37(e)" in its monopolization case.⁸ Specifically, the DOJ's accusations against Google included:

- Google's in-house messaging platform, Google Chat, has a "history off" or "off the record" setting that when turned on, will destroy any messages sent after 24 hours. Google's custodians and likely trial witnesses in the case held substantive and sensitive business discussions using this chat feature, including discussions relevant to the litigation.⁹
- Google intentionally "steered" its employees "away from email and toward chats" if discussions included sensitive topics, "sometimes explicitly requesting that the history remain off."¹⁰

⁴ Order at 2, *FTC v. James D. Noland, Jr., et al.*, No. CV-20-00047-PHX-DWL (D. Ariz., Aug. 30, 2021), ECF. No. 401.

⁵ *Id.* at 3.

⁶ *Id.* at 2.

⁷ *Id.* at 11-27.

⁸ Memorandum in Support of the United States' Motion for Sanctions Against Google, LLC and an Evidentiary Hearing to Determine the Appropriate Relief at 3, *United States v. Google LLC*, No. 1:20-cv-03010-APM (D.D.C. Feb. 23, 2023), ECF No. 512-1.

⁹ *Id.* at 5-6

¹⁰ *Id.* at 6.

- Google failed to disclose that some messages were being deleted after just 24 hours despite answering elsewhere that it had put a legal hold in place, which “suspends auto-deletion” and “also instructs custodians to preserve relevant documents.”¹¹
- Google did not disclose to the DOJ that it deleted “history chats” after 24 hours until more than two years after the DOJ filed its initial complaint.

In response, Google asserted that:

- The DOJ’s motion is untimely since the “history off” feature is a public feature of Google Chats and attorneys from the Texas Attorney General’s office, who are co-plaintiffs with the DOJ, “confirmed their clear understanding of how [Google Chat] preservation worked in *February 2020*.”¹²
- Google also took “reasonable steps” to explicitly instruct employees on legal holds “to not use messaging apps going forward, including Google Chat, to discuss topics covered by the legal hold,” and, “if they did still use such apps, to ensure that the messages were preserved, such as by turning history ‘on.’”¹³

Judge Mehta ruled that, “on the present record,” he could neither find that Google “acted ‘with the intent to deprive’ [the DOJ] of the ‘use’ of certain chats ‘in the litigation’” nor “determine whether Google ‘failed to take reasonable steps to preserve’ such information.”¹⁴

Identical allegations were brought against Google, with very different results, in the *Epic Games v. Google* case overseen by Judge James Donato in the Northern District of California. After Epic Games asserted similar facts to the DOJ’s sanctions motion, Judge Donato held hearings on Epic Games’ sanctions motion requiring that Alphabet Inc.’s Chief Legal Officer, Kent Walker, personally attend the hearing. Walker told the court that he did not audit whether Google employees complied with chat retention policies, and Google CEO Sundar Pichai admitted that he had marked documents as privileged “just so the emails weren’t forwarded.” In response, Judge Donato said that Google’s conduct was “the most serious and disturbing evidence I have ever seen in my decade on the bench with respect to a party intentionally suppressing relevant evidence ... This conduct is a frontal assault on the fair administration of justice. It undercuts due process. It calls into question just resolution of legal disputes. It is antithetical to our system.”¹⁵ However, Judge Donato held off from issuing to the jury a mandatory instruction that they infer that Google destroyed evidence hurtful to their case, issuing a permissive inference instruction instead, explaining that he would not “constrain” the jury’s discretion by making the inference for them “even though it would be well within bounds to issue” one. But he also made clear that this was not the end of the consequences for Google: “I can pursue these issues on my

¹¹ *Id.* at 8-9.

¹² Memorandum in Opposition to Plaintiffs’ Motions for Sanctions at 20, *United States v. Google LLC*, No. 1:20-cv-03010-APM (D.D.C. Mar. 17, 2023), ECF No. 566.

¹³ *Id.* at 26.

¹⁴ Order at 2, *United States v. Google LLC*, No. 1:20-cv-03010-APM (D.D.C. Apr. 27, 2023), ECF No. 586.

¹⁵ Sean Hollister, *Federal judge vows to investigate Google for intentionally destroying chats*, THE VERGE, Dec. 1, 2023, <https://www.theverge.com/2023/12/1/23984902/judge-james-donato-investigate-google>.

own, outside of the trial, in subsequent trials,” he said. “I am going to get to the bottom of who is responsible ... That is going to be separate and apart from anything that happens here, but that day is coming.”¹⁶

KEY TAKEAWAYS

When implementing a legal hold, clients should review their data-retention policies to ensure compliance with these obligations to preserve records resulting from “collaboration tools and ephemeral messaging” platforms, including ensuring that any “auto-deletion” functions are turned off.

While Slack, Microsoft Teams, and Signal were highlighted by the Agencies’ announcement, care should be taken to consider other forms of communications with auto-deleting features, including WhatsApp, Snapchat, and Instagram. Preservation obligations may also extend to voicemails, whether in audio or video form, and any automatic transcriptions. Companies should also not direct employees to use these applications or platforms for the purpose of avoiding preservation obligations.

¹⁶ *Id.*

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