September 13, 2022

The Honorable Lina M. Khan, Chair
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Chair Khan,

I’m writing to voice deep concerns over recent reporting that Fog Data Science LLC ("Fog") offers law enforcement the ability to conduct mass surveillance by providing data obtained through surveillance advertising, allowing them to track cell phone locations without a warrant. Such mass surveillance not only presents a severe invasion of privacy, but also raises significant Fourth Amendment search and seizure concerns. I urge the FTC to immediately investigate Fog and work to ensure that surveillance advertising becomes a prohibited business practice.

Fog Reveal is a cell phone tracking tool developed by Fog and ostensibly used by law enforcement to help solve crime. Documents obtained through a Freedom of Information Act request by the Electronic Frontier Foundation (EFF) found that Fog Reveal relies on advertising identification (ID) numbers culled from popular apps that target ads based on a person’s movements and interests. Using Fog’s data, which the company claims is anonymized, police can geofence an area or search by a specific device’s ad ID numbers. Police can see what devices were in a particular area at a particular time and track the locations of that device back by three years. Despite the company’s claims that the data is anonymized, location tracking can enable police to deduce the identities of individual ad ID numbers. For instance, a Missouri official said, “If we are good at what we do, we should be able to figure out the owner.”

In a post Roe v. Wade world, it’s more important than ever to be highly mindful of how tools like Fog Reveal may present new threats as states across the country pass increasingly draconian bills restricting people’s access to abortion services and targeting people seeking reproductive healthcare. The use of Fog Reveal is also seemingly incompatible with protections against unlawful search and seizure guaranteed by the Fourth Amendment. Consumers do not realize that they are potentially nullifying their Fourth Amendment rights when they download and use free apps on their phones. It would be hard to imagine consumers consenting to this if actually given the option, yet this is functionally what occurs.
I applaud the FTC’s steps to hold Kochava, Inc. accountable for selling data that tracks people at reproductive health clinics, places of worship, and other sensitive locations, in violation of the prohibition against unfair or deceptive acts or practices in or affecting commerce.\(^3\) I strongly urge the FTC to investigate Fog as well for the same or similar violations. Additionally, the FTC would not have to exert resources to investigate and bring suits against companies for their misuse of data if such data were not collected in the first place. The FTC needs to treat the disease rather than the symptoms and ban surveillance advertising.

In a joint letter sent to you of January 26, 2022, my colleague Senator Booker and I supported Accountable Tech’s Petition for Rulemaking\(^1\) to prohibit surveillance advertising due to its overwhelming harm to individuals and society, especially to the fundamental right to privacy. The surveillance advertising business model is premised on the unseemly collection and hoarding of personal data to enable ad targeting. Companies collect huge amounts of data to maximize user engagement because it increases ad revenue.\(^4\) By banning surveillance advertising, companies’ incentives to collect troves of user data is nearly eliminated.

Senator Booker and I also introduced S. 3520 and H.R. 6416, the Banning Surveillance Advertising Act, respectively, which prohibits advertising networks and facilitators from using personal data to target advertisements, with the exception of broad location targeting. The bill also clarifies that the FTC has existing authority to ban surveillance advertising and strengthens its enforcement capacity.

The FTC’s Advance Notice of Proposed Rulemaking regarding Commercial Surveillance and Data Security is an excellent and much-needed step to protect Americans’ privacy and data.\(^5\) I sincerely hope that the process informs the FTC of the harms associated with surveillance advertising and that whatever benefits they provide are nowhere near outweighed by the substantial costs they impose on individuals and our society as a democratically free country that champions individual freedoms like privacy.

For all the reasons I’ve stated, I strongly urge the FTC to investigate Fog for unfair and deceptive acts or practices that result in severe invasions of privacy and potentially skirt Fourth Amendment protections. I also recommit to working with the agency to ensure that it has all the resources it needs to protect consumers from harmful data collection and surveillance business models such as surveillance advertising.

Most gratefully,

Anna G. Eshoo
Member of Congress


