

ORIGINAL

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**



_____)
In the Matter of)
)
The North Carolina Board of)
Dental Examiners,)
Respondent.)
_____)

DOCKET NO. 9343

**ORDER ON RESPONDENT’S MOTION TO PREVENT
PUBLIC POSTING OF COMPLAINT COUNSEL’S POST-TRIAL FILINGS
ON THE FEDERAL TRADE COMMISSION’S WEBSITE**

I.

On April 29, 2011, Respondent filed a Motion to Prevent Public Posting of Complaint Counsel’s Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law Containing Confidential Information on the Federal Trade Commission’s Website (“Motion”). Complaint Counsel filed its Opposition on May 9, 2011. As explained below, Respondent’s Motion is DENIED WITHOUT PREJUDICE.

II.

The Protective Order entered in this case on June 18, 2010, pursuant to Commission Rule 3.31(d), states:

Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order.

16 C.F.R. § 3.31(d) Appendix A ¶ 2.

North Carolina General Statute 90-41(g) provides:

Records, papers, and other documents containing information collected or compiled by the Board, or its members or employees, as a result of investigations, inquiries, or interviews conducted with licensing or disciplinary matter, shall not

be considered public records within the meaning of Chapter 132 of the General Statutes

N.C.G.S. 90-41(g).

Respondent states that pursuant to N.C.G.S. 90-41(g), and in accordance with the Protective Order in this case, it designated certain documents as confidential when it produced documents to Complaint Counsel.

On April 25, 2011, Complaint Counsel filed its Post-Trial Proposed Findings of Fact and Conclusions of Law and its Post-Trial Brief and Proposed Order (“Post-Trial Filings”). Respondent states that Complaint Counsel did not file a confidential version of its Post-Trial Filings, but instead filed only a public version. Respondent asserts that Complaint Counsel disclosed in its public Post-Trial Proposed Findings of Fact information that Respondent had designated as confidential pursuant to the Protective Order. Respondent states:

For example, on page 41 the personally identifiable information of one of the cease and desist recipients is given, and there are numerous instances where documents that were clearly stamped as confidential when produced to the Commission in this matter are quoted and otherwise referenced in such a manner as to make public certain aspects of those confidential, pending investigative files.

Motion at 3. Respondent argues that should this information be posted on the Commission’s website, it will be made public, contrary to N.C. Gen. Stat. 90-41(g), and will cause irreparable harm to the Respondent’s investigative process.

Complaint Counsel states that its Post-Trial Filings do not contain any *in camera* information or any “sensitive personal information”¹ and that, therefore, Complaint Counsel was not required to file a confidential version of its Post-Trial Filings. Complaint Counsel argues that Respondent failed to move for *in camera* treatment for its confidential information, as required by the Scheduling Order and Commission Rule 3.45. 16 C.F.R. § 3.45. Nevertheless, Complaint Counsel states, it is willing to undertake the task of redacting materials if Respondent identifies specific disclosures and makes a showing for each disclosure that the material meets the requirements of Rule 3.45(b).

III.

A. Confidential versus *in camera* material

Rule 3.45(d) of the Commission’s Rules of Practice sets forth:

Briefs and other submissions referring to *in camera* or confidential information.

¹ “Sensitive personal information” is defined and explained in III.B. *infra*.

Parties shall not disclose information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order in the public version of proposed findings, briefs, or other documents

16 C.F.R. § 3.45(d)². Based on these provisions, Respondent appears to be arguing that Complaint Counsel was required to designate as confidential in its Post-Trial Findings all material that Respondent designated as confidential in the course of discovery. This interpretation is inconsistent with the Commission's Rules of Practice, case law, and the directives provided to Respondent in this case in the Protective Order, the Scheduling Order and at the Final Prehearing Conference.

The Commission's Rules of Practice are quite clear: "No material, or portion thereof, offered into evidence, whether admitted or rejected, may be withheld from the public record unless it falls within the scope of an order issued in accordance with this section, stating the date on which *in camera* treatment will expire, and including: (1) A description of the material; (2) A statement of the reasons for granting *in camera* treatment; and (3) A statement of the reasons for the date on which *in camera* treatment will expire, except in the case of sensitive personal information, which shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law." 16 C.F.R. § 3.45(b) (emphasis added). Therefore, pursuant to Commission Rule 3.45(b), once materials designated as confidential have been "offered into evidence," such materials may not be withheld from the public record unless they are covered by an order granting *in camera* treatment.

Moreover, both the Protective Order and the Scheduling Order entered in this case expressly advised Respondent of this requirement. The Protective Order, entered verbatim as set forth in Commission Rule 3.31(d), mandates:

[i]f counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except

² Rule 3.45(e) further provides: "When *in camera* or confidential information is included in briefs and other submissions. If a party includes specific information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order in any document filed in a proceeding under this part, the party shall file 2 versions of the document. A complete version shall be marked "*In Camera*" or "Subject to Protective Order," as appropriate, on the first page and shall be filed with the Secretary and served by the party on the other parties in accordance with the rules in this part. Submitters of *in camera* or other confidential material should mark any such material in the complete versions of their submissions in a conspicuous matter, such as with highlighting or bracketing. References to *in camera* or confidential material must be supported by record citations to relevant evidentiary materials and associated Administrative Law Judge *in camera* or other confidentiality rulings to confirm that *in camera* or other confidential treatment is warranted for such material. . . ." 16 C.F.R. § 3.45(e).

where such an order is granted, all documents and transcripts shall be part of the public record.

16 C.F.R. § 3.31(d) Appendix A ¶ 10.

Consistent with the Protective Order, the Scheduling Order directed: “[p]arties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing [to] provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b)” and set a January 7, 2011 deadline for filing such motions. Complaint Counsel represents that in December 2010, it “provided the Board with the notice required by Rule 3.45(b) of its intention to offer confidential evidence at trial unless Respondent moved for *in camera* treatment of such material.” In addition, Additional Provision 6 of the Scheduling Order informed Respondent of the requirements for filing a motion for *in camera* treatment for evidence to be introduced at trial.

To the extent that Respondent has misunderstood the provisions of Commission Rule 3.45, the distinction between a “confidential” document and a document which has been granted “*in camera* treatment” follows: A document that contains information asserted by a party or non-party to contain confidential information cannot be evaluated for determination of whether it should be “*in camera*” until it is “offered into evidence.” As the Commission has explained, the purpose of *in camera* treatment “is to prevent the incorporation of sensitive data in the public record. The need for it therefore does not arise until the material is about to be submitted in evidence. It is an extraordinary device when applied as provided in the Commission’s Rules to material about to be submitted.” *The Crown Cork & Seal Co., Inc.*, 71 F.T.C. 1669, 1671 (1967). *See also In re Bristol-Myers Co.*, 90 F.T.C. 455 (“Commission Rule 3.45(a) allows . . . [the ALJ to] grant *in camera* treatment for information at the time it is offered into evidence”); *Lehigh Portland Cement Co.*, 74 F.T.C. 1629, 1968 FTC LEXIS 287, at *7, n.6 (1968) (premature to grant *in camera* treatment where there is a possibility that none of the information will be offered into evidence).

Because of the parties’ need, on occasion, to disclose confidential information in filings before materials have been “offered into evidence,” Rule 3.45(d) allows parties to redact confidential information from such filings.³ However, once material has been offered into evidence, it may only be withheld from the public record if it is subject to an *in camera* order, or constitutes “sensitive personal information,” discussed below.

Respondent, despite being informed of the requirement, failed to move for *in camera* treatment of information marked as confidential that was offered into evidence. Therefore, Complaint Counsel was not, and is not, required to redact information designated as confidential from its Post-Trial Filings.

³ For example, if a party feels it needs to disclose confidential information in support of a discovery motion, Rule 3.45(d) allows the party to redact such information from its memorandum in support of its motion.

B. Sensitive personal information

Respondent also claims that Complaint Counsel disclosed “personally identifiable information” with regard to a recipient of one of the Board’s cease and desist letters. Complaint Counsel admits that one of its proposed findings of fact does list the name and business address of a recipient of one of the Board’s cease and desist letters.

The Commission’s Rules define “sensitive personal information” as follows:

“Sensitive personal information” shall include, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records.”

16 C.F.R. § 3.45(b). The business address of a public business clearly does not constitute “sensitive personal information.” Respondent has not pointed to any information contained in Complaint Counsel’s Post-Trial Findings that constitutes “sensitive personal information,” as defined by Rule 3.45(b).

“The Administrative Law Judge shall order that . . . material . . . be placed *in camera* . . . after finding that the material constitutes sensitive personal information.” 16 C.F.R. § 3.45(b). Respondent has charged that “personally identifiable information” has been publicly disclosed, but has not provided any specific examples of disclosure of “sensitive personal information.” Complaint Counsel has responded that none of its Post-Trial Findings contain any “sensitive personal information,” within the meaning of Rule 3.45(b).

IV.

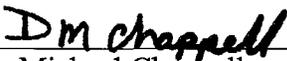
Respondent’s Motion is DENIED WITHOUT PREJUDICE as follows:

Material designated by Respondent as “confidential” that was not made subject to an *in camera* order shall not be withheld from the public record.

Material that constitutes “sensitive personal information” shall be withheld from the public record. Although Respondent’s Motion did not specifically identify any “sensitive personal information,” as defined by Rule 3.45(b), that was disclosed, in order to ensure that “sensitive personal information” is not disclosed, Respondent is hereby directed to review all of Complaint Counsel’s Post-Trial Filings to determine whether such filings include any “sensitive personal information” derived from documents produced by Respondent. If Respondent is able to identify any instances of the disclosure of “sensitive personal information,” derived from documents produced by Respondent in Complaint Counsel’s Post-Trial Findings, Respondent shall send a letter to Complaint Counsel, with a courtesy copy to the Office of Administrative Law Judges, at

OALJ@ftc.gov, that delineates the specific information, with reference to each specific proposed finding of fact, or page in the brief. Respondent shall have until 5:00 p.m. on May 20, 2011 to submit such letter. If Respondent does not submit such letter, all Post-Trial Filings will become public and the Office of the Secretary will be notified that the filings should no longer be withheld from the FTC's website.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 16, 2011