

PUBLIC

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

_____)	
In the Matter of)	
)	
Axon Enterprise, Inc.)	
a corporation,)	Docket No. 9389
)	
and)	
)	
Safariland, LLC,)	
a partnership,)	
)	
Respondents.)	
_____)	

**ORDER ON RESPONDENT’S
MOTION FOR *IN CAMERA* TREATMENT**

I.

Pursuant to Rule 3.45(b) of the Rules of Practice of the Federal Trade Commission (“FTC” or “Commission”) and the Scheduling Order entered in this matter, Respondent Axon Enterprise, Inc. (“Respondent” or “Axon”) filed a motion for *in camera* treatment for materials that the parties have listed on their exhibit lists as materials that might be introduced at trial in this matter (“Motion”). Complaint Counsel filed an opposition to the motion (“Opposition”). For the reasons set forth below, Respondent’s motion is GRANTED in part and DENIED WITHOUT PREJUDICE in part.

II.

Under Rule 3.45(b), the Administrative Law Judge may order that material offered into evidence “be placed *in camera* only [a] after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment or [b] after finding that the material constitutes sensitive personal information.” 16 C.F.R. § 3.45(b).

A. Clearly defined, serious injury

“[R]equests for *in camera* treatment must show ‘that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.’” *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984), quoting *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368 (Mar. 14, 1961). Applicants must “make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.” *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of FTC decisions is “the principal countervailing consideration weighing in favor of disclosure.” *Id.*

The Federal Trade Commission recognizes the “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *Hood*, 1961 FTC LEXIS 368, at *5-6. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 458 (1977). A full and open record also provides guidance to persons affected by its actions and helps to deter potential violators of the laws the Commission enforces. *Hood*, 58 F.T.C. at 1186. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Id.* at 1188. Moreover, there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old. *In re Int’l Ass’n of Conference Interpreters*, 1996 FTC LEXIS 298, at *15 (June 26, 1996) (citing *General Foods*, 95 F.T.C. at 353; *Crown Cork*, 71 F.T.C. at 1715).

In order to sustain the burden for withholding documents from the public record, an affidavit or declaration is always required, demonstrating that a document is sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *2-3 (Apr. 23, 2004). To overcome the presumption that *in camera* treatment will not be granted for information that is more than three years old, applicants seeking *in camera* treatment for such documents must also demonstrate, by affidavit or declaration, that such material remains competitively sensitive. In addition, to properly evaluate requests for *in camera* treatment, applicants must provide a copy of the documents at issue to the Administrative Law Judge for review. Where *in camera* treatment is sought for transcripts of investigational hearings or depositions, the requests shall be made only for those specific pages and line numbers of transcripts that contain information that meets the *in camera* standard. *In re Unocal*, 2004 FTC LEXIS 197, *4-5 (Oct. 7, 2004).

Under Commission Rule 3.45(b)(3), indefinite *in camera* treatment is warranted only “in unusual circumstances,” including circumstances in which “the need for confidentiality of the material . . . is not likely to decrease over time. . . .” 16 C.F.R. § 3.45(b)(3). “Applicants seeking indefinite *in camera* treatment must further demonstrate ‘at the outset that the need for confidentiality of the material is not likely to decrease over time’ 54 Fed. Reg. 49,279 (1989) . . .

[and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration.” *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (Apr. 25, 1990). In *DuPont*, the Commission rejected the respondent’s request for indefinite *in camera* treatment. However, based on “the highly unusual level of detailed cost data contained in these specific trial exhibit pages, the existence of extrapolation techniques of known precision in an environment of relative economic stability, and the limited amount of technological innovation occurring in the . . . industry,” the Commission extended the duration of the *in camera* treatment for a period of ten years. *Id.* at *5-6.

In determining the length of time for which *in camera* treatment is appropriate, the distinction between trade secrets and ordinary business records is important because ordinary business records are granted less protection than trade secrets. *Hood*, 58 F.T.C. at 1189. Examples of trade secrets meriting indefinite *in camera* treatment include secret formulas, processes, other secret technical information, or information that is privileged. *Hood*, 58 F.T.C. at 1189; *General Foods*, 95 F.T.C. at 352; *In re Textron, Inc.*, 1991 FTC LEXIS 135, at *1 (Apr. 26, 1991).

In contrast to trade secrets, ordinary business records include information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents. *See Hood*, 1961 FTC LEXIS 368, at *13; *In re McWane, Inc.*, 2012 FTC LEXIS 143 (Aug. 17, 2012); *In re Int’l Ass’n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14. When *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years. *E.g.*, *McWane, Inc.*, 2012 FTC LEXIS 143; *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101 (May 25, 2011).

In addition, Respondent’s motion is evaluated by the standards applied in *In re Otto Bock Healthcare N. Am.*, 2018 WL 3491602, at *1 (July 2, 2018).

B. Sensitive personal information

Under Rule 3.45(b) of the Rules of Practice, after finding that material constitutes “sensitive personal information,” the Administrative Law Judge shall order that such material be placed *in camera*. 16 C.F.R. § 3.45(b). “Sensitive personal information” is defined as including, but not 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). In addition to these listed categories of information, in some circumstances, individuals’ names and addresses, and witness telephone numbers have been found to be “sensitive personal information” and accorded *in camera* treatment. *In re LabMD, Inc.*, 2014 FTC LEXIS 127 (May 6, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 156 (Sept. 17, 2012). *See also In re Basic Research, LLC*, 2006 FTC LEXIS 14, at *5-6 (Jan. 25, 2006) (permitting the redaction of information concerning particular consumers’ names or other personal data when it

was not relevant). “[S]ensitive personal information . . . 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)(3).

III.

Respondent’s motion seeks *in camera* treatment for 659 identified trial exhibits, which include documents and testimony that, according to Respondent, fall into five categories: (1) internal pricing information, (2) internal financial and business planning, (3) business strategy information, (4) product security information, and (5) personal information. The large number of documents that Respondent seeks to protect exceeds that which would reasonably be expected to be entitled to the protection contemplated by Rule 3.45. This casts doubt on the claim that all the documents are in fact entitled to such protection. Furthermore, the declaration from Axon’s general counsel offered by Respondent to support its claim provides only general and conclusory justifications.

A review of a sampling of documents reveals that, for many documents, Respondent’s assertion that it would suffer serious competitive harm if the documents were publicly disclosed is unsupported and unpersuasive. For example, Respondent seeks *in camera* treatment for exhibits consisting of board meetings and updates from 2016 that detail plans for 2016 and into 2017, but do not appear to involve plans beyond 2017. Respondent fails to explain why this information is still competitively sensitive. Several pages of one of these exhibits involve details about Axon’s name change, which has already taken place. Some of the information contained therein is already public, such as lists of police departments that are using body worn camera systems. As another example, Respondent seeks *in camera* treatment for a chat transcript from 2015 that discusses an acquisition made by Axon in 2015. It is unclear why this information remains competitively sensitive.

Furthermore, many of the documents for which Respondent seeks *in camera* treatment are over three years old. There is a presumption that *in camera* treatment will not be accorded to information that is more than three years old unless the movant’s supporting declaration shows that such material remains competitively sensitive. Respondent’s supporting declaration fails to provide the necessary justification for granting *in camera* treatment to these documents.

In addition, Respondent seeks *in camera* treatment for a period of ten years for all of the documents at issue. Respondent has made no representations that the documents reveal trade secrets or highly detailed cost data, and are thus the types of documents that warrant ten-year protection, nor otherwise justified its request for an extended duration of *in camera* treatment for all of the documents. Documents reflecting business plans and strategies, contracts and negotiations with customers, customer specific information, market and competitive analyses, and sales and financial information are ordinary business records and generally are not entitled to an extended period of *in camera* treatment.

The following documents are less than one year old and appear to be competitively sensitive. Therefore, *in camera* treatment, for a period of five years, to expire October 1, 2025, is GRANTED for the documents identified as: RX000290, RX000291, RX000300, RX000305,

RX000432, RX000444, RX000464/PX11457, PX10141, PX10402, PX10404, PX10450, PX10459, PX10492, PX10502, PX10511, PX10617, PX10638, PX10642, PX10652, PX10654, PX10666, PX10667, PX10668, PX10670, PX10687, PX10690, PX10823, PX10825, PX10841, PX10847, PX10855, PX10858, PX10889, PX10900, PX10905, PX10908, PX10909, PX10910, PX10926, PX10939, PX10979, PX10981, PX11138, PX11181, PX11354, PX11389, RX000464/PX11457, PX11458, PX11524, PX11533, PX11682, PX11720, PX11721, PX11722, PX11723, PX11724, PX11745, PX11779, PX11791, PX11792, PX11796, PX11797, PX11798, and PX20311.

With respect to transcripts of investigational hearings and deposition testimony, requests for *in camera* treatment shall be made only for those specific pages and line numbers of transcripts that contain information that meets the *in camera* standard. *In re Unocal*, 2004 FTC LEXIS 197, *4-5 (Oct. 7, 2004). Respondent has properly tailored its request to cover only those portions of the transcripts that contain competitively sensitive information. *In camera* treatment, for a period of five years, to expire October 1, 2025, is GRANTED for the following:

RX000433: 67:6-21; 69:18-70:12; 88:23-93:8; 96:6-19; 104:8-22; 109:3-110:7; 111:9-20; 129:20-130:9; 132:11-133:24; 136:2-141:6; 184:3-186:7;
 RX000434: 46:14-48:14; 72:10-22; 87:19-94:6; 94:21-97:20; 112:9-12; 123:16-124:4; 129:1-23; 140:7-141:14; 151:5-153:15; 162:8-163:2; 173:13-14; 181:13-184:13; 188:4-191:12;
 RX000849/PX80001: 34:5-35:4; 42:20-23; 142:15-143:16; 144:2-146:7; 151:20-158:12;
 RX000850/PX80002: 37:2-5; 68:13-74:13; 79:4-7; 79:25; 154:2-156:19; 158:2-12;
 RX000851/PX80003: 67:6-21; 69:18-70:12; 88:23-93:8; 96:6-19; 104:8-22; 109:3-110:7; 111:9-111:20; 129:20-130:9; 132:11-133:24; 136:2-141:6; 184:3-186:7;
 RX000852/PX80004: 46:14-48:14; 72:10-72:22; 87:19-94:6; 94:21-97:20; 112:9-12; 123:16-124:4; 129:1-23; 140:7-141:14; 151:5-153:15; 162:8-163:2; 173:13-14; 181:13-184:13; 188:4-191:12;
 RX000862/PX81007: 30:2-31:19; 94:22-95:19; 140:9-143:11; 148:13-149:7; 193:7-195:22; 197:3-198:12; 222:20-226:5;
 RX000863/PX81008: 13:13-14:19; 48:18-51:3; 23:16-24:15; 29:17-31:21; 51:12-52:11;
 RX000866/PX81011: 180:7-184:17; 205:5; 207:1;
 RX000879/PX81024: 26:15-29:11;
 RX000883/PX81028: 23:20-27:4; 224:20-238:19;
 RX000888/PX81033: 52:10-54:14;
 RX000890/PX81035: 120:12-16; 137:5-138:9; 140:5-25; 141:15-25; 142:1-4; 143:22-25; 144:1-25; 158:2; 179:3-6, 19; 180:9; 187:19-25; 188:9-12; 189:5-15; 190:1-191:10; 196:9-14; 197:16-199:18;
 RX000891/PX81036: 35:1-36:8; 39:15-42:18;
 RX000895/PX81040: 104:24-25; 199:24-200:9; 216:10-231:2; 231:19-240:23; 247:3-8;
 RX000899/PX81044: 114:20-23; 115:19-25; 116:1-9; 160:16-25; 168:1-21; 214:16-18;
 RX000903/PX81048: 155:9-159:12; 162:12-164:9; 245:24-251:24; 257:6-262:4;
 RX000906/PX81051: 16:24-17:21; 27:1-29:2; 73:11-75:9; 81:11-84:21; 184:22-185:13;
 RX000910/PX81060: 82:22-83:8; 87:5-90:3; 100:10-16; 153:7-13; 154:14-163:11; 164:13-169:6; 177:17-178:24; 190:17-191:5.

One of the categories for which Respondent seeks *in camera* treatment is “personal information.” In support of Respondent’s request for *in camera* treatment for documents in this category, the declaration states: “certain documents reflect compensation, including bonus metrics, salaries, and stock options Other documents in this category include personal performance evaluations” Sensitive personal information includes personal financial information and employment arrangements. *In re Otto Bock Healthcare N. Am., Inc.*, 2018 FTC LEXIS 111, *16-17 (F.T.C. July 6, 2018). “[S]ensitive personal information . . . 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)(3).

Therefore, permanent *in camera* treatment is GRANTED for the following documents containing sensitive personal information: PX10052, PX10084, PX10128, PX10140, PX10187, PX10196, PX10730, PX10915, PX11125, PX11172, PX11229, PX11385, PX11444, PX11466, PX11506, PX11518, PX11529, PX11733, PX11744, and PX20167.

IV.

For all other documents, Respondent’s Motion is DENIED WITHOUT PREJUDICE, and it is hereby ORDERED that Respondent shall have until October 9, 2020 to refile a motion for *in camera* treatment. In advance of filing any such motion, Respondent shall carefully and thoroughly review all documents for which it seeks *in camera* treatment and narrow its requests to only those documents that comply with the Commission’s strict standards for *in camera* treatment and provide a declaration or affidavit that provides sufficient support for any requests. Complaint Counsel shall have until October 14, 2020 to file any opposition. In the event that either party wishes to introduce any document at trial that is the subject of a then-pending motion for *in camera* treatment, provisional *in camera* treatment may be granted until such time as a subsequent order is issued. *See* 16 C.F.R. § 3.45(g).

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: October 2, 2020