

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

**In the Matter of**

**Axon Enterprise, Inc.  
a corporation.**

**DOCKET NO. 9389**

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION FOR *IN CAMERA* TREATMENT OF TRIAL EXHIBITS AND DEPOSITION TESTIMONY**

Respondent Axon Enterprise, Inc. (“Axon” or “Respondent”) has moved for *in camera* treatment of 659 exhibits, claiming that disclosure would result in serious competitive injury. Respondent fails to meet its burden of demonstrating that clear injury would result from disclosure of the majority of these exhibits, and instead groups hundreds of documents together into broad categories, with only cursory explanations of the competitive harm purportedly posed by each. Even a brief review of the proposed *in camera* exhibits makes clear that the scope of Respondent’s motion far exceeds the protections contemplated by Rule 3.45.<sup>1</sup> Providing *in camera* treatment to this broad array of evidence would undermine the clearly stated goals of the Commission to encourage public access to adjudicative proceedings. Respondent’s motion should be denied as to all documents listed in Exhibit A to ensure that the evidentiary hearing can comply with the goal of public access.<sup>2</sup>

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<sup>1</sup> Complaint Counsel does not object to the documents and transcript cites listed in Exhibit B because they are either less than one year old or related to security or personal information.

<sup>2</sup> Axon has mislabeled some of the document dates in Attachment 1 to its motion papers. For instance, PX10480 is labeled with a document date of November 15, 2019 but the document

## LEGAL STANDARD

There is a strong presumption in favor of open access to Commission adjudicative proceedings. *In re Polypore Int'l, Inc.*, D-9327, 2009 FTC LEXIS 256, at \*3 (April 27, 2009); *see also In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961) (“To foreclose [FTC] hearings and the evidence adduced therein from the scrutiny of . . . interested persons would serve in large measure to defeat the very reason for our existence.”); *In re Impax Labs, Inc.*, D-9373, 2017 FTC LEXIS 121, at \*2 (Oct. 16, 2017). Open proceedings permit the public to evaluate the “fairness of the Commission’s work,” and “provide guidance to persons affected by [the Commission’s] actions.” *In re Intel Corp.*, D-9288, 1999 FTC LEXIS 227, at \*1 (Feb. 23, 1999) (citing *The Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1714-15 (1961) and *H.P. Hood*, 58 F.T.C. at 1196). Under Rule 3.45, Respondent must demonstrate that it will likely suffer “a clearly defined, serious injury” as a result of disclosure. 16 C.F.R. § 3.45(b). The standard for determining “a clearly defined, serious injury” is “based on the standard articulated in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).” 16 C.F.R. § 3.45(b) (also citing *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977) and *General Foods Corp.*, 95 F.T.C. 352, 355 (1980)). *H.P. Hood* explained that *in camera* requests for ordinary business documents “should be looked upon with disfavor and only granted in exceptional circumstances upon a clear showing that an irreparable injury will result from disclosure.” *H.P. Hood*, 58 F.T.C. 1184, at \*14. The Commission found that “the mere fact that respondent prefers to keep them confidential” is not evidence of injury. *H.P. Hood*, 58 F.T.C. 1184, at \*13. The potential for embarrassment or the desire to protect

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itself is a board presentation from 2015. Complaint Counsel reviewed the business records from the past year to confirm the accuracy of the date, corrected any mislabeled fields, and included the corrected documents in Exhibit A.

business information that competitors may be “desirous to possess” are not sufficient bases for obscuring material from the public. *H.P. Hood*, 58 F.T.C. 1184, at \*14. The motion must also be “narrowly tailored to request *in camera* treatment for only that information that is sufficiently secret and material.” *Polypore*, D-9327, 2009 FTC LEXIS 256, at \*4.

### ARGUMENT

“The burden rests on Respondent to demonstrate that the evidence sought to be withheld from the public record is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury.” *In re ProMedica Health Sys.*, D-9346, 2011 FTC Lexis 70, at \*5-6 (May 13, 2011). As in *ProMedica*, the Respondent has included information that has already been publicly disclosed, “contain little if any information of current competitive significance,” and are over three years old “with no explanation of why they warrant exception to the presumption that documents older than three years old do not merit *in camera* treatment.” *ProMedica*, D-9346, 2011 FTC Lexis 70, at \*5. The need for open proceedings is particularly important here, in light of the tremendous interest in BWC Systems in law enforcement, and Respondent has failed to show that disclosure of these documents will result in serious competitive injury.

Axon’s *in camera* motion is overbroad, fails to satisfy Rule 3.45, and is inconsistent with this Court’s past orders. See *ProMedica*, D-9346, 2011 FTC Lexis 70; *Polypore*, D-9327, 2009 FTC LEXIS 256; *Impax Labs.*, D-9373, 2017 FTC LEXIS 121. Complaint Counsel opposes *in camera* designation as to 558 documents. These documents were created prior October 13, 2019, for many prior to 2017, and were designated by Axon as “pricing and pricing strategy information,” “business development strategy plans,” and “internal financial information.”

Respondent and the accompanying declaration fail to satisfy Rule 3.45, only offering cursory explanations of the confidential nature of “the information” contained in “the materials,” and rehashing the six-factor test set forth in *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977). Respondent’s Motion for In Camera Treatment of Trial Exhibits and Deposition Testimony (“Respondent’s Motion”) at 6-7 & Ex. B. A list of these documents is attached as Exhibit A.<sup>3</sup>

Further, except for deposition and IH transcripts, Respondent made no effort to specify pages or sections with purportedly confidential information, and instead is seeking *in camera* treatment for the entirety of most documents. “A motion for *in camera* treatment must be narrowly tailored to request *in camera* treatment for only that information that is sufficiently secret and material.” *Polypore*, D-9327, 2009 FTC LEXIS 256, \*4 (April 27, 2009). It appears Respondent has only proposed redactions for approximately 35 of the documents at issue. In some cases, the information is discussed in the depositions and Respondent has not proposed *in camera* treatment for that information, belying Respondent’s claim that “[p]ublic disclosure of the identified documents and testimony would cause serious injury to Axon.” Respondent’s Motion at 3. For instance, Respondent has not designated deposition transcript testimony related to 2018 VieVu LE5 camera issues for *in camera* protection but designates several documents related to the same incidents in its list. *See* Exhibit L. More details related to these documents are set forth on page 8.

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<sup>3</sup> Respondent included PX11641, PX11646, PX11647 in its *in camera* motion, but these exhibits were withdrawn from Complaint Counsel’s exhibit list on September 16, 2020. Complaint Counsel opposes inclusion of these documents for *in camera* protection and have included them in Exhibit A but opposes any introduction of these exhibits during the hearing.

Furthermore, the grant of *in camera* treatment for business records is not absolute and typically limited to two to five years of *in camera* protection. *Impax Labs.*, D-9373, 2017 FTC LEXIS 121, at \*6. Respondent is seeking **ten years** of *in camera* protection for all documents. Respondent's Motion at 4. However, Respondent offers no evidence that every single document contains information that warrants such long protection. Unlike in *Impax*, Respondent provides no examples of documents that reflect projections beyond 2020 or pipeline products that have not yet been released. While Complaint Counsel agrees that business plans actually related to future plans would be competitively sensitive, the documents in Respondent's motion do not universally meet this standard. Respondent has not provided sufficient information to meet the *in camera* standard for the 558 documents listed in Exhibit A.

#### **I. DOCUMENTS OVER THREE YEARS OLD**

Respondent included over 100 documents that are older than three years.<sup>4</sup> While the law does not preclude *in camera* protection for older documents, the presumption is that documents more than three years old should not be afforded *in camera* treatment. *Impax Labs.*, D-9373, 2017 FTC LEXIS 121, at \*3-4. Respondent has made no specific argument regarding why these older documents should be afforded *in camera* protection. In its motion, it simply states that most of the documents are less than three years old. Respondent's Motion, at 4. It is clear from even a brief review of these older documents that they do not all contain competitively sensitive

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<sup>4</sup> Respondent also included approximately 50 un-dated documents. It is not obvious from the description of the document when these were created. Respondent bears the burden to prove *in camera* treatment is warranted, and therefore must provide sufficient information to the Court regarding the age of the documents. *See Impax Labs.*, D-9373, 2017 FTC LEXIS 121, at \*1.

information. By way of illustration, a non-exhaustive review of Respondent's list of documents reveals:

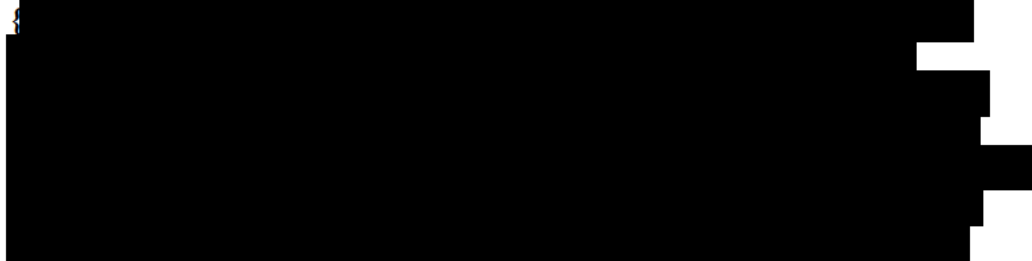
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]



Respondent's arguments do not overcome the presumption that documents older than 3 years should not be afforded *in camera* treatment.

## II. GROUNDS TO MAKE MORE RECENT DOCUMENTS PUBLIC

While there is a presumption that documents older than three years should be made public, there is ample grounds in this matter to make more recent documents public as well. Even for documents created less than three years ago, Respondent bears the burden to demonstrate it will suffer “a clearly defined, serious injury” as a result of disclosure. 16 C.F.R. §3.45(b). Respondent argues that the competition landscape is “so dynamic” – having changed since May 2018, when the Acquisition occurred. Scheduling Conference Tr. at 39:5-16. If this were true, even documents from two years ago would no longer contain competitively sensitive information. Respondent cannot pursue such an argument yet simultaneously argue that all the information contained in these documents are still competitively relevant.<sup>5</sup> By way of illustration, a non-exhaustive review of Respondent's list of documents reveals:

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<sup>5</sup> Respondent has included 304 documents dated between October 13, 2019 and October 13, 2017.

- [REDACTED]
- [REDACTED]
- [REDACTED]

It is clear that Respondent’s proposed list of documents for *in camera* treatment seeks to shield a significant volume of relevant evidence that is appropriate for disclosure. Without this



information in the public record, the matter's ultimate resolution is less useful as a guide to practitioners, the business community, and the law enforcement community.

### CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny Respondent's Motion for *In Camera* Treatment of Trial Exhibits and Deposition Testimony as provided in Exhibit A.

Dated: September 30, 2020

Respectfully submitted,

/s/ Jennifer Milici  
Jennifer Milici

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**EXHIBIT A**  
**Redacted in Entirety**

**EXHIBIT B**  
**Redacted in Entirety**

**EXHIBIT C**  
**Redacted in Entirety**

**EXHIBIT D**  
**Redacted in Entirety**

**EXHIBIT E**  
**Redacted in Entirety**

**EXHIBIT F**  
**Redacted in Entirety**

**EXHIBIT G**  
**Redacted in Entirety**



**EXHIBIT H**  
**Redacted in Entirety**

**EXHIBIT I**  
**Redacted in Entirety**

**EXHIBIT J**  
**Redacted in Entirety**

**EXHIBIT K**  
**Redacted in Entirety**

**EXHIBIT L**  
**Redacted in Entirety**

## CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2020, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
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Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

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**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

September 30, 2020

By: /s/ Jennifer Milici  
Jennifer Milici