

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

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In the Matter of)	
)	
Illumina, Inc.,)	
a corporation,)	Docket No. 9401
)	
and)	
)	
GRAIL, Inc.,)	
a corporation,)	
)	
Respondents.)	
_____)	

ORDER ON RESPONDENT GRAIL, INC.’S
MOTION FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Commission’s Rules of Practice and the Scheduling Order entered in this matter, Respondent GRAIL, Inc. (“Respondent” or “GRAIL”) 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. Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed an opposition. For the reasons set forth below, GRAIL’s motion is DENIED WITHOUT PREJUDICE.

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 competitive 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, a sworn statement 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 a sworn statement, 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).

B. Sensitive personal information

Under Rule 3.45(b) of the Rules of Practice, after finding that material constitutes “sensitive personal information,” (“SPI”) 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.

GRAIL’s motion seeks *in camera* treatment for approximately 850 potential trial exhibits that it states fall into at least one of the following categories: (1) trade secrets and product development; (2) financial data; (3) pricing and pricing strategy; (4) sales and marketing strategy; (5) regulatory strategy; (6) strategic initiatives; and (7) sensitive personal information. GRAIL supports its motion with a declaration from its general counsel and corporate secretary.

The declaration provides a general description of each category and asserts that disclosure of the documents in each category would cause serious competitive injury.

The sheer number of documents for which Respondent seeks *in camera* treatment far exceeds the number of documents that would reasonably be expected to be entitled to the protection contemplated by Rule 3.45, which casts doubt on the assertions that all the documents are entitled to such protection. *See In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *14 (July 2, 2018).

Furthermore, Respondent's motion and the attached declaration do not provide sufficient detail to determine whether *in camera* treatment is warranted for each exhibit. *See In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55, at *23 (Apr. 4, 2017) (explaining that the declaration submitted in support of *in camera* treatment failed to provide sufficient justification). Due to the substantial public interest in maintaining open adjudicative proceedings, Respondent bears the "heavy burden of showing good cause for withholding documents from the public record." *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *3 (Apr. 23, 2004).

A cursory review of the documents indicates that many do not meet the standards for *in camera* treatment. For example, PX4083 appears to be a news clip about the Illumina/GRAIL transaction and PX4099 appears to contain a document that GRAIL publicly filed with the United States Securities and Exchange Commission. Documents that are already public records are not secret and do not warrant *in camera* treatment.

In addition, Respondent's motion seeks *in camera* treatment for documents that 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. *In re Altria Group, Inc.*, No. 9393, 2021 WL 2258803 at *4 (F.T.C. May 19, 2021). GRAIL's supporting declaration fails to provide any justification for granting *in camera* treatment to these documents.

Other than the documents that contain sensitive personal information, GRAIL seeks *in camera* treatment for a period of ten years for all documents attached to its motion. Although trade secrets, specifications and product development plans may merit *in camera* treatment for an extended time period, when *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years. *Altria*, 2021 WL 2258803 at *3.

GRAIL seeks indefinite *in camera* treatment for documents that contain details regarding individuals' compensation, job performance, personal phone numbers, personal email addresses, and home addresses. Disclosure of this material could have the effect of embarrassing the named individuals or impacting their careers, and personal contact information need not be disclosed to the public in connection with this case. *Altria*, 2021 WL 2258803 at *3. To the extent that documents contain sensitive personal information such as home telephone numbers or personal addresses, that information can be redacted without requiring *in camera* treatment and does not serve as a basis for withholding documents from the public record. *Id.*; *Basic Research*, 2006 FTC LEXIS 14, at *5-6 (permitting redaction of customer names without requiring *in camera* request for such documents).

Permanent *in camera* treatment is GRANTED for the sensitive personal information contained in the documents in Category 7. However, the documents need not be withheld from the public record because the information can be redacted. GRAIL is instructed to redact the sensitive personal information from documents in Category 7.

IV.

The burden rests on the movant 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. GRAIL has failed to sustain its burden. Pursuant to FTC Rule 3.42(c)(11), Respondent's motion is DENIED WITHOUT PREJUDICE.

GRAIL may, by August 17, 2021, refile a motion for *in camera* treatment, supported with a sworn statement. Prior to filing such motion, GRAIL shall carefully and thoroughly review all documents for which it seeks *in camera* treatment, and strictly narrow its requests to only those documents that comply with the Commission's strict standards for *in camera* treatment. Furthermore, GRAIL's refiled motion shall include a sworn statement containing sufficient detail regarding the documents to identify the bases for the requests for *in camera* treatment and demonstrate that such documents are entitled to *in camera* treatment. Complaint Counsel may file an opposition to any such motion no later than noon on August 20, 2021.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: August 12, 2021