

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

In the Matter of)	
)	
H&R Block Inc.,)	
a corporation,)	
)	Docket No. 9427
HRB Digital LLC,)	
a limited liability company, and)	
)	
HRB Tax Group, Inc.,)	
a corporation,)	
)	
Respondents.)	

ORDER ON RESPONDENTS' MOTION FOR IN CAMERA TREATMENT

I.

Pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice and the Scheduling Order entered in this matter, Respondents filed a motion for in camera treatment for certain proposed trial exhibits that may be introduced at trial (“Motion”). Complaint Counsel opposes granting in camera treatment to certain categories of documents requested in the Motion.

II.

The term “in camera” in Commission practice “means that documents made subject to such orders are not made a part of the public record but are kept secret and only [authorized persons] are permitted access thereto.” *In re H.P. Hood & Sons*, No. 7709, 1961 FTC LEXIS 368, at *1 (Mar. 14, 1961). 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.*, No. 9080, 1984 FTC LEXIS 60, at *1 n.1 (May 25, 1984) (quoting *Hood*, 1961 FTC LEXIS 368 at *11). 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.*, No. 9085, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980). To determine whether confidential information that a party produces in the course of an adjudicative proceeding warrants in camera treatment, the potential harm to the party from disclosure is balanced against the substantial public interest in access to key facts and background underlying FTC decisions. *In re Polypore, Int’l Inc.*, No. 9327, 2011 FTC LEXIS 23, at *2 (Feb. 11, 2011); *In re Orkin Exterminating Co.*, No. 9176, 1986 FTC LEXIS 16, at *1 (Oct. 16, 1986).

The FTC 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.*, No. C-8917, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). A full and open record also provides guidance to persons affected by the Commission’s actions and helps to deter potential violators of the laws that the Commission enforces. *Hood*, 1961 FTC LEXIS 368, at *6-7. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be given in camera treatment. *Id.* at *10-11. 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*, No. 9270, 1996 FTC LEXIS 298, at *15 (June 26, 1996) (citing *General Foods*, 1980 FTC LEXIS 99, at *4-5; *In re Crown Cork & Seal Co.*, No. 8687, 1967 FTC LEXIS 128, at *2-3 (June 26, 1967)).

In order to sustain the burden for withholding documents from the public record, the applicant must submit an affidavit or declaration demonstrating that each 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 *3-4 (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 for in camera treatment must provide a copy of the documents for which they seek in camera treatment 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 which contain information that meets the in camera standard. *In re Union Oil Co. of California*, No. 9312, 2004 FTC LEXIS 197, at *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 “demonstrate 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.*, No. 9108, 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 allowed an extended period of in camera treatment 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*, 1961 FTC LEXIS 368, at *12. Examples of trade secrets meriting indefinite in camera treatment include secret formulas, secret processes, other secret technical information, or information that is privileged. *Hood*, 1961 FTC LEXIS 368, at *12; *General Foods*, 1980 FTC LEXIS 99, at *2; *In re Textron, Inc.*, No. 9226, 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, and 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.*, No. 9351, 2012 FTC LEXIS 143 (Aug. 17, 2012); *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*, 2012 FTC LEXIS 143; *In re ProMedica Health Sys.*, No. 9346, 2011 FTC LEXIS 101 (May 25, 2011).

B. Sensitive personal information

Under Rule 3.45(b) of the FTC Rules of Practice, after finding that material constitutes “sensitive personal information” (“SPI”), the Administrative Law Judge shall order that such material be given in camera treatment. 16 C.F.R. § 3.45(b). “[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).

SPI 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 SPI and accorded in camera treatment. *In re Illumina, Inc.*, No. 9401, 2021 WL 3701608, at *3 (F.T.C. Aug. 12, 2021); *In re Altria Group, Inc.*, No. 9393, 2021 WL 2258803, at *3 (F.T.C. May 19, 2021); *In re LabMD, Inc.*, No. 9357, 2014 FTC LEXIS 127 (May 6, 2014). In instances where SPI can be redacted from an exhibit, there is no basis for withholding an entire document from the public record. *Illumina*, 2021 WL 3701608, at *5; *Altria*, 2021 WL 2258803 at *6. *See also In re Basic Research, LLC*, No. 9318, 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).

III.

Respondents seek in camera treatment for potential trial exhibits that they state fall into

the following categories:

- (1) trade secrets and product development;
- (2) internal user data and financial information;
- (3) sales and marketing strategy;
- (4) pricing and pricing strategy;
- (5) business development strategy; and
- (6) taxpayers' personal information.

Respondents support their Motion with a declaration from its Senior Vice President of Consumer Tax Products and Support. The declaration provides a general description of each category and asserts that disclosure of the documents in each category would cause serious competitive injury.

Due to the substantial public interest in maintaining open adjudicative proceedings, Respondents bear the “heavy burden of showing good cause for withholding documents from the public record” *In re North Texas Specialty Physicians*, No. 9312, 2004 FTC LEXIS 109, at *3 (April 23, 2004). Complaint Counsel objects to the Motion on the basis that certain categories of information are vaguely described, that Respondents’ have vastly overdesignated materials for which they seek in camera treatment, and that numerous documents that have been designated as confidential do not necessitate in camera treatment. Indeed, Respondents seek in camera treatment for roughly 409 exhibits—33% of the total 1,246 thus far identified by the parties.

A modest review of the documents indicates that many do not meet the Commission’s strict standards for in camera treatment. For example, RX0326 is a working paper available on the public website url listed on the first page of the exhibit. RX0230 appears to be a print-out of a public-facing help article for customers posted on hrblock.com. RX0228 is a general biography of Respondents’ expert witness posted on a publicly available website. General or publicly available information and information does not merit in camera treatment. Moreover, documents that merely reference or contain general statements derived from confidential documents or that do not reveal information that is sufficiently secret and sufficiently material to Respondents’ business that disclosure would result in serious competitive injury will not be accorded in camera treatment.

Respondents’ Motion also seeks in camera treatment for numerous documents that are over three years old, including some as far back as ten years, such as PX012. 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. *Altria*, 2021 WL 2258803 at *2. Respondents’ supporting declaration does not explain how these materials remain competitively sensitive or why in camera treatment is necessary.

With respect to transcripts from investigational hearings and depositions, Respondents seek in camera treatment for vast portions of the transcripts. Respondents' proposed designations are overbroad and include testimony that does not meet the criteria for in camera treatment. For example, in RX0215, Respondents seek to shield the entire deposition transcript of one of Complaint Counsel's expert witnesses, which includes very general information not subject to protection, including a general discussion of the the deponent's background. Moreover, granting in camera treatment to general statements in depositions or investigational hearing transcripts would prevent inquiry on these topics at trial on the public record, which would thwart public understanding of decisions at the Commission. *See Bristol-Myers Co.*, 1977 FTC LEXIS 25, at *6.

Respondents seeks permanent in camera treatment for documents that purportedly contain SPI. However, a review of the documents categorized as personal consumer information on Attachment 1 to the Motion, shows that only five of them contain any identifying consumer information at all—PX523, PX750, PX758, PX775, and PX776; of those five, only PX523, PX750, and PX758 contain SPI.¹ Despite its categorization under "Trade Secret and Product Development," RX290 also contains SPI.

On the grounds that they contain SPI, permanent in camera status is **GRANTED** for PX523, PX750, PX758, and RX290. PX775 and PX776 contain only customer names, which can be redacted and therefore do not need to be withheld from the public record as SPI. *Illumina*, 2021 WL 3701608, at *5 (permitting redaction of customer information without requiring *in camera* treatment). Respondents are instructed to redact the customer information contained in PX775 and PX776 for the evidentiary record. Once properly redacted, no in camera protection is necessary for those redacted documents. *In re Basic Research*, 2006 FTC LEXIS 14, at *5-6.

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. For many of the documents for which Respondents seek in camera treatment, Respondents have failed to sustain their burden. Pursuant to FTC Rule 3.42(c)(11), except as set forth above, Respondents' Motion is **DENIED WITHOUT PREJUDICE**.

Respondents may, by October 16, 2024, refile a motion for in camera treatment. Prior to filing such motion, Respondents shall carefully and thoroughly review all documents for which they seek in camera treatment, and strictly narrow their requests to only those documents that comply with the Commission's strict standards for in camera treatment. Respondents' 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 renewed motion for in camera treatment by October 17, 2024.

Finally, as part of this in camera review, Respondents would be well-advised to revisit

¹ Although PX758 is redacted, it is clear from the context that the redacted information contains SPI.

whether identified RXs may simply be deleted as proposed trial exhibits.

ORDERED:

Jay L. Himes

Jay L. Himes
Administrative Law Judge

Date: October 11, 2024