

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



ORIGINAL

In the Matter of)

Axon Enterprise, Inc.)
a corporation,)

and)

Safariland, LLC,)
a partnership,)

Respondents.)

Docket No. 9389

**ORDER DENYING RESPONDENT’S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS RESPONSIVE TO
RESPONDENT’S SECOND SET OF REQUESTS FOR PRODUCTION**

I.

On July 8, 2020, Respondent Axon Enterprise, Inc. (“Respondent” or “Axon”) filed a Motion to Compel Federal Trade Commission (“FTC”) Complaint Counsel to produce documents responsive to Respondent’s Second Request for Production of Documents (“Motion”).¹ Complaint Counsel filed its Opposition on July 15, 2020. For the reasons set forth below, the Motion is DENIED.

II.

On March 3, 2020, Respondent served its Second Request for Production of Documents, containing four requests, which are set forth below. On March 12, 2020, Complaint Counsel responded with a number of objections to each request and did not produce any documents. After some discussion, the parties reached an impasse. This Motion followed, which attached the challenged requests and responses as Exhibit B.

FTC Rule 3.38(a) provides: “A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the

¹ On July 14, 2020, Respondent filed an Amended Motion to Compel Production of Documents Responsive to Respondent’s Second Set of Requests for Production to correct an inadvertent error in Exhibit C to the original Motion.

sufficiency of the answers or objections with respect to . . . a production of documents” requested under Rule 3.37. 16 C.F.R. § 3.38(a). “Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that” documents be served. *Id.*

In determining whether Complaint Counsel’s objections are justified, several principles apply. In general, “parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31(c)(1).

By way of limitation, the Rules further provide:

Complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics. The Administrative Law Judge may authorize for good cause additional discovery of materials in the possession, custody, or control of those Bureaus or Offices, or authorize other discovery pursuant to §3.36. Neither complaint counsel, respondent, nor a third party receiving a discovery request under these rules is required to search for materials generated and transmitted between an entity’s counsel (including counsel’s legal staff or in-house counsel) and not shared with anyone else, or between complaint counsel and non-testifying Commission employees, unless the Administrative Law Judge determines there is good cause to provide such materials.

16 C.F.R. § 3.31(c)(2). “Good cause” for “additional discovery” under Rule 3.31(c)(2) is satisfied when the record demonstrates (1) the requested material is relevant, (2) the request is “reasonable in scope and stated with reasonable particularity,” and (3) the request seeks information “not obtainable through other means.” *In re 1-800 Contacts, Inc.*, 2016 FTC LEXIS 233, at *8-9 (Dec. 20, 2016).

The Rules require that discovery be limited when the Administrative Law Judge determines that:

- (i) The discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii) The burden and expense of the proposed discovery on a party or third party outweigh its likely benefit.

Id.

Furthermore, under the Rules, “[d]iscovery shall be denied or limited in order to preserve the privilege of a witness, person, or governmental agency” 16 C.F.R. § 3.31(c)(4).

With the foregoing principles as background, Complaint Counsel’s objections to Respondent’s document requests are evaluated below.

III.

Request 23

Through Request 23, Respondent seeks:

All documents from 2010 to the present containing any discussion or analysis comparing, contrasting, or considering the similarities or differences between: (1) the FTC’s Part 3 rules and procedures, including, without limitation, the Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.1 et seq.); and (2) the rules and procedures applicable in federal district court, including, without limitation, the Federal Rules of Evidence and the Federal Rules of Civil Procedure.

Complaint Counsel objects to Request 23, arguing, among other reasons, that the similarities and differences between FTC practice rules and the rules applied in federal court are apparent on their face, and the meaning of the rules have been addressed by courts, academics, and practitioners in publicly available data bases. Complaint Counsel further argues that any assessments of such rules by the FTC would be irrelevant and would likely constitute protected work product.

Respondent contends that the similarities and differences between the rules applicable to federal court litigation and FTC administrative litigation are relevant to its Eighteenth Defense, which provides: “These Proceedings violate the right to due process of law under the Fifth Amendment to the Constitution, which requires equal protection of the laws, because the federal government seeks to enforce antitrust laws against other parties by bringing civil actions in federal district courts.” Amended Answer, Eighteenth Defense.

To the extent the “similarities or differences” between the rules applicable to federal court litigation and FTC administrative litigation are relevant, this is publicly available information. Respondent has failed to persuasively explain how FTC’s “assessments” of such asserted similarities and differences are relevant, or how such assessments could be produced without invading a privilege.

Based on the foregoing, as to Request 23, Respondent’s Motion is DENIED.

Requests 24 and 25

Through Requests 24 and 25, Respondent seeks:

All documents regarding or relating in any way to the clearance process or other decision-making as to whether the FTC or [Department of Justice (“DOJ”)] would exercise authority over the Axon/Viewu merger and the Motorola/WatchGuard merger.

All documents and communications regarding or relating in any way to the clearance or other decision-making process of allocating matters between the FTC and the DOJ following the Antitrust Division’s withdrawal from the 2002 Clearance Agreement, including, without limitation:

- a) Internal memos, informal agreements, guidance, analyses of each agency’s expertise, proposals, or other documents providing any justification or basis for which agency will assume responsibility for a particular merger category or industry; b) Analysis, comment, or objections to the Report and Recommendations of the Antitrust Modernization Commission (April 2007) regarding the merger clearance process; and c) Statistics, summaries, or reports regarding the FTC’s win rate or success in Part 3 enforcement actions from 1995 to the present, and any documents reporting, analyzing, or comparing such statistics to the outcome of merger challenges by the FTC or DOJ in federal district court during the same period.

Complaint Counsel objects to these requests, asserting, among other bases, that the requested information exceeds the scope of permissible discovery. Respondent argues that the requested information is relevant to its Eighteenth Defense.

Precedent holds that the reasons for issuing a complaint and the information considered or evaluated prior to issuance, “are outside the scope of discovery, absent extraordinary circumstances.” *In re LabMD, Inc.*, 2014 FTC LEXIS 45, at *7 (Mar. 10, 2014).² Moreover, any “attempt to probe the mental processes” of investigators and the decision-making leading up to the complaint “is ordinarily privileged since [such information relates] to an integral part of the decision-making process” of government. *In re School Services, Inc.*, 71 F.T.C. 1703, 1967 FTC LEXIS 125, at *5 (June 16, 1967) (citation omitted). *See also FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (“[T]he government’s ‘deliberative process privilege’ . . . permits the government to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated.”) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)).

Respondent has not identified any line of inquiry contemplated by requests 24 and 25 that would not implicate governmental decision-making. *Compare LabMD*, 2014 FTC LEXIS 45, at

² Although this decision holds that Respondent has failed to demonstrate that the governmental processes and decision-making leading up to the complaint in this case are within the scope of discovery, the Supreme Court has held that issuance of a complaint is reviewable on appeal of any resulting cease and desist order and noted that the FTC Act expressly authorizes a court of appeals to order that the Commission take additional evidence. *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 244-45 (1980) (citing 15 U.S.C. § 45(c) and stating that “a record which would be inadequate for review of alleged unlawfulness in the issuance of a complaint can be made adequate”). “Thus, limiting Respondent’s discovery as provided herein does not prejudice Respondent’s ability to pursue its claim at a later phase of the case.” *In re LabMD, Inc.*, 2014 FTC LEXIS 35, at *9 n.3 (Feb. 21, 2014).

*15-18 (allowing deposition of official of Bureau of Consumer Protection (“BCP”) in part, because the respondent had “articulated a valid line of inquiry” as to the factual bases for allegation that respondent’s data security standards were unreasonable, but barring inquiry into “why, or how, BCP or the Commission determined to use a reasonableness standard to enforce Section 5, or why the alleged facts justify a conclusion of unreasonableness,” because “a request for such justification is explicitly a request for the ‘mental impressions, conclusions, opinions or legal theories of a party’s attorney’”).

Respondent’s requests for information regarding the process and decision-making that resulted in the FTC, rather than the DOJ, bringing this enforcement action against Axon, as presented in requests 24 and 25, falls with the precedents cited above. Respondent does not cite any authority to the contrary.

Based on the foregoing, as to Requests 24 and 25, Respondent’s Motion is DENIED.

Request 26

Through Request 26, Respondent seeks:

All communications you have had with any other Federal agency or department relating to Respondents.

Respondent states that that Request 26 seeks documents “reflecting communications between government agencies about the clearance process.” Motion at 3. Complaint Counsel objects to Request 26, arguing, among other reasons, that the request seeks documents that are protected by privilege against disclosure and that the request is overbroad.

To the extent that Request 26 seeks documents reflecting communications between government agencies about the clearance process or other decision-making that allocates merger cases between the FTC and DOJ, the request is improper for the reasons discussed with respect to Requests 24 and 25.

To the extent Request 26 seeks communications between the FTC and other federal agencies reflecting pre-complaint decision-making, such materials would also be shielded by the law enforcement privilege and deliberative process privilege. See *United States v. Farley*, 11 F.3d 1385, 1388-89 (7th Cir. 1993) (holding that the deliberative process privilege precludes pre-complaint decision-making and communications between the FTC and DOJ); *FTC v. AMG Servs. Inc.*, 291 F.R.D. 544, 559-60 (D. Nev. 2013) (upholding law enforcement privilege to bar discovery of FTC investigatory files, including communications with other agencies); *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 188 (1975) (noting that Congress “plainly intended” advice from one agency to another to be no more disclosable than similar advice from within an agency).

To the extent that there are any responsive, non-privileged documents that “were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission

that investigated the matter, including the Bureau of Economics,” such documents are discoverable under Rule 3.31(c)(2). However, as stated in Request 26, Respondent’s request for “ all communications” that the FTC (as opposed to Complaint Counsel) has had with any other Federal agency or department relating to Respondent is not limited by topic, timeframe, and offices within the FTC from which Respondent seeks documents and is therefore overbroad.

Based on the foregoing, as to Request 26, Respondent’s Motion is DENIED.

IV.

For the above stated reasons, Respondent’s Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: July 21, 2020

Notice of Electronic Service

I hereby certify that on July 21, 2020, I filed an electronic copy of the foregoing Order Denying Respondents Motion for Issuance of Subpoena Ad Testificandum to the DOJ Under Rule 3.36, Order Denying Respondents MTC Production of Documents Responsive to Respondents Second Set of Requests, with:

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I hereby certify that on July 21, 2020, I served via E-Service an electronic copy of the foregoing Order Denying Respondents Motion for Issuance of Subpoena Ad Testificandum to the DOJ Under Rule 3.36, Order Denying Respondents MTC Production of Documents Responsive to Respondents Second Set of Requests, upon:

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