

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
Office of Administrative Law Judges**

In the Matter of)
)
)
Axon Enterprise, Inc.)
a corporation,) Docket No. 09389
)
and)
)
Safariland, LLC)
a partnership,)
)
Respondents.)

**UNOPPOSED NON-PARTY CITY OF AURORA'S
MOTION FOR *IN CAMERA* TREATMENT**

Pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b) and 4.10(g), non-party City of Aurora, Colorado (“Aurora” or “the City”) respectfully moves this Court for *in camera* treatment of certain sensitive, confidential deposition testimony. The City, through one of its police lieutenants, supplied the deposition testimony in response to a non-party deposition subpoena issued this matter. The City also seeks *in camera* treatment for trial testimony that is expected to cover similar sensitive, confidential information. The City has conferred with counsel for the FTC and Respondent Axon, who do not oppose the relief requested in this Motion.

I. DEPOSITION TRANSCRIPT

Both parties have informed the City that they intend to use the deposition transcript of the City Police Department Lieutenant Martin Garland (“the Garland Transcript”) at the administrative trial set to begin on October 13, 2020. *See* Email from the Complaint Counsel, dated 9/11/2020,

attached as **Exhibit A**; See Email from Counsel for Axon, dated 9/11/2020, attached as **Exhibit B**.

There are portions of the Garland Transcript for which the City seeks *in camera* treatment because of its pending body-worn camera solicitation process and a belief that disclosure would significantly harm the process and potentially if the information in the transcript were to become public record at this time.

A. *Portions of the Deposition Transcript for Which Protection is Sought.*

The City seeks *in camera* treatment for the following portions of the Garland Transcript, a copy of which is attached, under confidential cover, as **Exhibit C**. A copy of the full transcript is attached, under confidential cover, as **Exhibit D**.

Page 17, LL 4-25	Page 102 – entire page
Page 18, LL 1-3	Page 103, LL 1-12
Page 31, LL 15-24	Page 105, LL 10-25
Page 40, LL 5-25	Page 106, LL 1-20
Page 41, LL 3-9	Page 112, LL 9-25
Page 43, LL 3-25	Page 114, LL 5-25
Page 44 – entire page	Page 115 – 117 – entire pages
Page 45, LL 1-8	Page 118, LL 1-11
Page 51, LL 24-25	Page 120, LL 3-25
Page 52 – 69 - entire pages	Page 121-126 – entire pages
Page 70 – LL 1-22	Page 127, LL 1.
Page 72 – LL 16-25	Page 129, LL 18-25
Page 73 – 90 – entire pages	Page 130-133 – entire pages
Page 91, LL 1-16	Page 134, LL 1-4
Page 101, LL 13-25	

B. *Legal Standard.*

In camera treatment of material is appropriate when its "public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment." 16 CFR §3.45(b)

Establishing that a “serious injury” would ensue with disclosure requires a demonstration that serious and irreparable harm will result from the Court’s publication of the confidential documents. Meeting such a standard requires the City to make a clear showing that the information concerned is “sufficiently secret and sufficiently material to [the City’s] business that disclosure would result in serious competitive injury.” See *Bristol-Myers Co.*, 90 FTC 455 (1977), *General Foods Corp.*, 95 FTC 352 (1980).

In *Bristol-Myers*, 90 FTC 455 (1977), the Commission outlined six factors to be weighed when determining materiality and secrecy: (1) the extent to which the information is known outside of the applicant’s business; (2) the extent to which the information is known by employees and others involved in the applicant’s business; (3) the extent of measures taken by the applicant to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors; (5) the amount of effort or money expended by the applicant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Additionally, the Commission has expounded on the definition of “serious injury,” stating “[t]he likely loss of business advantages is a good example of a clearly defined, serious injury.” *Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 138 (Sept. 19, 2000). As set forth above and in the Affidavit of Lt. Garland, the portions of the deposition transcript contain information sufficiently secret, and sufficiently material to the City’s solicitation process, that disclosure constitutes a serious injury under the *Bristol-Myers* factors and prevailing Commission law.

C. *These Portions of the Garland Transcript Discuss the City’s Pending Body-Worn Camera Solicitation Process, Disclosure of Which Would Likely Cause Serious Injury to Aurora.*

Certain portions of the Garland Transcript contain information that is sensitive or confidential at this time because the City is currently in the process of selecting a vendor to enter into a contract for body worn camera equipment and services. The City acknowledges the oddity of a local government requesting *in camera* treatment for records that may be part of its own public record soon, but it is in the *timing* of this matter that is driving the City's request, as well as the *substance* of the information discussed.

The City currently uses Axon as its body-worn camera vendor. *See* Affidavit in Support of Motion for *In Camera* Treatment, at ¶3, attached as **Exhibit E**, and incorporated herein by this reference. Per City procurement practices, the City sent the contract for body-worn cameras out for open solicitations and sought requests for proposals from qualified companies. *Id.* at ¶5. The solicitation period closed on July 20, 2020. *Id.* The City does not expect to be completed with the solicitation process and have a selection of new vendor by the time trial starts in mid-October. *Id.* at ¶8.

The Garland Transcript discusses the responses to the RFP, the selection process, Lt. Garland's views regarding potential applicants and their qualifications, issues important to the City in the selection process, and other considerations that are valuable for companies participating in this solicitation. *Id.* at ¶12. The City asserts that, should that information be made public, it could negatively impact the body-worn camera solicitation process by improperly divulging information submitted confidentially to the City by a potential vendor, and causing concern about the veracity of the process. *Id.* at ¶15.

II. *In Camera* Treatment is Also Warranted for Possible Trial Testimony by a City Witness.

Lt. Garland has been designated as a potential trial witness by Respondent Axon. The City expects that Lt. Garland will be questioned about the City's body-worn camera solicitation process

and evaluation. Testimony on the City's body-worn camera solicitation process could result in the disclosure of the same or similar information in the transcript described above. Thus, the City also requests that any trial testimony, either upon direct examination or cross examination by either party, regarding confidential information about the City's body-worn camera solicitation process, to include substance of responses and nonpublic evaluations and determinations by City employees involved with the process, be subject to *in camera* treatment.

CONCLUSION

For the foregoing reasons, and those articulated in the Affidavit of Lt. Garland, the City respectfully requests that this Court grant *in camera* protection to all portions of the Garland Transcript identified above and any trial testimony related to confidential information regarding the City's body-worn camera solicitation process covered by the documents in Exhibit A.

Respectfully submitted this 23rd day of September 2020.

By: s/ Nancy C. Rodgers
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Attorney for non-party City of Aurora, Colo.

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Acting Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

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

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Hana Verwilt
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Counsel for Respondent Axon Enterprises, Inc

s/Nancy C. Rodgers _____

PUBLIC

DOCKET No. 09389
City of Aurora Motion for *In Camera* Treatment

EXHIBIT A

From: [Lindquist, Nicole](#)
To: [Rodgers, Nancy](#)
Cc: [Ansald, Alexander](#); [Verwilt, Hana](#); [Glover, Christian](#)
Subject: In Re Axon Docket No. 9389 In Camera Notice—AURORA PD
Date: Friday, September 11, 2020 12:34:38 PM
Attachments: [2020.07.10 Second Revised Scheduling Order.pdf](#)
[2020.01.30 Scheduling Order.pdf](#)
[2020.09.10 IC Attach A Aurora.pdf](#)

Dear Nancy,

Pursuant to the January 30 and July 10 Scheduling Orders in In the Matter of Axon Enterprise, Inc., Docket No. 9389 (attached for your reference), we are providing notice that Complaint Counsel intends to offer the documents listed on Attachment A into evidence in the administrative trial set to begin October 13, 2020. All exhibits admitted into evidence become part of the public record unless Administrative Law Judge D. Michael Chappell grants *in camera* status.

For documents or testimony that include sensitive or confidential information that you do not want on the public record, you must file a motion by **September 23, 2020** seeking *in camera* status or other confidentiality protections pursuant to 16 C.F.R. §§ 3.45 and 4.10(g). Judge Chappell may order that materials, whether admitted or not as evidence, be placed *in camera* only after finding that their public disclosure will likely result in a clearly-defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment. Motions for *in camera* treatment of evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000); and *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006).

Pursuant to Additional Provision 13 of the Scheduling Order, motions for *in camera* treatment also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the material, *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004), and one copy of the documents for which *in camera* treatment is sought must be provided to the Administrative Law Judge.

You can find examples of previously filed motions for *in camera* treatment and Judge Chappell's corresponding orders in the July and August 2018 portions of the following docket: <https://www.ftc.gov/enforcement/cases-proceedings/171-0231/otto-bock-healthcarefreedom-innovations>

Sincerely,

Nicole

Nicole Lindquist
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Federal Trade Commission
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(202) 326-6295
NLindquist@ftc.gov

PUBLIC

DOCKET No. 09389

City of Aurora Motion for *In Camera* Treatment

EXHIBIT B

From: jbaumann@jonesday.com
To: [Rodgers Nancy](#)
Cc: [Marlowe Lisette](#); dbelott@jonesday.com; kbryan@jonesday.com; ahealey@jonesday.com; riddell@jonesday.com; jmcevov@jonesday.com
Subject: In re Axon, Dkt.D9389 - Aurora Documents
Date: Friday, September 11, 2020 9:56:36 PM

You have received 2 secure files from jbaumann@jonesday.com.

Use the secure links below to download.

Hi Nancy,

I am writing to provide formal notice, pursuant to Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b), that Axon intends to offer into evidence in the administrative trial in the above-captioned matter the documents and testimony referenced in the attached document (Attachment A). Please use the below link to access the documents referenced in Attachment A. The administrative trial is scheduled to begin on October 13, 2020.

All exhibits and testimony admitted into evidence become part of the public record unless in camera status is granted by Administrative Law Judge D. Michael Chappell. For documents or testimony which include sensitive or confidential information that you do not want on the public record, you must file a motion seeking in camera status or other confidentiality protections pursuant to 16 C.F.R. §§ 3.45, 4.10(g). Motions for in camera treatment must meet the strict standard set forth in 16 C.F.R. § 3.45, which provides that "[t]he Administrative Law Judge shall order that such material, whether admitted or rejected, be placed in camera only 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 after finding that the material constitutes sensitive personal information." 16 C.F.R. § 3.45. The strict standard is further explained in *In re Otto Bock Healthcare N. Am.*, 2018 WL 3491602 at *1 (July 2, 2018) and *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017). Motions for in camera treatment must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re North Texas Specialty Physicians 2004 FTC LEXIS 109*, *3-4 (April 23, 2004). You must also provide one copy of the documents for which in camera treatment is sought to the Administrative Law Judge.

Under the current Scheduling Order dated July 10, 2020, the deadline for filing motions seeking in camera treatment of proposed trial exhibits is September 30, 2020.

Feel free to contact me if you have any questions.

Secure File Downloads:

Available until: **16 September 2020**

Click links to download:

[Aurora PD Attachment A.pdf](#)

94.02 KB, Fingerprint: ba01a22f3285b5688b4fcc30226c047 ([What is this?](#))

[2. Aurora.zip](#)

61.22 MB, Fingerprint: 06588382b0009ff51d4c144040cf78cb ([What is this?](#))

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PUBLIC

DOCKET No. 09389

City of Aurora Motion for *In Camera* Treatment

EXHIBIT C and D

FILED UNDER CONFIDENTIAL COVER

PUBLIC

DOCKET No. 09389

City of Aurora Motion for *In Camera* Treatment

EXHIBIT E

PUBLIC

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
Office of Administrative Law Judges**

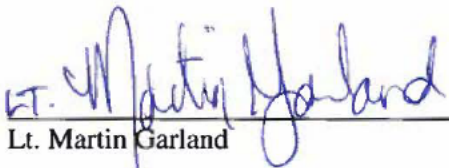
_____)	
In the Matter of)	
)	
Axon Enterprise, Inc.)	
a corporation,)	Docket No. 9389
)	
and)	
)	
Safariland, LLC)	
a partnership,)	
)	
Respondents.)	
_____)	

AFFIDAVIT OF LT. MARTIN GARLAND

1. I am currently a lieutenant with the Aurora Police Department (“Aurora PD”) for the City of Aurora, Colorado. I oversee the Electronic Support Section for the Aurora PD and have been since May 2019.
2. My responsibilities include managing the electronic hardware and software programs for the Aurora PD, which includes the body worn camera system.
3. Aurora PD currently uses Axon as its body-worn camera vendor, but that contract is coming to an end.
4. The City of Aurora is currently in the middle of a solicitation process to select a vendor to enter into a contract with for body worn camera services.
5. Per City procurement practices, the City sent the contract for body-worn cameras out for open solicitations and published a Request for Proposals (“RFP”) from qualified companies. The solicitation period closed on July 20, 2020.
6. At this time, proposals have been submitted by various companies.
7. As of the date of this affidavit, the City is still completing the initial selection and notification portion of the process, where the City informs those vendors who have made the “short list” and will go on to the next step in the process.

- 8. Although the City expects the "short list" portion of the process to be done in the next couple weeks, the City does not expect to complete the entire solicitation process and have a selection of new vendor by the time trial starts in mid-October.
- 9. The RFP and steps for the City's solicitation process are public information.
- 10. However, portions of the proposals submitted to the City in response to the RFP, if properly designated, are confidential. The City, in its RFP, stated that it will not release information that a company designated confidential unless compelled to do so.
- 11. I received a subpoena to be deposes in this matter and was deposed on Friday, August 21, 2020.
- 12. During the deposition, I was asked and responded to questions about the responses to the RFP, the selection process, my views regarding potential applicants and their qualifications, and issues important to the City in the selection process.
- 13. I expect that I will be asked similar questions at trial.
- 14. For most of these companies, my ability to answer these questions comes from the proposals submitted to the City by companies wishing to be considered the City's body worn camera vendor.
- 15. I believe that if confidential information in the proposals and confidential information related to the City's selection is made public, it could negatively impact the body worn camera solicitation process by improperly divulging information submitted confidentially to the City or by disclosing the City's views before a decision is made.

Executed this 23rd day of September, 2020



 Lt. Martin Garland

Lt. Garland, who is known to me and who confirmed his identity to me through government issued identification, appeared before me this day and stated upon his oath that the above one-page AFFIDAVIT is true to the best of his knowledge and belief.

9/23/2020

 Date



 Notary Public

ASHLEY DICKENS
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID# 20044028273
MY COMMISSION EXPIRES 12/15/2021