

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

_____)	
In the Matter of)	
Intuit, Inc.,)	
a corporation,)	Docket No. 9408
))	
Respondent.)	
_____)	

ORDER ON RESPONDENT’S MOTION
FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Rules of Practice of the Federal Trade Commission (“FTC” or “Commission”) and the Scheduling Order entered in this matter, Respondent Intuit, Inc. (“Respondent”) filed a motion for *in camera* treatment for designated materials that FTC Complaint Counsel and Respondent have listed on their exhibit lists as materials that might be introduced at trial (“Motion”). Complaint Counsel responded that it does not oppose granting *in camera* treatment as requested in the Motion.

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 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 (F.T.C. May 25, 1984) (quoting *In re H. P. Hood & Sons, Inc.*, No. 7709, 1961 FTC LEXIS 368 (F.T.C. 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.*, No. 9085, 1980 FTC LEXIS 99, at *10 (F.T.C. 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 (F.T.C. Feb. 11, 2011); *In re Orkin Exterminating Co.*, No. 9176, 1986 FTC LEXIS 16, at *1 (F.T.C. 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 (F.T.C. 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 (F.T.C. 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 (F.T.C. 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 (F.T.C. 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 (F.T.C. 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.*, No. 9108, 1990 FTC LEXIS 134, at *2-3 (F.T.C. 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 (F.T.C. 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 (F.T.C. 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 (F.T.C. 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).

“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 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 (F.T.C. 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 (F.T.C. Jan. 25, 2006) (permitting the redaction of information concerning particular consumers’ names or other personal data when it was not relevant).

III.

Respondent seeks *in camera* treatment for 333 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) business strategy/strategic initiatives; (6) regulatory strategy; (7) arbitration documents; (8) IRS free file documents; and (9) sensitive personal information. Respondent supports its Motion with a declaration from its Vice President, Marketing, Partnerships & Advertising Operations. 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, Respondent bears 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 (F.T.C. April 23, 2004).

A cursory review of the documents indicates that many do not meet the standards for *in camera* treatment. For example, GX 431 is a spreadsheet which appears to list various dates, networks and times in which Intuit aired TurboTax television advertisements between January and February of 2022. GX 646 is a PowerPoint presentation which appears to have been distributed throughout the company and contains general conclusions. RX 308 appears to be an “earnings script” from 2019. General or publicly available information and information that is widely disseminated within a company 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 Intuit’s business that disclosure would result in serious competitive injury will not be accorded *in camera* treatment.

Respondent’s Motion also seeks *in camera* treatment for numerous documents that are over three years old, such as RX 36, which appears to contain Intuit’s financial and revenue projections and figures for 2012 to 2018. 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. Respondent’s supporting declaration asserts that these materials remain competitively sensitive but 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, Intuit seeks *in camera* treatment for vast portions of the transcripts. Intuit’s proposed designations are overbroad and include testimony that does not meet the criteria for *in camera* treatment. For example, in GX 146, what Intuit seeks to shield from disclosure is very general, such as a definition of “brand advertising,” and whether Intuit employs such method of advertising, and whether Intuit uses marketing directed to millennial taxpayers. 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.

Respondent seeks permanent *in camera* treatment for the tax history of TurboTax consumers who submitted complaints relied upon by the FTC. These spreadsheets contain consumer names and taxpayer information and thus constitute sensitive personal information. Permanent *in camera* treatment is GRANTED to: RX 121, 137, 146, 153, 157, 207, 223, 232, and 239.

Respondent also seeks *in camera* treatment for arbitration decisions, settlement agreements relating to consumer arbitrations, and consumer releases related to those settlements. The arbitration documents, including the releases, contain consumers' sensitive personal information, including consumers' date of birth and citizenship status. Therefore, permanent *in camera* treatment is GRANTED to: RX 67, 68, 69, 383, 384, 385, 386, and 392.

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 Respondent seeks *in camera* treatment, Respondent has failed to sustain its burden. Pursuant to FTC Rule 3.42(c)(11), except as set forth above, Respondent's Motion is DENIED WITHOUT PREJUDICE.

Respondent may, by March 15, 2023, refile a motion for *in camera* treatment. Prior to filing such motion, Respondent 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. Respondent'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.¹

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 1, 2023

¹ Complaint Counsel did not oppose Respondent's initial motion and will not be permitted to oppose Respondent's revised motion.