

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

In the matter of

H&R BLOCK INC.,
a corporation,

HRB DIGITAL LLC,
a limited liability company, and

HRB TAX GROUP, INC.,
a corporation.

DOCKET NO. 9427

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION
FOR IN CAMERA TREATMENT**

Respondents, H&R Block Inc., HRB Digital LLC, and HRB Tax Group, Inc., seek *in camera* treatment for documents and testimony that purportedly fall into one of six categories: (1) trade secrets and product development, (2) internal user data and financial data, (3) sales and marketing strategy, (4) pricing and pricing strategy, (5) business development strategy, and (6) taxpayers' personal information. While Complaint Counsel do not oppose *in camera* treatment for those documents where "public disclosure will likely result in a clearly defined, serious injury," 16 C.F.R. 3.45(b), Complaint Counsel oppose Respondents' flagrant over-designation of documents as confidential and necessitating *in camera* treatment, including, for example, documents that are otherwise publicly available or expert material that analyzes information which is itself not confidential (e.g., expert surveys, analyses of websites, estimates of harm, etc.). Complaint Counsel additionally oppose Respondents' request for *in camera* treatment of "technical information" without more specificity as to what constitutes such information.

PUBLIC**I. STANDARD**

The Commission has consistently recognized the “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *In the Matter of Altria Grp.*, No. 9393, 2021 WL 2379509, at *2 (May 26, 2021) (quoting *In re H. P. Hood & Sons*, 1961 FTC LEXIS 368 (Mar. 14, 1961)). Commission Rule 3.45(b) therefore provides that materials offered into evidence may only be given *in camera* treatment where the Administrative Law Judge finds “that [their] public disclosure will likely result in 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(b).

Parties requesting *in camera* treatment 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,” and must, in their request, show that disclosure of the information will result in the “clearly defined, serious injury” asserted. *In re General Foods Corp.*, No. 9085, 1980 FTC LEXIS 99, at *10 (F.T.C. Mar. 10, 1980); *In re Kaiser Aluminum & Chem. Corp.*, No. 9080, 1984 FTC LEXIS 60 at *1 n.1 (F.T.C. May 25, 1984). The potential harm to the party seeking *in camera* treatment must be balanced “against the substantial public interest in access to the key facts and background underlying a Commission decision.” *In re Polypore, Int’l Inc.*, No. 9327, 2011 FTC LEXIS 23, at *2 (F.T.C. Feb. 11, 2011) (quoting *In re Orkin Exterminating Co.*, 108 F.T.C. 147 (1986)).

As the Court reminded the parties in its May 8, 2024 order, “[t]he Protective Order does not give parties or non-parties the unfettered ability or option to designate every document produced as ‘confidential.’” Order on: (1) Motion to Remove Redactions From Paragraphs 29 Through 32 of the Public Complaint, And (2) Unopposed Motion to Remove Certain Redactions From the Public Complaint, at 3 (May 8, 2024) (“Redaction Order”). Further, “[a] designation of confidentiality shall

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constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined” in the Protective Order. Protective Order at para. 5.

II. ARGUMENT

Respondents fail to demonstrate that the 486 documents specified in their Motion and “technical information” testimony meet the standards for *in camera* treatment. Additionally, Respondents’ superficial conclusions, omission of material facts, misstatements as to the nature of certain information at issue, and assertions that information is sensitive, notwithstanding the publicly-available nature of much of that information or its age, demonstrate a lack of good faith in filing their Motion for *In Camera* Treatment (“Motion”) while failing to undertake the careful consideration of each document for which they seek *in camera* treatment, as required by the Protective Order. Protective Order at para. 5.

A. Respondents Improperly Seek *In Camera* Treatment for Publicly Available Information

Respondents seek *in camera* treatment for the 486 specific documents listed in Attachment A to the declaration of Heather Watts, the Senior Vice President of Consumer Tax Products and Support at H&R Block. Motion, Exh. B at para. 1, Attach. A. They seek complete *in camera* treatment for 479 documents and partial treatment for the remaining 7 documents.¹ While Ms. Watts describes in broad terms the harms she asserts the company will suffer if *in camera* treatment is not provided for various categories of documents (e.g., “trade secrets and product development,” “business

¹ Many of the documents listed in Attachment A are more than three years old. While numerous of these documents are relevant to Complaint Counsel’s allegations, demonstrating longstanding practices and motivations for conduct challenged in the Complaint, there is a presumption against *in camera* treatment for information that is more than three years old. See *In the Matter of Jerk, LLC*, No. 9361, 2015 WL 926508, at *1 (Feb. 23, 2015); *In the Matter of La. Real Estate Appraisers Bd.*, No 9374, 2021 WL 1223991, at *1-2 (Mar. 29, 2021).

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development strategy,” “other confidential information”), the application of those categories to the documents listed in Attachment A appear to be done without consideration of the actual underlying documents, as discussed in more detail below. As such, Ms. Watts’ assertion that release of information contained in those documents will result in the articulated harm cannot be credited. As was the case in Ms. Watts’ previous declaration submitted in this matter, “some of Ms. Watts’ assertions border on the conclusory, and the declaration does not provide overwhelming or incontrovertible proof” of the harms alleged. *See* Redaction Order at 3.

Ms. Watts asserts that the documents listed in Attachment A are so voluminous that “no one person could reasonably review and categorize each document.” *Id.* at 6. Despite her admitted lack of personal knowledge as to the full set of documents, Ms. Watts states that “it is clear that public disclosure and dissemination of the exhibits or portions identified in this declaration or its Attachment would result in substantive competitive and financial injury to H&R Block.” Motion at Exh. B, para. 7. This statement is both conclusory and facially untrue.²

For example, Attachment A lists the following documents as requiring *in camera* treatment:³

- RX0326 – [REDACTED]
[REDACTED]: Despite including in their description of this publicly available document the url at which anyone can access this paper, Respondents list “Trade Secret and Product Development” as the reason for which they are seeking *in camera*

² While Respondents may assert that Complaint Counsel has also classified many of these documents as “confidential” in various settings, Complaint Counsel has been required to do so because of Respondents’ blanket assertion and marking of every document (as noted in the Motion, nearly 50,000) as “confidential.”

³ Because Respondents have redacted the exhibit descriptions column in Attachment A, Complaint Counsel treat that information as confidential for purposes of this filing. However, Complaint Counsel do not believe these document descriptions/titles should be given confidential treatment for the reasons explained in this opposition.

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treatment for the entirety of this article authored by Complaint Counsel's expert Youssef Benzarti in 2023.

- RX0230 – [REDACTED]
[REDACTED]
[REDACTED]: This document is a print-out of a public-facing “help” article from hrblock.com, which Respondents assert implicates “Trade Secret and Product Development; Pricing and Pricing Strategy” and thus requires complete *in camera* treatment.
- RX0200 – [REDACTED]: Respondents assert this document contains “Trade Secret and Product Development” information. This document was compiled by Complaint Counsel expert Rick Watts and associates tax forms to the DIY Online Product in which they are available. This information is all publicly available in other formats on hrblock.com.
- RX0244 – [REDACTED]: This document discusses and cites to only publicly available documents and information, but Respondents nonetheless assert “Business Development Strategy” as the justification for seeking *in camera* treatment for the entire document.
- RX0255 – [REDACTED]: Respondents assert complete *in camera* treatment is necessary for this document, asserting “Business Development and Strategy.” This is despite Respondents attaching to one of their own public filings a detailed description of the contents of this document, including quotes and findings. *See* Respondents’ Motion *In Limine* to Exclude Survey and Expert Testimony of Sarah Butler, Exh. C (Rebuttal Report of Sarah Butler) at 5-22 (pages 97 through 113 of PDF).
- PX523 and PX750 – [REDACTED]
[REDACTED]: While Complaint Counsel agree that certain pages of these exhibits

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contain "Taxpayer Personal Information," asserted by H&R Block as the reason for *in camera* treatment, they object to requesting *in camera* treatment for the entire document because only certain pages contain sensitive information and can be easily redacted. (Complaint Counsel have filed their own motion for *in camera* treatment of consumers' personal identifying information.)

- PX703 – [REDACTED]: Respondents assert "Business Development Strategy" as the reason for *in camera* treatment of this entire document and attached exhibits. While that may be applicable to portions of the document, the vast majority of the document is an analysis of H&R Block's public-facing website and associated screen captures.

To take a single example, it is difficult to see how a public article authored by one of Complaint Counsel's experts prior to his engagement on this matter contains H&R Block's trade secrets or product development information, much less how failure to give that article *in camera* treatment will result in the H&R Block's competitors gaining insight into the Respondents "strategies, development, and implementation of certain features," as foretold by Ms. Watts. Motion, Exh. B at para. 9.

B. Respondents Improperly Seek *In Camera* Treatment of Documents Absent Careful Consideration of the Information Therein

It is facially obvious that Respondents failed to engage, in good faith, in a careful determination of whether the materials they seek *in camera* treatment for are "not reasonably believed to be already in the public domain" and contain confidential material, defined as "privileged, competitively sensitive information, or sensitive personal information." See Protective Order at paras. 1, 5. If Respondents had done so, they would not have included the above documents, which are only a handful of examples of similar documents listed in Attachment A.

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Given this failure, it is inappropriate to grant *in camera* treatment to any document contained in Attachment A to the Motion, at this time, absent a demonstration of good-faith efforts to comply with the instructions, which have been provided in numerous instances and forms. *See* Redaction Order at 3 (“when potential over-designation is brought to the attention of the Administrative Law Judge by appropriate motion, it is well within the ALJ’s discretion in overseeing the conduct of litigation to require sufficient proof of confidentiality...”); Protective Order at paras. 3, 9; Scheduling Order at additional provision 8 (“The parties are directed to adhere to the limitations on designating material as confidential under the Protective Order.... Designating material as ‘confidential’ constitutes that party’s ‘representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain....’”); Tr. of Prehearing Scheduling Conference at 25:5-10 (March 21, 2024) (“the Commission Rules and our additional provisions are in part directed to confidential designations, and they have criteria for designating contents of material as confidential. And those designations do have to be made in good faith.”).

C. Respondents Improperly Seek *In Camera* Treatment for Vaguely Described Categories of Information

In addition to the documents specified in Attachment A, Respondents request *in camera* treatment of “documents and testimony – whether already given or anticipated – that discuss, refer, or relate to how H&R Block’s software operates” (hereinafter referred to as “software operation information”) and “technical information.” Motion at 5. Respondents do not define what constitutes software operation information or technical information but have, in a meet and confer with Complaint Counsel, asserted that expert testimony from experts at the most general and high level, such as expert testimony that “the DIY Online Products [REDACTED]

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[REDACTED]⁴ should be given *in camera* treatment.

However, Respondents fail to detail the serious competitive injury that would result from such generic testimony and, to the extent injury could be identified, any injury does not outweigh “the substantial public interest in access to the key facts and background underlying a Commission decision.” *In re Polypore, Int’l Inc.*, 2011 FTC LEXIS at *2. The second count of the Complaint relates directly to the operation of Respondents’ software. While Complaint Counsel agree that the source code itself constitute sensitive information deserving *in camera* treatment, the same cannot be said for testimony that discusses the DIY Online Products at a generic level. While the amount of testimony provided at this level may be limited, Complaint Counsel believe that allowing the public to hear even that limited testimony is in the best interests of the public and the Commission.

III. CONCLUSION

For the reasons above, Respondents’ Motion for In Camera Treatment should be denied in its entirety (excepting PX731, Source Code for DIY Online Products, which Complaint Counsel have stipulated should be given *in camera* treatment).

Dated: October 8, 2024

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⁴ Complaint Counsel mark this for redaction in the public filing not because they agree that such a general statement warrants confidential or *in camera* treatment but rather out of an abundance of caution given that the Court has not yet ruled on this issue.

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2024, I filed the foregoing Complaint Counsel's Opposition to Respondents' Motion for *In Camera* Treatment electronically using the FTC's E-Filing system, and I caused courtesy copies to be sent via email to:

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*Secretary of the Commission
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I further certify that on October 8, 2024, I caused the foregoing document to be served via email on:

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