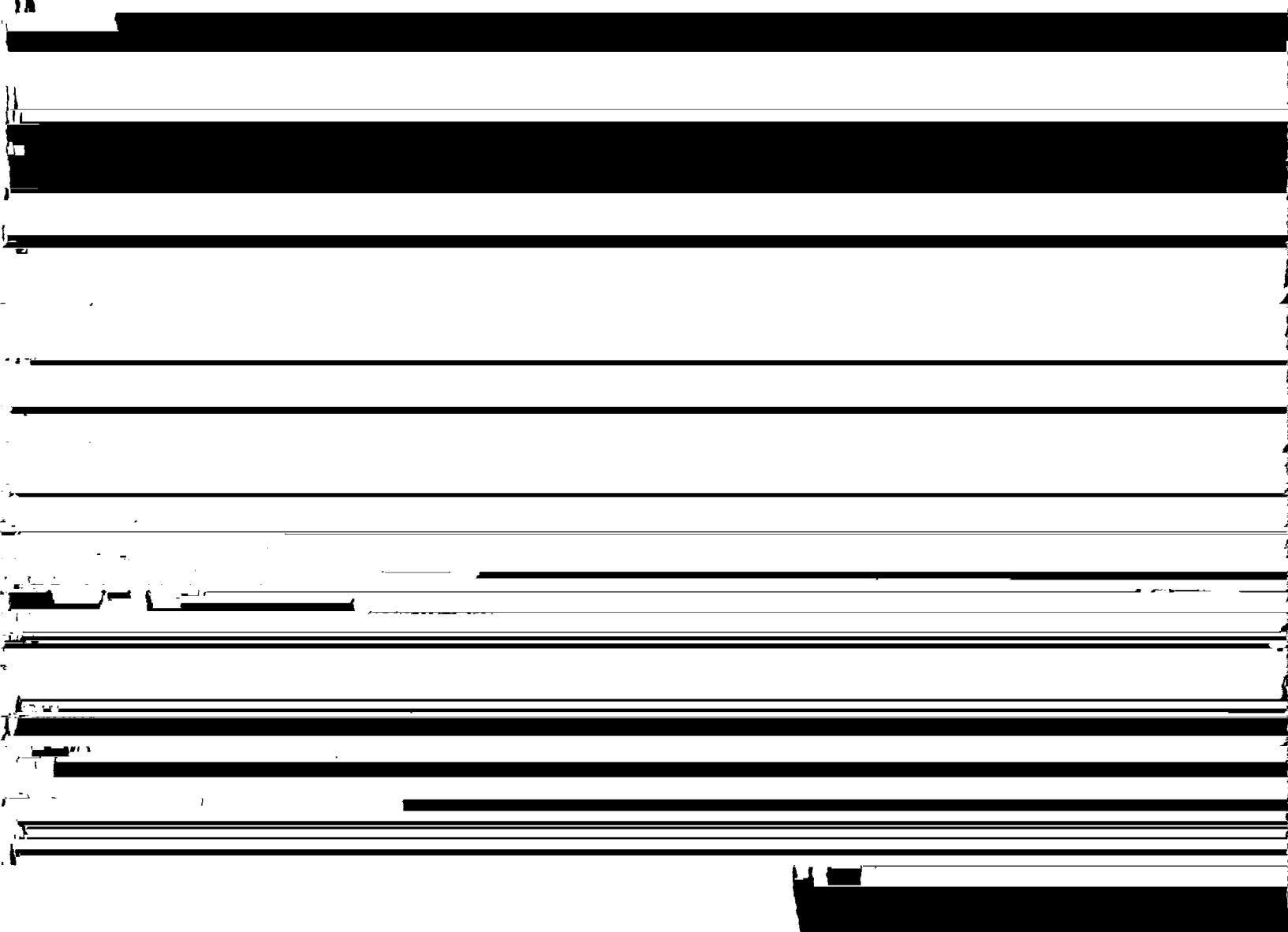


secrets; and (3) the scope and short time frame for response make compliance impossible.

Respondent asserts that its subpoena seeks relevant information and the subpoena is not unduly burdensome. Respondent further asserts that the Protective Order Governing Discovery Material, entered on October 16, 2003 in this case ("Protective Order") adequately protects BCBSTX's confidential and proprietary information.

### III.

Discovery sought in a proceeding before the Commission must be "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent." 16 C.F.R. § 3.31(c)(1); *Federal Trade Commission v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979). However, discovery may be limited if the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive, or if the burden and expense of the proposed



Counsel is not unreasonable. Unless a request for production indicates otherwise, the period of time for which documents should be produced is January 1, 1998 through the present.

**2. Definition of BCBSTX**

BCBSTX asserts that the subpoena defines BCBSTX as "Blue Cross and Blue Shield of Texas, a Division of Health Care Service Corporation, a Mutual Legal Reserve Company, its parents, subsidiaries, affiliates, employees, agents and representatives." BCBSTX asserts that

this definition expands the scope of the subpoena to Health Care Service Corporation itself and all of its divisions. Respondent does not address this argument in its opposition.

The scope of the subpoena is hereby limited to demand production only from Blue Cross and Blue Shield of Texas, its subsidiaries, affiliates, and employees.

**3. Confidential documents are discoverable**

BCBSTX asserts that the subpoena requests production of documents containing confidential and commercially sensitive information, including competitively sensitive pricing information and BCBSTX trade secrets.

"The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery." *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9<sup>th</sup> Cir. 1971). *See also Federal Trade Commission v. Rockefeller, et al.*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977) *aff'd* 591 F.2d 182 (2<sup>d</sup> Cir. 1979) (An objection to a subpoena

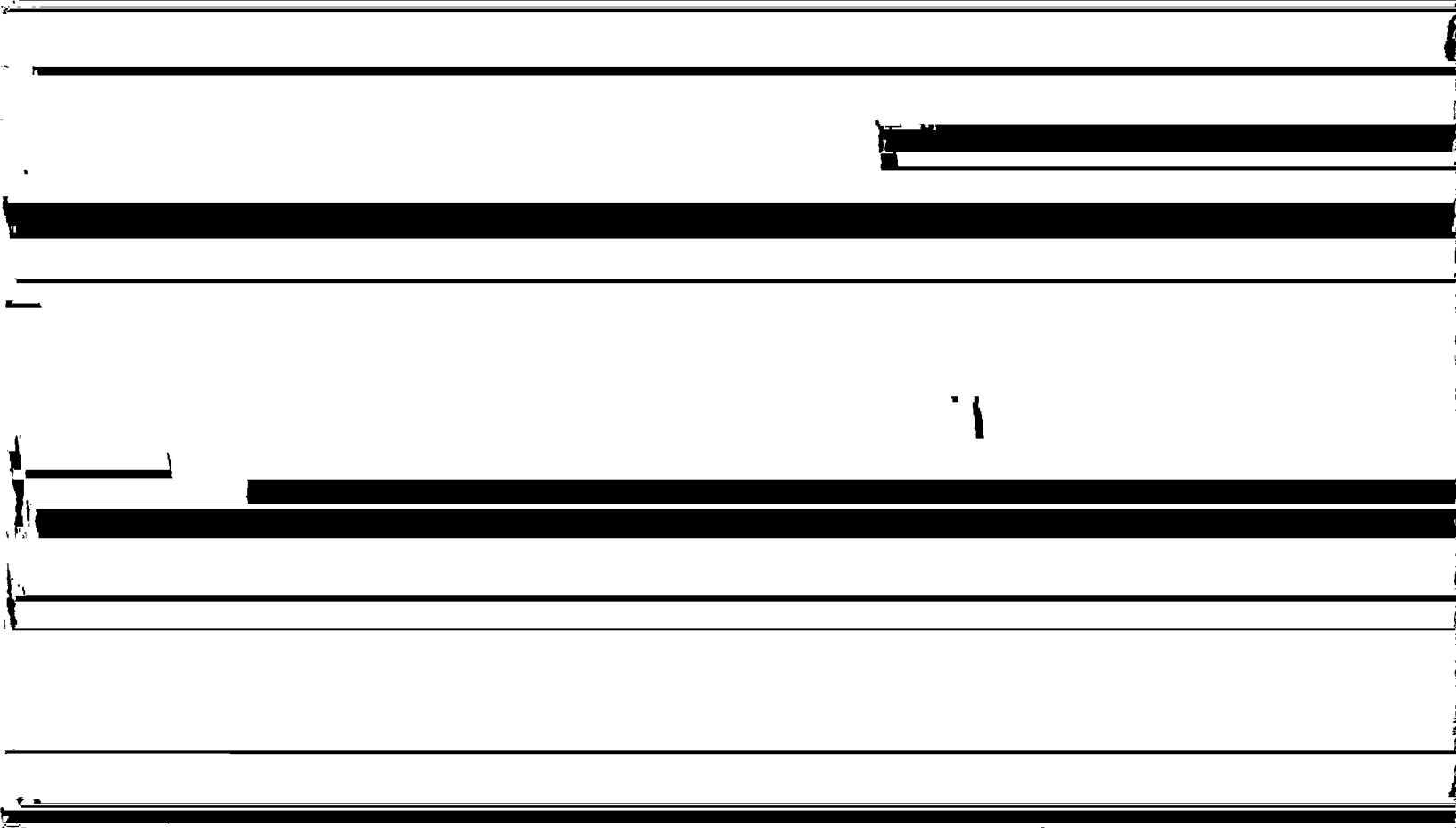
BCBSTX. In addition, BCBSTX is not required to produce privileged information. If information is withheld on grounds of privilege or any similar basis, BCBSTX shall submit

**Request Number 1: Documents previously produced or otherwise sent to the Federal Trade Commission concerning your business relationships with healthcare providers in the State of Texas.**

BCBSTX asserts that these documents may be retrieved from the Commission as easily as from BCBSTX and that because the Commission is a party, while BCBSTX is a non-party, Respondent should be required to seek the documents from the FTC. Respondent replies that a subpoena may not be avoided merely by saying the information sought is available from another.

Pursuant to Commission Rule 3.31(c)(1), discovery may be limited if it is obtainable from another source that is more convenient. 16 C.F.R. § 3.31(c)(1)(i). It is more convenient for a party, Complaint Counsel, to produce documents already obtained from BCBSTX than to request production, a second time, from BCBSTX, a non-party.

To the extent that documents responsive to this request are relevant, Respondent may request them from Complaint Counsel. The issue presented here is distinguishable from other orders addressing whether the Commission, as a repository of documents obtained from non-parties, should be compelled to produce documents obtained from non-parties. *Cf In re Schering-Plough Corp.*, Docket 9297 (Order on American Home Products Corporation's and Schering Plough Corporation's Motion to Compel and on Non-Parties Andrx Pharmaceutical, Inc.'s and Aventis Pharmaceutical Inc.'s Motion for a Protective Order, September 10, 2001) (available at [www.ftc.gov/os/adjpro/index.htm](http://www.ftc.gov/os/adjpro/index.htm)). Here, the non-party, BCBSTX, is not seeking to prevent Complaint Counsel from producing documents BCBSTX previously produced to the Commission. Rather, it is asking Respondent to prevent the Commission from producing



and probably millions.” Affidavit of Rick Haddock, filed January 9, 2004, at 4. BCBSTX also asserts that the information provided to the Attorney General in the course of an investigation is

Respondent asserts that the requested documents are highly relevant and that the burden of re-producing files does not outweigh the benefit of allowing Respondent to develop a defense. Respondent asserts that its intent was to make the request for documents less burdensome by

BCBSTX's objection to the scope of years for which documents are requested and its concerns about maintaining the confidentiality of its documents are addressed *supra*, section III.A. The subject matter, which relates solely to Respondent, is not overly broad.

BCBSTX's request to quash Request Number 4 is denied. However, internal information about active negotiations between BCBSTX and NTSP may be redacted. Entire documents relating to NTSP may not be withheld unless BCBSTX provides a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; and the names, addresses, positions, and organizations of all authors and recipients of

the item.

~~BCBSTX's request to quash Request Number 4 is denied. However, internal information about active negotiations between BCBSTX and NTSP may be redacted. Entire documents relating to NTSP may not be withheld unless BCBSTX provides a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; and the names, addresses, positions, and organizations of all authors and recipients of~~

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



DOCSY 12/1/78 (M. L. O'Connell) DOCSY shall produce only

[REDACTED]

[REDACTED]

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