

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

of redacted versions of certain documents. *Id.* On January 31, Complaint Counsel and Respondent met and conferred on a number of issues. Complaint Counsel's position regarding the eight withheld documents remained unchanged from December 11, 2017. *Id.* at 2. On February 1, 2018, Complaint Counsel submitted a revised privilege log, on which all eight documents were still marked privileged. *See* Respondent's Exhibit B. On February 6, Complaint Counsel confirmed that this was the "final version" of the privilege log, and that Complaint Counsel would not be producing the documents in dispute. Respondent's Statement of Conference at 2. *See* Respondent's Exhibit 8.

On February 23, 2018, *Respondent* confirmed that the parties were "at an impasse concerning Complaint Counsel's" claims of privilege over at least five of the seven documents. *See* Respondent's Exhibit 9, p.2. In the same email, Respondent requested that Complaint Counsel join Respondent in filing a joint motion regarding two documents: **FTC-INFO-00000222** and **FTC-INFO-00000289**. *Id.* Complaint Counsel declined this request. On March 6, 2018, Respondent filed its present motion.

Respondent's motion is untimely as to at least five of the seven documents for which it seeks in camera review.² In addition, Respondent's arguments are insufficient to warrant *in camera* review of any of the documents that Complaint Counsel has withheld on grounds of privilege.

ARGUMENT

I. Respondent's Motion is Untimely as to At Least Five Documents

The Scheduling Order provides that, "where parties have been engaging in negotiations over a discovery dispute, the deadline for the motion to compel shall be within 5 *days* of reaching an impasse." Scheduling Order ¶ 10 (Jul. 6, 2017) (emphasis added). This Court has

² **FTC-INFO-00000110; FTC-INFO-00000223; FTC-INFO-00000236; FTC-INFO-00000228; and FTC-INFO-00000230.**

previously evaluated the timeliness of a motion based on the date of the parties' impasse

on parties' "negotiations as to the sufficiency of" the response regarding a specific question, regardless of continuing disputes regarding other related questions).

Indeed, the Court may reasonably conclude that the parties reached impasse on *all* of the documents well in advance of Respondent's filing. Complaint Counsel repeatedly and consistently adhered to its position that the documents at issue are privileged. Respondent declared an impasse on February 23, meaning that a motion was required on or before February 28. After February 23, the only issue that was discussed by the parties was whether Complaint Counsel would join Respondent's motion (as to two documents). Such discussions should not extend the deadline for the filing of Respondent's motion.

II. Respondent Has Failed to Demonstrate that *In Camera* Review is Appropriate

Independent of the untimeliness of Respondent's motion, Respondent also fails to make the requisite preliminary showing that *in camera* review is necessary or appropriate. A party seeking *in camera* review of documents withheld from production on the basis of privilege must demonstrate "a factual basis adequate to support" the necessity of such a review. *United States v. Zolin*, 491 U.S. 554, 572 (1989). *See also Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 792 (D.C. Cir. 1971) (citing *United States v. Reynolds*, 345 U.S. 1, 11 (1953)). Such a threshold showing is necessary to "protect[] open and legitimate disclosure" among parties entitled to privilege, *Zolin*, 491 U.S. at 571; to guard against the erosion of due process; and to avoid burdening courts with routine review of "large evidentiary records." *Id.* "There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents." *Id.*

The cases cited by Respondent – *In re Amrep Corp.*, 90 F.T.C. 140 (1977) and *Kerr v. United States District Court*, 426 U.S. 394 (1976) – are not to the contrary. They stand for the unremarkable proposition that *in camera* review of privileged material is *sometimes* appropriate.

But *in camera* inspection is generally disfavored, absent need. *Zolin*, 491 U.S. at 571-72. *See also Torres v. Kuzniasz*, 936 F. Supp. 1201, 1213 (D.N.J. 1996) (“The purpose of the rules governing assertion of privileges is, in part, to avoid having the court expend its resources in reviewing every document that every [party] claims is privileged.”).

In camera review is particularly disfavored where, as here, Complaint Counsel provided a detailed description and basis of privilege for each of the seven withheld documents. *See* Respondent’s Exhibit 4. *See also Linder v. NSA*, 94 F.3d 693, 696-97 (D.C. Cir. 1996); *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 883 (5th Cir. 1981). A detailed description of the documents “is a surrogate for the production of documents for *in camera* review, designed to enable the district court to rule on a privilege without having to review the document itself.” *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1249 (4th Cir. 1994). *See also Pentagen Techs., Int’l. Ltd. v. United States*, 2000 WL 347165, at *2 (S.D.N.Y. March

To overcome the privilege, the party opposing the privilege must show that the disclosure is “essential” to the fair determination of the party’s case. *Rovario*, 353 U.S. at 61. *See Holman v. Cayce*, 873 F.2d 944, 946 (6th Cir. 1989); *Harper & Row*, 1990 FTC LEXIS at *9 (“The respondents have the burden of showing that the identity of the informants is essential to their defense. . . .”). This requires more than “mere conjecture or supposition about the possible relevancy of the informant’s testimony.” *Kleberg County*, 86 Fed. Appx. at 34 (internal citations omitted). The informant’s privilege “will not yield to permit a mere fishing expedition, nor upon bare speculation that the information may possibly prove useful.” *United States v. Valles*, 41 F.3d 355, 358 (7th Cir. 1994) (internal quotation omitted).

Respondent has ma

The small number of documents that have been withheld are those that, based on their content, would “tend to reveal the identity of the informant.” *See Napier*, 436 F.3d at 1136. *See also Pool Prods.*, 2013 U.S. Dist. LEXIS at *9 (informant’s privilege “extends to information that would tend to reveal the identity of the informant”) (internal quotation omitted); *FTC v. AMG Servs.*, 291 F.R.D. 544, 559 (D. Nev. 2013) (FTC may withhold documents in their entirety where the requesting party “may still be able to surmise the identities of the individuals based on the information provided, the type of relationship the information derived from, and/or the date of the communications”).⁶ Moreover, Complaint Counsel does not plan to rely on these documents in prosecuting its case against Respondent. *Cf. AMG Servs.*, 291 F.R.D. at 558-59 (upholding withholding of certain documents under informant’s privilege where FTC represented that “any documents created as a result of the informants’ communications were produced, and [requesting party] has the ability to conduct discovery regaSee

powers are actively supervised by the state.” *Id.*⁷ Respondent cannot rely on legal arguments as evidence that the government’s informants should have “no reasonable fear” of retaliation. Indeed, the government’s case against Respondent expressly alleges the type of illegitimate enforcement activity that Respondent now (implausibly) claims is unlikely and also that Respondent’s misconduct has not been supervised by the state. *See* Compl. ¶¶ 29-42, 51-54. The Supreme Court requires “active supervision” of state boards comprised of “market participants,” such as Respondent, precisely because market participants are poor judges of whether their enforcement activity actually serves a bona fide public purpose. As the Supreme Court observed in *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015):

Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy.

Id. at 1111 (internal citations omitted).

Respondent further asserts that the informant’s privilege should not apply because Complaint Counsel has disclosed parties with relevant knowledge. Respondent’s Motion at 1; Respondent’s Memorandum at 3 n.3. Respondent is correct that the privilege does not apply where the identity of the informant has already been disclosed (*see FTC v. Qualcomm Inc.*, 17-cv-00220 LHK, at *4 (N.D. Cal. Aug. 24, 2017)), but the “disclosure” must be more than mere speculation. Rather, there must be an express identification or overwhelming evidence as to the identity of the informant. *Dole*, 870 F.2d at 374-75. Courts have found that merely identifying

⁷ This issue is currently pending before the Commission in both Respondent’s Motion to Dismiss Complaint and Counsel’s Motion for Partial Summary Judgment. *See* Respondent’s Motion to Dismiss Complaint (Nov. 27, 2017); and Complaint Counsel’s Motion for Partial Summary Decision (Nov. 27, 2017), *In re Louisiana Real Estate Appraisers Board*, Docket No.9374. Oral argument on both of these motions was held before the Commission on February 22, 2018.

In determining whether the law enforcement privilege applies, a court must balance “[t]he public interest in nondisclosure” against “the need of a particular litigation for access to the privileged information.” *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988). Such balancing includes multiple factors, such as “the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information,” “the impact upon persons who have given information of having their identities disclosed”; and “the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure,” among others. *Id.* (citing *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973)).

Respondent asserts, without citation, that the documents at issue are not entitled to law enforcement protection because they involve “communications sent by third parties.” Respondent’s Memorandum at 6. Respondent offers no support or rationale for the claim that the law enforcement privilege should be limited, essentially, to what already constitutes attorney work product (such as “handwritten notes” by attorneys). *See id.*

In fact, the law enforcement privilege is not so circumscribed, as its purpose is to broadly protect the ability of the government to conduct investigations without interference. *See AMG Servs.*, 291 F.R.D. at 559 (“The public has an interest in agencies conducting investigations without the targets of the investigations interfering, as the agencies’ goal is to protect the public from fraud and deception.”); *Tuite*, 181 F.R.D. at 176-77 (“The privilege serves to preserve the integrity of law enforcement techniques and confidential sources, protects witnesses and law enforcement personnel, safeguards the privacy of individuals under investigation, and prevents interference with investigations.”). *See also Sealed Case*, 856 F.2d at 272 (refusing request for “disclosure of the information would jeopardize ongoing investigations by prematurely revealing facts and investigatory materials to potential subjects of those investigations”); *Hoechst Marion*

Roussel, 2000 FTC LEXIS at *14 (refusing request for production of the FTC’s discovery requests served on third parties in pre-complaint investigation).

Indeed, several of the factors in the “balancing” test contemplate protecting information secured by the government from third parties. *See Sealed Case*, 856 F.2d at 272 (among others, considering “the extent to which disclosure will . . . discourage[e] citizens from giving the government information”; “the impact upon persons who have given information of having their identities disclosed”). *See also Tuite*, 181 F.R.D. at 179 (discussing the “potential harm to individuals who have provided [the government] with information in having their identities disclosed”).

Respondent offers no basis for why its need for these documents outweighs the government’s interest in protecting its ability to conduct ongoing investigations.

CONCLUSION

For the foregoing reasons, Respondent’s Expedited Motion for *In Camera* Review should be denied.

Dated: March 9, 2018

Respectfully submitted,

/s Lisa Kopchik
Geoffrey M. Green

EXHIBIT 1

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

In the Matter of

Louisiana Real Estate Appraisers Board,
Respondent

Docket No. 9374

DECLARATION OF D. BRUCE HOFFMAN

I, D. Bruce Hoffman, declare as follows:

1. I am the Acting Director of the Bureau of Competition (the "Bureau") of the Federal Trade Commission ("FTC" or "Commission"). I have held this position since August 2017. I am an attorney and a duly admitted member of the Florida and District of Columbia bars. This declaration is based on my professional experience, personal knowledge, and information that I have received in my official capacity as Acting Bureau Director.
2. I supervise the Bureau's Assistant Directors, who in turn supervise the attorneys and other

Background on Commission Investigations and the Need for Informant Confidentiality

3. Pursuant to Rule 0.16 of the FTC's Rules of Practice and Procedure, 16 C.F.R. § 0.16, the Bureau is responsible for enforcing federal antitrust and competition laws, including the Federal Trade Commission Act, the Clayton Act, and certain other statutes. In fulfilling its

the content of their communications with Commission staff will be kept confidential, is often necessary for members of the public to communicate with Commission staff freely and without fear of reprisal. For example, a firm may be hesitant to discuss a state regulatory board's anticompetitive practices if doing so would become public and expose the board to adverse and unjustified action by the board (such as license revocation).

9. Without the assurance of anonymity, voluntary reporting of alleged antitrust violations to

the Commission could be chilled. In addition, industry participants could be discouraged

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

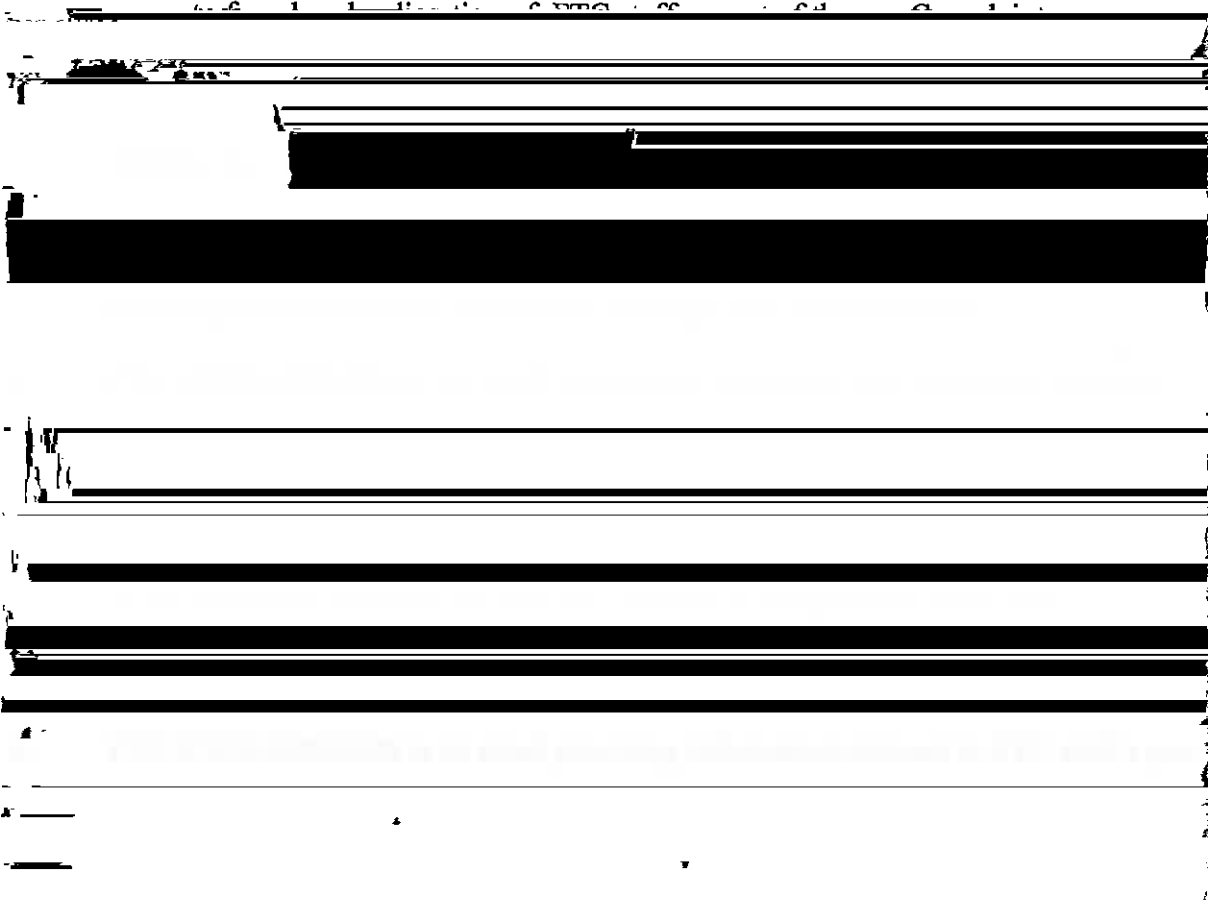
The Need to Protect the Informant and the Law Enforcement Privileges in this Matter

11. During the course of the investigation of this Respondent, Commission staff interviewed and received information and documents from many industry participants. Additionally, some industry participants brought to Commission staff's attention potential legal violations and other information helpful to the investigation. I have been informed that these industry participants expressed concern to Commission staff that their voluntary submissions and other cooperation would subject them to significant business and legal risk if their cooperation became known to Respondent, including the risk that Respondent would target them in its investigations. These concerns are understandable given the nature of the Commission's complaint allegations in this matter, namely that Respondent targeted some appraisal management companies ("AMCs") for enforcement, levied fines and threatened license suspensions. Only after receiving assurances from Commission staff that staff would make all appropriate efforts to protect their identities were these parties willing to communicate freely with Commission staff.
12. I also understand that informants continue today to fear reprisals if their cooperation with the Commission's investigation were to be disclosed to Respondent or become public.
13. I understand that Complaint Counsel also produced to Respondent nearly all correspondence between non-parties and FTC staff during the investigation, withholding only eight such documents exchanged between staff and non-parties. These documents were withheld primarily on the basis of the informant's privilege and/or the law enforcement privilege.

4. One of the documents, FTC INFO 00000330, was subsequently produced to Respondent

15. I have personally reviewed the seven documents that Complaint Counsel has withheld from production, and have concluded that these documents were appropriately withheld based on one or more privileges.

- a. **FTC-INFO-00000110** and **FTC-INFO-00000233** are duplicate documents. I believe that these documents, which are emails regarding a complaint about a state other than Louisiana, are protected both by the informant's privilege and the law enforcement privilege. Further, on the face of the documents, it is clear that nothing in them relates to the state of Louisiana or Respondent.
- b. **FTC-INFO-00000222** is an attachment to an email that was produced to Respondent (**FTC-INFO-00000221**). This attachment is a spreadsheet prepared at the



that this document is protected by both the informant's privilege and law

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

e.

of Louisiana or Respondent.

f. **FTC-INFO-00000289** is a presentation, the disclosure of which would tend to reveal the identity of an informant based on the content of the document, even if the name is redacted. The author has expressly relayed concerns of retaliation, as the author apparently regularly appears before Respondent. Based on this, I believe that this document is protected by the informant's privilege.

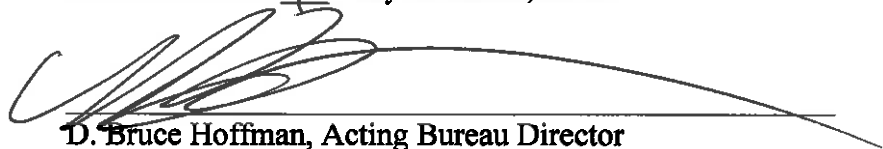
16. As discussed above, the Commission's ability to conduct investigations and to enforce the antitrust laws depends on preserving the confidentiality of this type of information. Maintaining the confidentiality of informants' identities and the information they provided to the Commission is critical to the ability of the Commission to fulfill its Congressionally-mandated duties. If this discovery were allowed, I believe that members of the public would be less willing to bring complaints of potential antitrust violations to the Commission's attention and to candidly express their views on the impact on competition of the conduct under investigation. As a result, the Commission's investigations, and resulting decisions about potential enforcement actions, would occur without the benefit of valuable market

potential Commission investigations, because disclosure could prejudice the target before any finding of a violation has occurred, could discourage the target from cooperating with any ensuing investigation, and could alert the target that its business records could become subject to compulsory process. This too would seriously impair the Commission's ability to conduct investigations and enforce the antitrust laws.

~~_____~~

is true and correct.

Executed on the 9th day of March, 2018.



D. Bruce Hoffman, Acting Bureau Director

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Date: March 9, 2018

By: /s/ Lisa B. Kopchik
Lisa B. Kopchik, Attorney