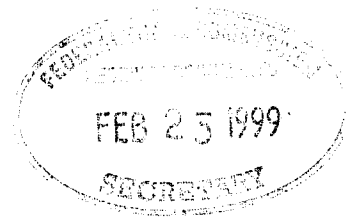


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)
)
)
INTEL CORPORATION,)
)
)
a corporation.)

DOCKET NO. 9288

ORDER RE *IN CAMERA* TREATMENT OF EVIDENCE AT TRIAL

In the interest of ensuring that matters raised by this proceeding are open to the public and, at the same time, to ensure that confidential commercial information submitted by Intel Corporation (“Intel”) or third parties (whether pursuant to compulsory process or voluntarily) is granted appropriate protection from potentially harmful disclosure, this order sets forth the standards by which requests for *in camera* treatment will be evaluated. The parties are urged to provide this order to third parties who they anticipate may request *in camera* treatment of evidence.

The Federal Trade Commission strongly favors making available to the public the full record of its adjudicative proceedings to permit public evaluation of the fairness of the Commission’s work, and to provide guidance to persons affected by its actions. *Crown Cork & Seal Co., Inc.*, 71 F.T.C. 1714, 1714-15 (1967); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961)(“there is a substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons”).¹ Accordingly, the Commission’s Rules of Practice provide for issuance of *in camera* orders only in unusual and

¹ See also *RSR Corp.*, 88 F.T.C. 734 (1976), in which the Commission explained:

One reason for the requirement that proceedings of this sort be decided “on the record” is to permit the public to evaluate the fairness and wisdom with which the decisions of public agencies have been made, and to permit affected parties to draw guidance from those decisions in determining their future conduct. . . . [*I*]n *camera* treatment of certain relevant information may be appropriate where the prospective injury from disclosure outweighs the public interest in full knowledge.

Id. at 734-35.

exceptional circumstances upon a showing of good cause. Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b); *Hood*, 58 F.T.C. at 1189.

The party seeking *in camera* treatment has the burden of showing "that the public disclosure . . . will result in a clearly defined, serious injury to the person or corporation whose records are involved." *Hood*, 58 F.T.C. at 1188. The party seeking the treatment "must make a clear showing that 'the information concerned is sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury.'" *Volkswagen of America, Inc.*, 103 F.T.C. 536, 538 (1984); *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). Whenever an applicant seeks *in camera* treatment, it should demonstrate the necessity thereof by "using the most specific information available." *Bristol-Myers Co.*, 90 F.T.C. 455, 457 (1977). See also *Kaiser Aluminum & Chem. Co.*, No. 9080 (F.T.C. Jan. 3, 1978).

In *Bristol-Myers*, 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. 90 F.T.C. at 456-57. The likely loss of business advantages is a good example of a "clearly defined, serious injury." *General Foods Corp.*, 95 F.T.C. at 355.

A determination that a document should be accorded *in camera* treatment does not end the inquiry. The next step is to determine the duration for which it will be held *in camera*. In making this determination, the distinction between trade secrets and ordinary business records is important since ordinary business records are granted less protection than trade secrets. See *Hood*, 58 F.T.C. at 1189. "Trade secrets" are primarily limited to secret formulas, processes, and other secret technical information. *Hood*, 58 F.T.C. at 1189; *General Foods*, 95 F.T.C. at 352. "Ordinary business records" includes names of customers,² prices to certain customers, and costs of doing business and profits. *Hood*, 58 F.T.C. at 1189.

Unlike the private interest satisfied by an *in camera* order, the public interest in open proceedings does not fade over time. Accordingly, permanent *in camera* treatment will rarely be granted. See *Volkswagen of America*, 103 F.T.C. at 539.³ Applicants seeking indefinite *in*

² Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), prohibits the Commission from publishing "trade secrets and names of customers." This provision does not apply to adjudicative proceedings. *Hood*, 58 F.T.C. at 1186 n.1. It does, however, show Congressional concern for this type of business information.

³ The discussion of permanent *in camera* treatment in Rule 3.45 of the Commission's Rules of Practice reflects this common sense approach:

[An] expiration date [for an *in camera* order] may not be omitted except in

camera treatment must demonstrate “at the outset that the need for confidentiality of the material is not likely to decrease over time.” *E.I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, *2 (April 25, 1990)(quoting 54 Fed. Reg. 49,279 (1989)). Requests for indefinite *in camera* treatment should provide justification as to why the document should be withheld from the public’s purview in perpetuity and why the requestor believes the information is likely to remain sensitive or become more sensitive with the passage of time. See *DuPont*, 1990 FTC LEXIS 134 at *2.

In addition, there is a presumption that *in camera* treatment will not be provided to information that is three or more years old. See, e.g., *General Foods Corp.*, 95 F.T.C. at 353; *Crown Cork & Seal Co.*, 71 F.T.C. at 1715.

IT IS HEREBY ORDERED that:

With respect to documents obtained in discovery in this administrative proceeding that have been deemed confidential pursuant to the protective order entered on July 20, 1998, in the event that counsel for either party desires to introduce into evidence at this proceeding any information or documents designated confidential, counsel seeking to introduce said information into evidence shall provide the party who submitted such document (“Document Submitter”) no less than ten (10) business days prior notice of their intent to offer such evidence, so that Document Submitter may seek *in camera* treatment of said information or documents, pursuant to Rule 3.45 of the Commission’s Rules of Practice. If advance notice cannot be provided pursuant to this Order, Document Submitter shall be so notified at the time of introduction of such information or documents, and said information or documents shall be accorded temporary *in camera* treatment pending a ruling by the Administrative Law Judge upon the request of the Document Submitter for such treatment, which request must be filed within ten (10) business days of receipt of such notice.



James P. Timony
Administrative Law Judge

Dated: February 23, 1999

unusual circumstances, in which event the order shall state with specificity the reasons why the need for confidentiality of the material, or portion thereof at issue is not likely to decrease over time, and any other reasons why such material is entitled to *in camera* treatment for an indeterminate period.

16 C.F.R. § 3.45(b)(3).