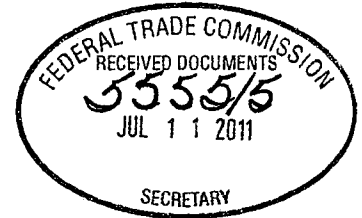


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

ORIGINAL



_____)
In the Matter of)
)
The North Carolina Board of)
Dental Examiners,)
Respondent.)
_____)

DOCKET NO. 9343

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

I.

On June 15, 2011, Respondent filed a Motion for *In Camera*/Protected Treatment of Respondent's Confidential Information in the Record and Complaint Counsel's Post-Trial Filings ("Motion"). Complaint Counsel filed its Opposition on June 24, 2011. As explained below, Respondent's Motion is GRANTED in part and DENIED in part.

II.

Trial in this matter commenced on February 17, 2011 and the record was closed on March 30, 2011. After the conclusion of trial, pursuant to Commission Rule 3.46(a), the parties each submitted post-trial briefs and proposed findings of fact and conclusions of law, and each party submitted replies thereto ("Post-Trial Filings"). On April 29, 2011, Respondent filed a Motion to Prevent Public Posting of Complaint Counsel's Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law Containing Confidential Information on the Federal Trade Commission's Website. By Order dated May 16, 2011, that motion was denied without prejudice and, after receipt and review of information requested in the Order, was subsequently denied by Order dated June 3, 2011, since the material sought to be withheld from the public website was not subject to an *in camera* order and did not constitute Sensitive Personal Information, as those terms are defined in Commission Rule 3.45, and explained in the May 16, 2011 Order.¹

Respondent now moves for *in camera* treatment for documents it states are in the following categories: (1) documents in open case files; (2) memoranda or other logs regarding open cases and those proposed to be closed; (3) closed session Board minutes; and (4)

¹ The Office of the Secretary of the Federal Trade Commission has refrained from posting the Post-Trial Filings on the Federal Trade Commission's website pending the resolution of Respondent's Motion for *In Camera* Treatment.

documents reflecting revenues of Board members. Respondent supports its motion with the Declaration of Bobby White, Chief Operating Officer of the North Carolina State Board of Dental Examiners.

The Scheduling Order entered in this case set January 7, 2011 as the deadline for filing motions for *in camera* treatment of proposed trial exhibits. In addition, the Scheduling Order set December 21, 2010 as the deadline for parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing to provide notice to the opposing party. Complaint Counsel states that it sent Respondent such notice in December 2010. Complaint Counsel's Opposition to Respondent's Motion to Prevent Public Posting at 3. Respondent states that it did not receive the notice "that would allow for it to move for *in camera* treatment." Motion at 2.

Accepting as true Respondent's statement that it did not receive the December 2010 notice, that fact does not demonstrate that Respondent was not aware of its obligation to file a motion for *in camera* treatment. In addition to the January 7, 2011 deadline for filing motions for *in camera* treatment, Additional Provision 6 of the Scheduling Order directed the parties to standards used in evaluating motions for *in camera* treatment for evidence to be introduced at trial, further putting Respondent on notice of the requirements for filing an *in camera* treatment motion.

Complaint Counsel provided its proposed exhibit list to Respondent on December 8, 2010, and its revised exhibit list to Respondent on January 3, 2011, which listed as potential trial exhibits the documents for which Respondent now seeks *in camera* treatment. Thus, on January 3, 2011 at the very latest, Respondent was on notice that Complaint Counsel sought to introduce on the public record at trial documents that Respondent had designated as confidential. At the final prehearing conference on February 15, 2011, the issue of *in camera* treatment for evidence was discussed and Respondent did not raise the issue of the confidential documents it now seeks to withhold from the public record. Therefore, even if Respondent did not receive the December notice from Complaint Counsel, Respondent was required to be familiar with all provisions of the Scheduling Order, which means that Respondent was or should have been aware of its obligation to file a motion for *in camera* treatment to protect its confidential documents from being disclosed at trial.

Respondent continues to maintain "that the FTC Rules do not require Respondent to meet the specific showing under Rule 3.45(b) regarding '[i]n camera treatment of material' in order for Complaint Counsel to be required to redact such information from its Proposed Findings, because Rule 3.45 makes a clear distinction between information that is to be accorded *in camera* treatment and information that is 'subject to confidentiality protections pursuant to a protective order.'" Motion at 2. This argument was previously rejected as explained in the May 16, 2011 Order. Respondent fails to accept or acknowledge the difference between disclosure of materials offered into evidence and disclosure of materials that are subject to the confidentiality protections of a protective order. 16 C.F.R. § 3.45(b) ("No material, or portion thereof, offered into evidence, whether admitted or rejected, may be withheld from the public record unless it falls within the scope of an [*in camera*] order . . .").

Moreover, Respondent's argument ignores the fact that the Post-Trial Filings were filed pursuant to Commission Rule 3.46, which sets forth: "Within 21 days of the closing of the hearing record, each party may file with the Secretary for consideration of the Administrative Law Judge proposed findings of fact, conclusions of law, and rule or order, together with reasons therefor and briefs in support thereof. . . . If a party includes in the proposals **information that has been granted *in camera* status** pursuant to § 3.45(b), the party shall file 2 versions of the proposals in accordance with the procedures set forth in § 3.45(e)." 16 C.F.R. § 3.46(a) (emphasis added). Thus, Rule 3.46 requires a party to file two versions of post-trial filings only where the post-trial filings contain information that has been granted *in camera* status and not, as is the case here, where the post-trial filings contain information that was designated as confidential, but for which *in camera* status was not granted.

Following the June 3, 2011 Order that denied Respondent's motion to prevent the public posting of Complaint Counsel's Post-Trial Filings, Respondent filed a motion for leave to file the instant motion for *in camera* treatment. A motion for *in camera* treatment would be procedurally improper for two reasons. First, the deadline for filing a motion for *in camera* treatment was January 7, 2011. Second, the motion seeks to withhold from the public record materials and information that have already been offered and admitted into evidence at the public trial in this matter, with no objection by Respondent's counsel.² Nevertheless, Respondent's motion for leave to file was granted in order to evaluate Respondent's claim that North Carolina law protects the information from public disclosure.

Indeed, if the North Carolina statute upon which Respondent relies prohibits the disclosure of the documents Respondent now seeks to withhold, *in camera* treatment is appropriate. See *In re POM Wonderful LLC*, 2011 FTC LEXIS 78, *5 (May 9, 2011) ("[W]here federal regulations prohibit a federal agency from disclosing information, prevention of a clearly defined, serious injury has been codified, and *in camera* treatment, for an indefinite period, is appropriate."). No lesser deference shall be given to a state statute governing a state board's disclosure of information. However, because Respondent's motion for *in camera* treatment is untimely, the only argument advanced by Respondent that will be addressed is whether the North Carolina statute requires that materials for which Respondent seeks *in camera* treatment be withheld from the public record in this case.

III.

Respondent states that pursuant to North Carolina General Statute 90-41(g) certain of its documents are subject to protection.

North Carolina General Statute 90-41(g) provides:

Records, papers, and other documents containing information collected or compiled by the Board, or its members or employees, as a result of **investigations, inquiries, or interviews conducted in connection with a**

² "Any material that has previously been made public will not be afforded *in camera* treatment." *In re ProMedica Health System, Inc.*, 2011 FTC LEXIS 70, *5 (May 13, 2011).

licensing or disciplinary matter, shall not be considered public records within the meaning of Chapter 132 of the General Statutes; provided, however, that any notice or statement of charges against any licensee, or any notice to any licensee of a hearing in any proceeding, shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of any investigation, inquiry, or interview; and provided, further, that if any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in any hearing before the Board, it shall then be a public record within the meaning of Chapter 132 of the General Statutes.

N.C.G.S. 90-41(g) (emphasis added).

On its face, Section 90-41(g) applies only to investigations conducted in connection with a “licensing or disciplinary matter.” Under the North Carolina statute, the Board has the authority to issue licenses, renewals of licenses, and take disciplinary actions against dentists practicing in North Carolina. N.C. Gen. Stat. §§ 90-30, 31, 34, 40, 40.1, 41. The Board’s authority to hold administrative hearings under the Dental Practice Act is limited to addressing conduct of its licensees or applicants for such a license. N.C. Gen. Stat. § 90-41.1(a)). The Board does not have authority to hold administrative hearings pertaining to claims that a non-licensee is engaging in the unlicensed practice of dentistry. N.C. Gen. Stat. § 90-41.1(a).

Most of the documents that the Board claims are confidential pursuant to N.C. Gen. Stat. § 90-41(g) relate to investigations that the Board has conducted on non-licensed providers of teeth whitening services. Such documents, relating to non-dentists, do not constitute “documents containing information collected or compiled by the Board . . . as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter” and thus are not protected from disclosure by N.C. Gen. Stat. § 90-41(g).

However, many of the exhibits for which *in camera* treatment is sought do in fact relate to investigations into complaints against dentists. For exhibits that are “documents containing information collected or compiled by the Board . . . as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter,” N.C. Gen. Stat. § 90-41(g) does provide a basis to withhold such documents from the public record. Accordingly, *in camera* treatment is proper only for “documents containing information collected or compiled by the Board . . . as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter.” N.C. Gen. Stat. § 90-41(g).

IV.

The following exhibits contain information relating to investigations in connection with a licensing or disciplinary matter involving licensed dentists and, based on an interpretation of the North Carolina statute as discussed above, *in camera* treatment is GRANTED, for an indefinite time, to: CX105, CX106, CX107, CX109, CX130, CX131,

CX132, CX160, CX270, CX276, CX303, CX315, CX316, CX317, CX318, CX319, CX320, CX321, CX368, CX439, CX447, CX462, CX471, CX478, CX479, CX480, CX481, CX482, CX483, CX530, CX537, CX622, CX623, CX624, CX625, CX639, CX640, CX656, CX658, CX659, and CX660.

Pursuant to this Order, the above listed documents shall be withheld from the public record. Although these documents have now been accorded *in camera* status, it is only the information pertaining to investigations in connection with licensed dentists that is protected from disclosure. Information from any of these exhibits pertaining to non-dentists is not covered by N.C. Gen. Stat. § 90-41(g) and, thus, is not protected from disclosure.

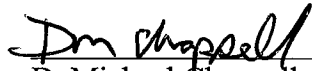
The parties are hereby directed to review their Post-Trial Filings to determine if those filings include any information that has been accorded *in camera* status by this Order. In addition, the parties are hereby directed to review the hearing transcript in this matter and determine if that transcript includes any information protected from disclosure by this Order.

Each party shall separately inform the Office of Administrative Law Judges of their determinations regarding information that has now been accorded *in camera* status by letter that delineates the specific information, if any, with reference to each specific proposed finding of fact, page in brief, or page and line number in the transcript. The parties shall have until 5:00 p.m. on July 14, 2011 to submit such letters to the Office of Administrative Law Judges.

If either party's Post-Trial Filings contain information that has been granted *in camera* status by this Order, pursuant to Rule 3.46(a), the party shall file 2 versions of its Post-Trial Filings in accordance with the procedures set forth in § 3.45(e), no later than July 20, 2011.

The Office of the Secretary will be notified by the Office of Administrative Law Judges if and when the Post-Trial Filings that have already been submitted should no longer be withheld from the FTC's website.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: July 11, 2011