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No. SCPW-25-419

IN THE SUPREME COURT OF THE STATE OF HAWAII

PUBLIC FIRST LAW CENTER,

Petitioner,

vs.

THE HONORABLE KEVIN T.
MORIKONE, Tax Appeal Court Judge,

Respondent.

ORIGINAL PROCEEDING
NO. 1CTX-21-1613

PETITION FOR WRIT OF
PROHIBITION AND WRIT OF
MANDAMUS

TAX APPEAL COURT, STATE OF
HAWAII

The Honorable Kevin T. Morikone, Tax
Appeal Court, State of Hawai'i

**MEMORANDUM IN OPPOSITION TO BOOKING.COM B.V.'S MOTION TO
SEAL CERTAIN TRANSCRIPTS; DECLARATION OF RICHARD P.
MCCLELLAN, III; AND DECLARATION OF R. BRIAN BLACK**

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Respondent Booking.com B.V. (Booking.com) moves for this Court to seal transcripts of *public* summary judgment hearings that took place on April 10, 2023 and May 6, 2024 as part of its tax appeal. There is no legal basis for a motion to seal transcripts of public hearings. And Booking.com’s motion misstates facts.

Petitioner Public First Law Center (Public First) respectfully requests that the Court deny the motion to seal.

I. SEALING SERVES NO COMPELLING INTEREST

Booking.com claims that sealing the two transcripts will serve a compelling interest in protecting trade secrets and confidential business information. Dkt. 5 at 3.¹ There are several problems with its argument.

First, procedurally, Booking.com incorrectly cites HCRR 3.3 as the basis for this motion. HCRR 3.3 concerns temporary sealing pending a more substantive review *by the court that maintains the record*. *Oahu Publ’ns Inc. v. Takase*, 139 Hawai‘i 236, 246-47, 386 P.3d 873, 883-84 (2016) (describing procedure after temporary sealing). This Court maintains the records at issue here. The two transcripts are filed in this action, not the tax appeal court. If this Court temporarily seals its records, *this* Court should issue the written order that provides notice, an opportunity to be heard, and substantive review of the basis for sealing.²

Second, Booking.com’s argument illustrates the improper scope of the asserted protected information. *See generally* Dkt. 1 at 17-27. None of the information from these transcripts is “confidential” within any reasonable understanding of that term. Booking.com affirmatively publishes online the same information that it seeks to hide through this motion to seal. The topics of concern discussed at the April 10, 2023

¹ Pinpoint citations reference the corresponding pages of the PDF.

² If the Court grants the motion for temporary sealing pending a decision not by this Court, but by the tax appeal court, Public First would respectfully request that the Court order a temporary remand to the tax appeal court that would permit Public First to supplement this petition with any sealing decision by the tax appeal court. *See, e.g., Oahu Publ’ns, Inc. v. Ahn*, 133 Hawai‘i 482, 488, 331 P.3d 460, 466 (2014).

hearing (Dkt. 25 at 35) are published verbatim on Booking.com's website.³ *Compare* Dkt. 11 at 19-20, 35-36, *with* Tax Dkt. 288 at 25.⁴

Similarly, the information of concern discussed at the May 6, 2024 hearing (Dkt. 25 at 35) has been published or disclosed by Booking.com in a variety of settings. For example, Booking.com's online contract terms for accommodation providers recite the same concepts described at the May 6, 2024 hearing. *Compare, e.g.,* Dkt. 15 at 5-10, 35, 37-41, *with* Tax Dkt. 288 at 20 (defining "Accommodation", "Accommodation Information", "Customer Data", "Extranet"), 21 (defining "Service" as "the online accommodation reservation system of Booking.com through which Accommodations can make their rooms available for reservation and through which Guests can make reservations at the Accommodations"), 22 (providing that "Accommodations" represent that "Accommodation Information" is true and remains the exclusive property of the accommodation and explaining the provisions that keep rates on the platform competitive to protect Booking.com's investments), 23 (describing the "Commission" earned by Booking.com based on bookings through the platform), 24-25 (describing the reservation process by which Booking.com sends a confirmation to the Accommodation with Customer Data that includes the Guest's wishes and that creates a contract relationship between the Accommodation and Guest that the Accommodation must accept). Also, Booking.com publicly filed similar discovery responses in its prior civil case. *Compare* Dkt. 15 at 37-38, *with* Civ. Dkt. 204 at 44-45, 47. Regardless whether there may be some protected information in the exhibits sealed by the tax appeal court – which is the subject of the petition – the information discussed in these public hearings was not confidential.

³ Because Public First did not have access to the April 10, 2023 hearing before it filed the motion to unseal – unlike the May 6, 2024 hearing, see below – Public First will not draw a direct connection between the April 10 transcript and Booking.com's online contractual terms in this publicly filed opposition, but it is obvious.

⁴ "Civ. Dkt." refers to filings in *Booking.com B.V. v. Takayama*, No. 1CC191000107; "Tax Dkt." refers to filings in *In re Booking.com B.V.*, No. 1CTX-21-1613.

Third, these hearings were open to the public. “Secrecy is a one-way street: Once information is published, it cannot be made secret again.” *United States v. Doe*, 870 F.3d 991, 1002 (9th Cir. 2017); accord *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004) (“We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again.”); *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1184 (9th Cir. 2006) (affirming an unsealing order because the information at issue was “already publicly available”); see also *Constand v. Cosby*, 833 F.3d 405, 410 (3d Cir. 2016) (“appeals seeking to restrain ‘further dissemination of publicly disclosed information’ are moot”); *MD Spa Shop LLC v. Med-Aesthetic Sols, Inc.*, No. 21-CV-1050, 2021 U.S. Dist. LEXIS 210552 at *18-19 (S.D. Cal. Oct. 29, 2021) (“A request to seal information that was publicly disclosed involves ‘an inherent logical dilemma’ in that ‘information that has already entered the public domain cannot in any meaningful way be later removed from the public domain.’”). Even as to the constitutional right of privacy, this Court has observed that an individual cannot claim protection for “information that has already been made public.” *Civil Beat Law Ctr. for the Pub. Interest, Inc. v. City & County of Honolulu*, 144 Hawai‘i 466, 482, 445 P.3d 47, 63 (2019). Prior public disclosure is a bell that cannot be unrung.

It does not matter whether anyone attended the hearings. Courts are not open to the public simply for those who happen to attend the proceeding. *Ahn*, 133 Hawai‘i at 494, 331 P.3d at 472 (“The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known.”). As this Court observed in *Ahn*: “It would be an odd result indeed were we to declare our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?” *Id.* at 506, 331 P.3d at 484 (quoting *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994)). Nothing justifies sealing information openly and voluntarily discussed in a public hearing.

The only “authority” that Booking.com cites is a plainly distinguishable Delaware Chancery Court decision. Dkt. 25 at 16. In that case, a witness during an open hearing “inadvertently” disclosed information that was not material to the underlying dispute. *In re Tr. for Gore*, C.A. No. 1165-VCN, 2011 Del. Ch. LEXIS 3, at *2-5 (Del. Ch. Jan. 6, 2011). As that judge, and later decisions of the same court, made clear, there is no sealing for information intentionally used by a party at the hearing or for information that is material to the dispute. *Id.* at *6-7 (lifting sealing order as to other information, *i.e.*, about the allocation of shares; “it would assist the public in understanding the dispute that the Court has been called upon to resolve. To that end, the policy values served by disclosure of the Share Information outweigh any incidental confidentiality concerns of the parties”); *accord, e.g., Baker v. Sadiq*, C.A. No. 9464-VCL, 2016 Del. Ch. LEXIS 304, at *4 (Del. Ch. June 8, 2016) (distinguishing *Gore* and denying motion to seal, in part, because introduction of the evidence was not “inadvertent” and the information was material to the dispute).

Here, the contract terms that Booking.com seeks to seal were core to the dispute about, for example, whether Booking.com has a principal-agent relationship with accommodation providers. That is why contract terms were discussed during the parties’ arguments on summary judgment. And there was nothing inadvertent about the disclosure. To the contrary, Booking.com knew that discussion during the hearings would be publicly accessible. When Booking.com attempted to close the courtroom and eject a member of the public from the March 18, 2024 summary judgment hearing, the Honorable Gary Chang said no.⁵ Decl. of Richard P. McClellan, III, dated June 25, 2025 (McClellan Decl.), ¶¶ 5-6. There is no similarity between *Gore* and this case.

Lastly, as it concerns the May 6, 2024 hearing, Booking.com’s factual assertions as the premise for sealing are wrong. Counsel for Booking.com declares that no member

⁵ Booking.com’s in-court request to close the courtroom was improper. *Ahn*, 133 Hawai‘i at 497, 331 P.3d at 475 (“if the court is contemplating whether closure of the courtroom is necessary, it must provide a reasonable opportunity for the public to object”); *accord United States v. Biagon*, 510 F.3d 844, 848 (9th Cir. 2007) (motion to close courtroom properly denied when “made orally at the hearing without prior notice”).

of the public has had access to or used the May 6, 2024 *transcript*. Dkt. 25 at 32 ¶ 13. That is misleading. On or about September 17, 2024 – before filing its motion to unseal with the tax appeal court – Public First obtained the recording of the May 6, 2024 hearing. Decl. of R. Brian Black, dated June 25, 2025, ¶¶ 2-4. Booking.com knew that Public First had obtained the May 6, 2024 recording because Public First quoted from the recording in the tax appeal court and in its petition to this Court. Tax Dkt. 263 at 4-5 (filed November 20, 2024); Dkt. 1 at 16-17 (filed May 23, 2025); *accord* Tax Dkt. 246 (Public First’s August 30, 2024 request for the recording). The public has had and used the information from the May 6, 2024 public hearing for months, including publicly quoting virtually all of the information that Booking.com now seeks to seal.

Counsel for Booking.com also declares that no member of the public was present in the courtroom at the May 6, 2024 hearing. Dkt. 25 at 31 ¶ 9. That is not correct. A member of the public was present at the May 6, 2024 hearing when Booking.com openly discussed its contract terms and discovery responses with the tax appeal court. McClellan Decl. ¶ 7.

Booking.com has proffered no justification for sealing the two transcripts.

CONCLUSION

Public First respectfully requests that the Court deny the motion to seal.

Dated: Honolulu, Hawai‘i, June 25, 2025

Respectfully submitted,

/s/ Robert Brian Black

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