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Attorneys for Non-Party
Public First Law Center

IN THE TAX APPEAL COURT OF THE
STATE OF HAWAII

In the Matter of the Tax Appeal of

BOOKING.COM B.V.,

Taxpayer-Appellant.

CASE NO. 1CTX-21-0001613

MEMORANDUM OF LAW IN
OPPOSITION TO TAXPAYER-
APPELLANT BOOKING.COM B.V.'S
MOTION TO SEAL TRANSCRIPTS;
DECLARATION OF RICHARD P.
MCCLELLAN, III; DECLARATION OF
R. BRIAN BLACK; and CERTIFICATE
OF SERVICE

HEARING MOTION

DATE: August 11, 2025
TIME: 1:30 PM
JUDGE: Hon. Kevin T. Morikone
TRIAL DATE: June 15, 2026

**MEMORANDUM OF LAW IN OPPOSITION TO TAXPAYER-APPELLANT
BOOKING.COM B.V.'S MOTION TO SEAL TRANSCRIPTS**

Taxpayer-Appellant 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. There is no legal basis for a motion to seal transcripts of public hearings. And Booking.com's motion misstates facts.



Non-party Public First Law Center respectfully requests that the Court deny Booking.com's motion to seal.

I. LEGAL STANDARDS

The Hawai'i Supreme Court has recognized that the public has the right to access judicial proceedings and records, including records filed in civil cases. *Grube v. Trader*, 142 Hawai'i 412, 422, 420 P.3d 343, 353 (2018); *accord Oahu Public's, Inc. v. Ahn*, 133 Hawai'i 482, 493 & n.14, 496 & n.18, 507, 331 P.3d 460, 471 & n.14, 474 & n.18, 485 (2014); *Estate of Campbell*, 106 Hawai'i 453, 462-63, 106 P.3d 1096, 1105-06 (2005) (observing that the public generally has the right "to inspect and copy public records and documents, including judicial records"). "[T]here is a strong presumption that court proceedings and the records thereof shall be open to the public." *Grube*, 142 Hawai'i at 428, 420 P.3d at 359. The proponent of sealing has the burden to overcome this presumption of access. *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1467 (9th Cir. 1990).

To seal records, "the reasons supporting closure must be articulated in findings." *Ahn*, 133 Hawai'i at 497-98, 331 P.3d at 475-76. "Requiring specific findings on the record enables the trial court to address each element necessary for closure and allows an appellate court to review the reasoning of the trial judge to ensure that protection of the public right was adequately considered." *Id.* at 498, 331 P.3d at 476. The order must provide "findings that 'the closure is essential to preserve higher values' and that the closure is 'narrowly tailored' to serve that interest." *Grube*, 142 Hawai'i at 424, 420 P.3d at 355; *Ahn*, 133 Hawai'i at 507, 331 P.3d at 485. The court thus must address specifically whether: "(1) the closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Grube*, 142 Hawai'i at 424, 420 P.3d at 355.

The trial court may not rely on "generalized concerns" but *must indicate facts* demonstrating "a compelling interest justifying the continued sealing of the hearing transcript." Additionally, the court must "specifically explain the necessary connection between unsealing the transcript" and the infliction of irreparable damage resulting to the compelling interest.

Ahn, 133 Hawai'i at 507, 331 P.3d at 485 (emphasis added) (citations omitted).

“To qualify as compelling, the interest must be of such gravity as to overcome the strong presumption in favor of openness. . . . [T]he asserted interest must be of such consequence as to outweigh both the right of access of individual members of the public and the general benefits to public administration afforded by open trials.” *Grube*, 142 Hawai`i 425-26, 420 P.3d at 356-57. If a compelling interest exists, “a court must find that disclosure is sufficiently likely to result in irreparable damage to the identified compelling interest.” *Ahn*, 133 Hawai`i at 507, 331 P.3d at 485. “It is not enough that damage could possibly result from disclosure, nor even that there is a ‘reasonable likelihood’ that the compelling interest will be impeded; there must be a ‘substantial probability’ that disclosure will harm the asserted interest.” *Grube*, 142 Hawai`i at 426, 420 P.3d at 357. The harm “must be irreparable in nature.” *Id.* If there is a compelling interest that would be irreparably harmed by disclosure, redaction is an adequate alternative to concealing an entire document from the public. *Ahn*, 133 Hawai`i at 507-08, 331 P.3d at 485-86; *accord Oahu Public`ns Inc. v. Takase*, 139 Hawai`i 236, 246-47, 386 P.3d 873, 883-84 (2016).

II. FACTUAL BACKGROUND

This Court held multiple hearings on motions for summary judgment by DOTAX and Booking.com. Dkt. 74 (October 17, 2022); Dkt. 118 (April 10, 2023); Dkt. 120 (April 17, 2023); Dkt. 195-96 (March 18, 2024); Dkt. 232-33 (May 6, 2024). Those proceedings were open to the public. 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 W.B. Chang said no.¹ Decl. of Richard P. McClellan, III, dated June 25, 2025 (McClellan Decl.), ¶¶ 5-6. Recordings of those public proceedings have been and are publicly accessible. Decl. of R. Brian Black, dated July 18, 2025 (Black Decl.), ¶¶ 2-4.

¹ 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”).

III. 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. 324 at 11.² There are several problems with its argument.

First, Booking.com's argument illustrates the improper scope of the asserted protected information. None of the information to be redacted from these transcripts, *id.* at 31, 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.³ The topics of concern discussed at the April 10, 2023 hearing are published verbatim on Booking.com's website.⁴ Compare HSC Dkt. 11 at 19-20, 35-36, *with* Dkt. 288 at 25.⁵

Similarly, the information of concern discussed at the May 6, 2024 hearing, Dkt. 324 at 31, 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.*, HSC Dkt. 15 at 5-10, 35, 37-41, *with* 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

² Pinpoint citations reference the corresponding pages of the PDF.

³ Contrary to Booking.com's analysis, Dkt. 324 at 14-24, this motion does not concern the summary judgment exhibits (Dkt. 110, 204, 207, and 224). This Court sealed those exhibits in their entirety – which is one subject of Public First's petition to the Hawai'i Supreme Court – but sealing those exhibits entirely does not mean that every word within those documents is a trade secret. This motion concerns the specific topics discussed at the hearings and whether *that specific information* is a protected trade secret (it is not).

⁴ 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.

⁵ "HSC Dkt." refers to filings in *Public First Law Center v. Morikone*, No. SCPW-25-419; "Civ. Dkt." refers to filings in *Booking.com B.V. v. Takayama*, No. 1CC191000107.

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* HSC 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 this Court, the information discussed in these public hearings was not confidential.

Second, 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.’”). Prior public disclosure is a bell that cannot be unrung.

If Booking.com wanted to protect purported trade secrets during a hearing, it had to move to close the courtroom. *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”). The only time that Booking.com attempted to do so, Judge Chang denied the request. McClellan Decl. ¶¶ 5-6. Booking.com did not request closure when a member of the public was present at the May 6 hearing that it now seeks to seal. *Id.* ¶ 7.

And 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 the Hawai‘i Supreme 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. 324 at 12. 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. 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 of the public has had access to or used the May 6, 2024 *transcript*. Dkt. 324 at 28 ¶ 13. That is misleading. On or about September 17, 2024—before filing its motion to unseal with this Court—Public First obtained the recording of the May 6, 2024 hearing. Black Decl. ¶¶ 2-4. Booking.com knew that Public First had obtained the May 6, 2024 recording because Public First quoted from the recording in filings with this Court and in its petition to the Hawai'i Supreme Court. Dkt. 263 at 4-5 (filed November 20, 2024); HSC Dkt. 1 at 16-17 (filed May 23, 2025); *accord* 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. 324 at 27 ¶ 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 this 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, July 18, 2025



ROBERT BRIAN BLACK
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Attorneys for Non-Party Public First Law Center

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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

TAX APPEAL COURT, STATE OF
HAWAII

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

DECLARATION OF RICHARD P.
MCCLELLAN, III

DECLARATION OF RICHARD P. MCCLELLAN, III

1. I am a member of the public. I am not a party nor do I represent a party in this case or in *In re Booking.com B.V.*, No. 1CTX-21-1613. I make this declaration based on personal knowledge.

2. I am a licensed member of the Hawaii bar with an active tax practice.

3. Because of my area of practice, I am professionally interested in the interaction of the Department of Taxation's administrative rules on economic nexus and sourcing of activities. Answering the question "where" an activity occurs ("used and consumed") for general excise tax purposes, while obvious for certain activities, is far less obvious for others.

4. Based on that interest, I attended two of the hearings in *In re Booking.com B.V.* to better understand the Department's position because of its significance to the tax practitioner community.

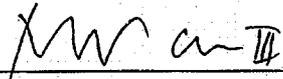
5. On March 18, 2024, I attended my first hearing in the case.

6. At the March 18 hearing, counsel for Booking.com asked the Honorable Gary Chang that I be excluded from the courtroom. Judge Chang denied the request.

7. On May 6, 2024, I attended my second hearing in the case. There was no request to exclude me from the courtroom at the second hearing.

I, RICHARD P. MCCLELLAN, III, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, June 25, 2025



RICHARD P. MCCLELLAN, III

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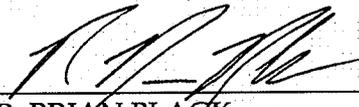
DECLARATION OF R. BRIAN BLACK

DECLARATION OF R. BRIAN BLACK

1. I, R. Brian Black, am an attorney for Non-party Public First Law Center and submit this declaration based on personal knowledge.
2. On August 30, 2024, I submitted a request to the clerk of this court for the audio recording of the May 6, 2024 summary judgment hearing (Dkt. 246).
3. On September 12, 2024, the court reporters office informed me that the recording was available.
4. On or about September 17, 2024, I obtained the audio recording of the May 6, 2024 summary judgment hearing.

I, R. BRIAN BLACK, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, July 18, 2025



R. BRIAN BLACK

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CERTIFICATE OF SERVICE

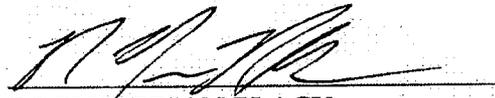
CERTIFICATE OF SERVICE

I, Robert Brian Black, certify that on July 18, 2025, I will serve a copy of the foregoing Memorandum of Law in Opposition to Taxpayer-Appellant Booking.com B.V.'s Motion to Seal Transcripts; Declaration of Richard P. McClellan, III; and Declaration of R. Brian Black on the following parties by electronic mail:

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DATED: Honolulu, Hawai'i, July 18, 2025


ROBERT BRIAN BLACK