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a Limited Liability Law Partnership

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Dkt. 332 REPLY

IN THE TAX APPEAL COURT OF THE
STATE OF HAWAII

In the Matter of the Tax Appeal)	Case No. 1CTX-21-0001613
)	
of	)	TAXPAYER-APPELLANT
	)	BOOKING.COM B.V.'S REPLY IN
Booking.com B.V.	)	SUPPORT OF MOTION TO SEAL
	)	TRANSCRIPTS; DECLARARTOIN OF
Taxpayer-Appellant	)	NATHANIEL A. HIGA; CERTIFICATE
	)	OF SERVICE
)	
)	
)	
	)	<u>Hearing:</u>
	)	Date: Monday, August 11, 2025
	)	Time: 1:30 p.m.
	)	Judge: Hon. Kevin T. Morikone
)	
)	

**TAXPAYER-APPELLANT BOOKING.COM B.V.’s
REPLY IN SUPPORT OF MOTION TO SEAL TRANSCRIPTS**

COMES NOW Taxpayer¹ by and through its attorneys, Chun Kerr LLP, a Limited Liability Law Partnership, hereby submits its Reply in Support of the Motion to Seal Transcripts filed June 18, 2025 (the “**Motion**”) [Dkt. 324], and requests that this Court grant the Motion. The Motion is simple. This Court has already correctly ruled that various contracts of Taxpayer should themselves be sealed. Dkt. 311 (FOFCOL). The Motion seeks consistent treatment by sealing a very small portion of verbal discussion of the terms in those contracts in two hearings. The transcripts of those hearings total about 170 pages, amounting to approximately 4,250 lines. Taxpayer seeks to seal by redaction only 200 lines of the transcripts, less than 5%. Motion, Exhibit A.

As a preliminary matter, the Director argues that the Motion seeks to have this Court seal or redact documents that are part of the record with the Hawaii Supreme Court. Dkt. 330 (Director’s Response). Not so. Taxpayer has filed a companion motion with the Hawaii Supreme Court for that purpose, which remains pending. SCPW-25-0000419 [Dkt. 25]. The Director also argues that this Court lacks authority to order redaction of hearing transcripts because they are not filed on the docket. Pursuant to HCRR 3.1, this court maintains, through the Court Clerk, all records of each case, “including a docket.” Nothing indicates that the record of the case does not include transcripts that are not filed in the docket. In fact, pursuant to HRS § 606-12:

Each official court reporter *shall file the official court reporter’s notes with the clerk of the court* and when requested by any party to a cause and *so directed by the court* or by the court of its own motion, within a reasonable time thereafter *as the court may designate*, shall furnish a certified transcript of the official court

¹ Defined terms herein retain their meaning as noted in the Motion filed on June 18, 2025 [Dkt. 324].

reporter's notes, *or any portion thereof*, taken in the cause, upon the payment of the fee fixed in section 606-13.

As clearly outlined, the court reporter's notes, from which the transcript is produced are maintained by the Court Clerk and when there is a request for transcript made, the Court directs and designates whether the full transcript "or any portion thereof" is provided. The Court can grant the Motion

I. SEALING THE RECORDS SERVES A COMPELLING INTEREST

Taxpayer requests this Court, pursuant to Rule 10.4 of the HCCR to: (1) redact portions of the April 2023 Hearing Transcript from the April 10, 2023 hearing on Taxpayer's Motion for Summary Judgment, filed July 7, 2022 [Dkt. 31]²; and (2) seal portions of the May 2024 Hearing Transcript from the May 6, 2024 hearing on Taxpayer's Motion for Summary Judgment, filed December 1, 2023 [Dkt. 140] and the Director's Cross Motion for Partial Summary Judgment, filed February 29, 2024 [Dkt. 154]³. Taxpayer requests redaction of these certain, limited portions of the Hearing Transcripts on the basis that the discussion of and/or quotes from Dkt. 110, 204, 207, and 224 therein constitute confidential business information and/or trade secrets. See Dkt. 311. For the foregoing compelling reasons as stated in the Motion, Taxpayer reiterates that a compelling interest exists, that it would be harmed absent redaction, and that redaction of the Hearing Transcripts is a reasonable alternative to complete sealing to protect this compelling interest.

² Only page:line 19:24 – 20:8; 20:17 – 18 and 35:14 – 36:1 (both regarding Dkt. 110) of the April 2023 Hearing Transcript are requested to be sealed.

³ Only page:line 5:20 – 8:19 (regarding Dkt. 224), 9:18 – 10:16 (regarding Dkt. 224), 35:1 – 13 (regarding Dkt. 207), 37:25 – 38:16 (regarding Dkt. 204), and 39:7 – 41:8 (regarding Dkt. 207) of the May 2024 Hearing Transcript are requested to be sealed.

II. THE CONTRACTS HAVE NOT BEEN POSTED ON TAXPAYER'S WEBSITE

The contractual information Taxpayer seeks to redact is a *prior version* of the contractual information currently located on Taxpayer's website. Public First argues that because the contract on Taxpayer's website appears to be a prior similar version the information is not confidential. See Dkt. 328 at 4-5 (Public First's Memo in Opp.). Similarly, Public First argues that the information at issue cannot be confidential because it appears to be "similar" to information disclosed in discovery responses a separate action. Dkt. 328 at 5. Disclosure of "similar" information has nothing to do with the confidentiality of the actual information at issue in the Motion. As discussed and determined by this Court in granting Taxpayer's prior motion to seal [Dkt. 265], Taxpayer's decision to make its *current* "General Delivery Terms" available online does not subject every prior version of those terms to disclosure. Rather, those prior versions are still protected. Dkt. 311. Taxpayer seeks to redact direct quotes and/or paraphrased references to those confidential agreements that existed years prior to the versions currently available online. See generally Dkt. 31.

The Hearing Transcripts at issue in the Motion reference Taxpayer's General Delivery Terms section 2.5.3 in Dkt. 110. Docket 110 involves Taxpayer's contractual terms and conditions during a period in which Taxpayer did not make such information public. Dkt. 110 (referencing "v2011," referring to November 2020). The general terms and conditions on Taxpayer's current website was accessed in January of 2025, well after the version at issue and references in this action. Dkt. 228 (containing a version labeled "v2412," which version is as of December 2024).

As an online travel company, Taxpayer engages in negotiations with accommodation providers that are provided general terms and conditions. However, like many such contracts,

these general terms and conditions change over time and are amended based on a myriad of factors, including current economic conditions and competing rates and services provided by other online booking travel companies. Release of contract terms and conditions from prior versions of the General Delivery Terms would allow entities negotiating with Taxpayer to leverage certain terms and conditions from previous years in current negotiations to Taxpayer's detriment. Taxpayer reiterates that the Hearing Transcripts contain confidential business information and trade secrets that were already found to have satisfied the constitutional requirements to seal court records from public access. See Dkt. 311. Accordingly, and for the same reasons that this Court granted Taxpayer's Motion to Seal [Dkt. 265], certain, limited portions of the Hearing Transcripts should be redacted.

III. INFORMATION DISCLOSED AT HEARINGS OPEN TO THE PUBLIC MAY STILL BE SEALED

Public First argues that all information within the Hearing Transcripts should remain unsealed because the hearings were open to the public. Dkt. 328 at 5-6. Public First incorrectly concludes that "prior public disclosure is a bell that cannot be unrung." Id.

Public First's argument arises from the belief that because the hearings were not closed, the information contained therein can never be sealed. In Ahn, cited by Public First, the Court noted that "the value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed." 133 Hawaii at 494, 331 P.3d at 472. However, that value of openness must be balanced against the interests of the party seeking to protect confidential business information. See Roy v. Gov't Emples. Ins. Co., 152 Haw. 225, 233, 524 P.3d 1249, 1257 (2023) (considering whether the interest in protective information "outweighs" the detriment to openness).

In several cases, courts have recognized that evidence admitted in open court can be subject to redactions after the fact. Yador v. Mowatt, 2025 U.S. Dist. LEXIS 116672, *5, (E.D.N.Y 2025) (“The fact that certain evidence was admitted in open court does not mean that post hoc redactions are categorically inappropriate.”); United States v. Akhavan, 532 F. Supp. 3d 181, 187-88 (S.D.N.Y 2021) (ordering redaction of exhibits entered into evidence after the fact notwithstanding the “‘especially strong’ common law presumption of access”); Sempowich v. Tactile Sys. Tech., Inc., 2020 U.S. Dist. LEXIS 94111, *17-18 (N.C. 2020) (granting motion to seal in part by ordering the filing of redacted versions of previously public documents that had been filed in opposition to a motion for summary judgment); Clearmeadow Invs., LLC v. United States, 86 Fed. Cl. 30, 33 (Ct. Cl. 2009) (requiring the refiling of a redacted document previously filed publicly). Clearly, this Court retains discretion to consider targeted redactions despite the fact that the hearings themselves were open to the public. Particularly in light of this Court’s prior ruling on Taxpayer’s Motion to Seal [Dkt. 311], a weighing of the competing interests of openness and protecting information already deemed confidential by the Court tilts in favor of redaction.

IV. TAXPAYER’S PROPOSED REDACTIONS ARE EXTREMELY MINIMAL AND TAILORED

Taxpayer requests the sealing of only a small portion of the transcripts, which amount to approximately 170 pages in total. Of these pages, only nine small sections amounting to approximately 200 lines are proposed to be redacted. Given the minimal proposed redactions and the Court’s prior order sealing the underlying contracts [Dkt. 311], the balance of the interests should favor allowing the redactions. United States v. Schlette, 842 F.2d 1574, 1581 (9th Cir. 1988) (noting that “whether disclosure is warranted in a given case requires the court to balance the need for disclosure against the reasons for confidentiality”).

V. CONCLUSION

Based on the foregoing, Taxpayer respectfully requests that this Court grant the Motion in its entirety.

DATED: Honolulu, Hawai'i, August 6, 2025.

/s/ Nathaniel A. Higa
NATHANIEL A. HIGA
MICHELLE K. CORREIA

of CHUN KERR LLP
a Limited Liability Law Partnership
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IN THE TAX APPEAL COURT OF THE
STATE OF HAWAII

In the Matter of the Tax Appeal)	Case No. 1CTX-21-0001613
)	
of	)	DECLARATION OF
	)	NATHANIEL A. HIGA
Booking.com B.V.)	
)	
Taxpayer-Appellant)	
_____)	

DECLARATION OF NATHANIEL A. HIGA

1. I am NATHANIEL A. HIGA, a partner in the law firm of Chun Kerr LLP, a Limited Liability Law Partnership, counsel for Taxpayer-Appellant, Booking.com B.V. (“**Taxpayer**”) in the above-captioned action. I am duly licensed to practice law before this Court, and I make this declaration based on personal knowledge.

2. I do not recall Mr. Richard P. McClellan, III, Esq. having been in attendance at the May 6, 2024 hearing. However, I have no reason to doubt his declaration dated June 25, 2025. It is possible that I misremembered those in attendance at the hearing and that my prior declaration as to the attendees at the May 6, 2024 hearing was not accurate. However, as explained in the foregoing memorandum, his attendance does not preclude the Court from redacting the transcript.

3. Mr. R. Brian Black, Esq. is correct that his office requested the May 6, 2024 hearing transcript on or about August 30, 2024. Around the same time, he had asked for various portions of the record as well. On September 9, 2024, the Court filed a “Notice of Denied Access.” Apparently, this applied only to the filed docket entries and not the May 6, 2024 hearing transcript. As such, this confirms that my prior declaration as to whether anyone had previously obtained that

transcript was incorrect. That said, Taxpayer's position remains that the prior access to the transcript does not preclude this Court from granting this Motion.

I, Nathaniel A. Higa, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, August 6, 2025.

/s/ Nathaniel A. Higa
NATHANIEL A. HIGA

IN THE TAX APPEAL COURT OF THE
STATE OF HAWAII

In the Matter of the Tax Appeal	)	Case No. 1CTX-21-0001613
)	
of	)	CERTIFICATE OF SERVICE
)	
Booking.com B.V.)	
)	
Taxpayer-Appellant)	
_____)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, a true copy of the foregoing document was or will be served upon the parties identified below, through the Judiciary Electronic Filing System (“JEFS”), as indicated below:

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The undersigned hereby further certifies that on this date, a true copy of the foregoing document was or will be served upon the parties identified below, at their last known address, by mailing said copy, postage prepaid, in a United States post office at Honolulu, Hawaii, addressed as follows:

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DATED: Honolulu, Hawai'i, August 6, 2025.

/s/ Nathaniel A. Higa
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