

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
)	
BABY MATTERS, LLC)	CPSC DOCKET NO. 13-1
)	
Respondent.)	HON. WALTER J. BRUDZINSKI
)	Administrative Law Judge
)	

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL’S MOTION TO
PRODUCE DOCUMENTS *IN CAMERA***

Complaint Counsel seeks an order, pursuant to 16 C.F.R. § 1025.45, allowing the production *in camera* of confidential police records concerning an infant death that occurred in one of Respondent’s Subject Products.

Background

On April 21, 2011, Commission staff wrote to the Homewood, Alabama Police Department requesting law enforcement records concerning the death of a 6-month-old infant in one of Respondent’s Subject Products. BML 7587 (BML documents attached as Exh. 1). On May 10, 2011, the Homewood Police Department responded and stated that the documents consisted of “[l]aw enforcement investigative reports” that could not be provided to the Commission because Alabama law prohibited their disclosure. BML7586. In response, the Commission issued a subpoena to obtain the documents. BML 7595-99. On June 29, 2011, the Homewood Police Department complied with the subpoena, providing the documents but marking them “confidential” and stating that “these records are not public records and are not to be disclosed,” to the public. *Id.*

Argument

Pursuant to 16 C.F.R. § 1025.45, the Presiding Officer has the authority for good cause shown to allow documents to be offered *in camera*. Those documents are then to be “kept confidential and excluded from the public record. 16 C.F.R. § 1025.45(a), (b). Furthermore, “[i]n camera materials shall be segregated from the public record and protected from public view.” 16 C.F.R. § 1025.45(d).

The documents at issue here were produced pursuant to a subpoena requiring that they be kept confidential and were produced subject to Alabama law limiting their disclosure. *See* Ala. Code § 12-21-3.1(b) (“Law enforcement investigative reports and related investigative material are not public records. Law enforcement investigative reports, records, field notes, witness statements, and other investigative writings or recordings are privileged communications protected from disclosure.”). In addition, law enforcement investigative documents may be protected from discovery to ensure “the privacy of individuals involved in an investigation,” and that investigation “need not be ongoing for the law enforcement privilege to apply....” *In re The City of New York*, 607 F.3d 923, 944 (2nd Cir. 2010) (granting writ of mandamus to protect law enforcement records from disclosure).

Furthermore, the documents at issue here contain highly sensitive, private medical details about the death of an infant. Courts have “recognized that interests in privacy may call for a measure of extra protection” from disclosure in the course of discovery, even where the information sought is not privileged. *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1215 (D.C. Cir. 2004) (requiring that court consider “privacy interests” before ordering release of medical records). Because these are highly sensitive, confidential, and non-public documents,

Complaint Counsel requests that the Court allow the filing of these documents *in camera* and that they be permanently excluded from the public record.¹

Complaint Counsel has advised counsel for Baby Matters that the Homewood Police report would not be included in discovery, and set forth the steps we expected to take to secure permission from the Court to release the reports. Counsel has no objection at this time to our proceeding in this manner.

For good cause shown, Complaint Counsel requests that the Court allow these documents to be produced *in camera* and excluded from the public record.

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¹ If the Court grants this motion, Respondent may seek “access to [the] ... *in camera* materials for the preparation and presentation of that party’s case” through a motion pursuant to 16 C.F.R. § 1025.45(c)(2). The Court “may grant such motion for good cause shown and shall enter a protective order prohibiting unnecessary disclosure and requiring any other necessary safeguards.” *Id.* Complaint Counsel would not oppose such a motion provided that the Court enters a protective order requiring Respondent to treat such documents as confidential and not disclose them publicly. Furthermore, because the records were sought in order for Commission staff to create an “accident or investigation report made under [the Consumer Product Safety Act],” pursuant to 15 U.S.C. § 2074(c), any protective order should specify that the documents can only be disclosed to Respondent in redacted form, “in a manner which will not identify any injured person or any person treating him, without the consent of the person so identified....” 15 U.S.C. § 2074(c).