

IN THE MATTER OF

BOC INTERNATIONAL, LIMITED, ET AL.
(formerly known as British Oxygen Company, Limited)

Docket 8955. Interlocutory Order, October 9, 1985.

ORDER LIFTING *IN CAMERA* TREATMENT AND
PLACING EXHIBITS ON THE PUBLIC RECORD

By order of January 14, 1978, the Commission temporarily reinstated *in camera* treatment for certain evidentiary exhibits in this matter, pending receipt of answers to, and resolution of, motions for extension of the *in camera* treatment of these documents by BOC for one year and Airco for three months or until document production was complete in another proceeding. On May 14, 1980, the Commission dismissed the complaint in this matter without resolving the motions, thus leaving the documents in an *in camera* status.

On January 5, 1985, access was requested under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), for documents submitted during investigation of companies in the industrial gas industry. All responsive documents were examined pursuant to the request to ascertain whether they were protected from mandatory public disclosure by the exemptions contained in the FOIA. That examination included analysis of whether the exhibits described below warranted continuing *in camera* protection. Because, as explained below, the Commission has determined that *in camera* treatment is no longer justified, the documents will become part of the public record in this matter. Accordingly, no FOIA exemptions will apply to them.

The exhibits in question were entered into evidence in the matter of *British Oxygen Company, Limited*, D. 8955, [86 F.T.C. 1241 (1975), *dismissed*, 95 F.T.C. 805 (1980)] as CX 78, 95, 161, 162, 163, 232, 254, 255, and 301. They consist of business records containing financial information that was sensitive to the parties at the time it was introduced into evidence in 1974 and other information reflecting BOC's interest during the period from 1970 through 1973 in entering the United States industrial gas market. The exhibits also comprise reports of interviews held in 1973 with Airco's two top executives. The latter group of documents includes evaluations made twelve years ago of Airco's top executives and its Board of Directors.

There is a strong public interest in holding all aspects of Commission adjudicative proceedings open to interested persons for public inspection and understanding. Accordingly, the Commission's Rules of Practice provide for issuance of *in camera* orders only in unusual

and exceptional circumstances. 16 C.F.R. 3.45(b). Those circumstances occur only on a showing that placing the documents on the public record would result in a clearly defined, serious injury to the corporation submitting the documents. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961); *Bristol-Myers Co.*, 90 F.T.C. 455 (1977).

In cases such as these, where the information is old, an even greater burden is placed on the submitter. Even where a clearly defined, serious injury can be demonstrated when close in time, its basis is normally removed by the passage of years. *Columbia Broadcasting System, Inc.*, 72 F.T.C. 27, 334 (1967). Unless the documents can be used to make such a convincing showing of significant insight into current operations that serious competitive injury would result, continued *in camera* treatment is not justified. *General Foods Corp.*, 95 F.T.C. 352 (1980).

The Commission has examined the business records at issue of Airco and BOC to determine whether they presently deserve the *in camera* protection that has been accorded to them. Information contained in these records is at least 12 years old. Without addressing whether publication might have caused a clearly defined, serious injury had the records been disclosed in 1974, the Commission has determined that any sensitivity that may have existed has been removed by passage of twelve years. Specifically, the Commission recognizes that in some instances old data may be used to extrapolate information that would provide significant insight into current business operations. In this instance, however, the Commission believes that the passage of twelve years makes the construction of a current, accurate model impossible. Thus, we find that disclosure of the business records would not result in the clearly defined, serious injury necessary to justify continued *in camera* protection.

Similarly, the Commission has concluded that public disclosure of the twelve year old comments evaluating the performance of Airco's officers and directors would create nothing more than a slight embarrassment to the individuals involved, not a clearly defined, serious injury. The Commission has previously held that "the mere embarrassment of the movant should not foreclose public disclosure." *Hood*, *supra* at 1188-89. For these reasons,

It is ordered, That the *in camera* status of exhibits CX 78, 95, 161, 162, 163, 232, 254, 255, and 301 be lifted.

It is further ordered, That the Secretary notify the companies by mail of our determination to lift the *in camera* status of the exhibits referenced above; and that the Secretary place the exhibits in this matter on the public record no sooner than ten (10) calendar days after receipt of this notification by the parties.

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NOTICE OF INTENT TO RELEASE CONFIDENTIAL INFORMATION

This is to advise BOC International, Limited, BOC Financial Corporation, BOC Holdings Limited, British Oxygen Investments, Limited and Airco, Incorporated ("the companies") that, pursuant to the Commission's order in Docket 8955, the Commission intends to place on the public record certain exhibits introduced into evidence in Docket No. 8955 in an *in camera* status. [86 F.T.C. 1241 (1975)]

By order of January 14, 1978, the Commission temporarily reinstated *in camera* treatment for these exhibits, pending receipt of answers to, and resolution of, motions for extension of the *in camera* treatment of these documents by BOC for one year and Airco for three months or until document production was complete in another proceeding. On May 14, 1980, the Commission dismissed the complaint in this matter without resolving the motions, thus leaving the documents in an *in camera* status. [95 F.T.C. 805 (1980)]

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