Michigan Law Review

Volume 60 | Issue 5

1962

Federal Trade Commission-Adjudicatory Proceedings-Receipt of Evidence in Camera

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FEDERAL TRADE COMMISSION—ADJUDICATORY PROCEEDINGS—RECEIPT OF EVIDENCE IN CAMERA—During an adjudicatory hearing pursuant to a complaint filed by the Federal Trade Commission, counsel for the Commission offered as evidence some confidential documents subpoenaed from respondent. The hearing examiner, on his own motion, ordered all confidential documents placed *in camera*.[1] Counsel for the FTC objected to the order and filed an interlocutory appeal to the Commission. On the interlocutory appeal, *held*, error in part. Because these documents do not contain highly secret business information they must appear on the public transcript, unless tendered to the Commission and obtained subject to an express stipulation that, if offered in evidence, they would be placed *in camera*. In order to support an *in camera* ruling, respondent must show that public disclosure would result in a serious, clearly-defined injury to its interests. *H. P. Hood & Sons*, TRADE REG. REP. ¶ 29461 (FTC 1961).

In today's economy, the secrecy of business data which relates to promotional strategy, research and development, and manufacturing processes can be essential, in certain industries, to the maintenance of a lawfully advantageous or competitive position.[2] Moreover, business concerns are desirous of keeping confidential a variety of information in order to avoid embarrassing criticism, treble damage actions, and direct prosecution by governmental agencies.[3] The activities of many parties, nevertheless, threaten exposure of such confidential data to the public and especially to business adversaries. For example, federal agencies[4] and grand juries[5] may subpoena confidential documents, and private parties also may seek

1 "[D]ocuments made subject to such orders are not made a part of the public record but are kept secret and only respondents, their counsel and authorized Commission personnel are permitted access thereto." Principal case at 37790.

2 See generally Furach, *Industrial Espionage*, Harv. Bus. Rev., Nov.-Dec. 1959, p. 6. Especially important to competitors is information which concerns pricing, sales statistics, cost data, promotional strategy, research and development, and manufacturing processes.

3 See BNA Antitrust & Trade Reg. Rep., Nov. 28, 1961, p. B-1.

4 Clarke v. FTC, 128 F.2d 542 (9th Cir. 1942) (FTC subpoena for confidential documents enforced). With respect to the powers of other agencies to obtain confidential information, see generally 1 DAVIS, ADMINISTRATIVE LAW § 3.06 (1958).

5 Application of Radio Corp. of America, 13 F.R.D. 167 (S.D.N.Y. 1952).

them through the use of discovery procedures.[6] If an administrative agency or a grand jury obtains such information during an investigatory hearing, the confidential nature of the material is not endangered directly.[7] The public nature of the judicial process, however, limits the protection which the courts are able to give to confidential data introduced as evidence. Traditionally, it rests in the judge's discretion "to determine whether, to whom and under what precautions" such documents should be made available.[8] Although there is some confusion with respect to the scope of the protection afforded, the courts apparently employ the *in camera* procedure only if the documents reveal a secret manufacturing process.[9]

When the FTC institutes formal proceedings against a suspected violator it sometimes becomes necessary to introduce as evidence a variety of confidential data.[10] The Commission's hearing examiners, in order to protect businesses from unnecessary injury, had developed a rather liberal practice of withholding confidential documents from the public transcript through the medium of *in camera* hearings, although there is no express provision in the rules for such treatment.[11] In the principal case the Commission critically considered this policy for the first time and, in the process, severely limited its scope. Valuable trade secrets such as manufacturing processes or customer lists presumptively satisfy the newly enunciated test and will receive protection from disclosure through an *in camera* order.[12] But with respect to other types of data, hearing examiners

6 See, *e.g.*, Burroughs v. Warner Bros. Pictures, Inc., 12 F.R.D. 491 (D. Mass. 1952); Eastern States Petroleum Co. v. Asiatic Petroleum Co., 27 F. Supp. 121 (S.D.N.Y. 1938).

7 Grand jury minutes generally are not available to private parties. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); United States v. Procter & Gamble Co., 356 U.S. 677 (1958). The FTC, moreover, has been denied access to them. *In re* Grand Jury Proceedings, 30 U.S.L. WEEK 2219 (E.D.Pa. Nov. 14, 1961). Furthermore, under the rules of the FTC all investigatory proceedings are nonpublic, 16 C.F.R. § 1.41 (1960), and other federal agencies have similar rules. See generally 1 DAVIS, *op. cit. supra* note 4, § 3.13. Once these agencies, however, acquire confidential information or documents, the policies which govern their release vary from agency to agency. See *id.*

8 E. I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917).

9 See Herold v. Herold China & Pottery Co., 257 Fed. 911, 918 (6th Cir. 1919); Griffin Mfg. Co. v. Gold Dust Corp., 245 App. Div. 385, 282 N.Y. Supp. 931 (1935). See generally 4 MOORE, FEDERAL PRACTICE § 26.22 (1950); 8 WIGMORE, EVIDENCE § 2212 (McNaughton rev. ed. 1961).

10 See principal case at 37792. Respondents in FTC proceedings have been required to give testimony or produce documents which involve trade secrets in spite of their objections. Clarke v. FTC, 128 F.2d 542 (9th Cir. 1942). The failure, furthermore, to produce such information when material to the inquiry may produce a strong presumption of guilt. Charles of the Ritz Dist. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).

11 See National Dairy Prod. Corp., 55 F.T.C. 2069 (1959); American Cyanamid Co., 55 F.T.C. 2049 (1958).

12 The FTC Act § 6(f), amended by 38 Stat. 721 (1914), 15 U.S.C. § 46(f) (1958), prohibits the publication of either "trade secrets or customer lists" by the Commission. This limitation, however, does not preclude inclusion in the hearing transcript of such material when it is relevant to the matter in controversy. FTC v. Tuttle, 244 F.2d 605 (2d Cir.), *cert. denied*, 354 U.S. 925 (1957).

are not hereafter to grant *in camera* protection unless respondents show that severe economic damage will result if the public record contains the document in question. Further, a mere showing of embarrassment, exposure to treble damage proceedings, or the desire of competitors to gain access to the documents for business reasons will not support an *in camera* order. In justification of its new position, the Commission noted that the restrictions placed on the hearing examiners' discretion with respect to the receipt of evidence *in camera* may have two significant and desirable effects. First, implementation of this policy assures a more comprehensive public transcript.[13] The documents and other evidence contained therein will aid private litigants in treble damage actions founded on similar grounds.[14] Second, the publicity accorded documents received as evidence may act as an effective prospective policing device. Companies may avoid illegal business activities because they will fear public exposure of confidential documents in later FTC proceedings. But it would seem that a procedural policy justified on such grounds, since serving no apparent judicial purpose, is initially open to question. In order to permit parties to cross-examine opposing witnesses and view adverse evidence, general judicial policy favors open and public adjudicatory hearings.[15] Nevetheless, this judicial attitude sanctions the *in camera* treatment of business secrets which, under the Commission's newly enunciated policy, will be included in the public transcript.[16]

Effectuation of this new policy depends somewhat on the number of confidential documents free of any protective stipulation which the Commission obtains during a formal, non-investigatory hearing. The Commission frequently does not control the procedures invoked to procure such documents.[17] Some courts, perhaps with knowledge of the burdens

13 Any interested party may obtain a hearing transcript. 26 Fed. Reg. 6018 (1961), amending 16 C.F.R. § 4.14 (f) (1960).

14 Private parties face substantial difficulties when they seek to acquire confidential documents in the possession of third parties. See E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944); Louis Weinberg Associates, Inc. v. Monte Christi Corp., 15 F.R.D. 493 (S.D.N.Y. 1954); Caldwell-Clements, Inc. v. McGraw-Hill Publishing Co., 12 F.R.D. 531 (S.D.N.Y. 1952); Joseph A. Kaplan & Sons, TRADE REG. REP. ¶ 29193 (FTC 1960). The FTC regularly refuses to produce confidential documents in its possession. Mohawk Ref. Corp. v. FTC, 263 F.2d 818 (3d Cir. 1959); Texas Co., 30 U.S.L. WEEK 2452 (FTC Mar. 9, 1962). See generally Miller, *Availability and Use of Non-Public Governmental Records and Reports in Civil Litigation*, 9 SYRACUSE L. REV. 163 (1958); Comment, 36 B.U.L. REV. 118 (1956).

15 See E. Griffiths Hughes, Inc. v. FTC, 63 F.2d 362, 364 (D.C. Cir. 1933); 1 DAVIS, *op. cit. supra* note 4, § 8.09.

16 *Cf.* FTC v. Bowman, 149 F. Supp. 624, 631 (N.D. Ill.), *aff'd*, 248 F.2d 456 (7th Cir. 1957).

17 The Commission issues the subpoena, but if it is returned unsatisfied the federal courts enforce it. FTC Act § 9, amended by 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958). See St. Regis Paper Co. v. United States, 368 U.S. 208 (1961); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

which parties must bear in other respects during formal hearings,[18] indicate a distinct reluctance to enforce FTC subpoenas for confidential information absent a stipulation to protect from injury the party contributing the documents.[19] The subpoena powers of the Commission, nevertheless, are so broad that business concerns under investigation voluntarily contribute many documents of a confidential nature to the FTC.[20] Companies, however, ordinarily attach a stipulation to such documents which, if accepted by the Commission, will protect the data from public disclosure.[21] Although there is no legal compulsion on the FTC to honor such stipulations, it announced in the principal case that they would not be violated. The Commission, during nonpublic investigational activities, depends on the cooperation of industry, rather than its subpoena power, for the production of documents.[22]

If the FTC discontinued the policy of honoring stipulations, it perhaps would find it necessary to apply to the federal courts to enforce an increasing number of subpoenas when issued for confidential documents. The need to take such action would place a heavy burden on judicial time and on the Commission's financial and personnel resources. Finally, the FTC, in view of the forces arrayed to protect the confidential nature of data submitted to it, apparently can compel public disclosure only when it is in direct control of the procedures under which such material is received as evidence. Thus, hearing examiners do not accept confidential documents entered as evidence in defense of formal charges unless they appear on the public transcript.[23] Parties unable to protect business secrets as a result of this practice may forego any defense to the action, and accept a consent order[24] or a stipulation[25] settled in private rather than risk the unwanted disclosure which may occur during litigation.

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18 See MASON, THE LANGUAGE OF DISSENT (1959); Kintner, *Federal Administrative Law in the Decade of the Sixties*, 47 A.B.A.J. 269, 278 (1961); Editorial Note, 13 RUTGERS L. REV. 315 (1958).

19 FTC v. Bowman, 149 F. Supp. 624, 631 (N.D. Ill.), *aff'd*, 248 F.2d 456 (7th Cir. 1957); Menzies v. FTC, 145 F. Supp. 164, 171 (D. Md. 1956), *aff'd*, 242 F.2d 81 (4th Cir. 1957).

20 See 1960 FTC ANN. REP. 29-31.

21 See principal case at 37794.

22 1960 FTC ANN. REP. 29-31.

23 Sperry Rand Corp., 1961 TRADE REG. REP. ¶ 15468, *request for interlocutory appeal denied*, TRADE REG. REP. ¶ 15569 (FTC 1961).

24 26 Fed. Reg. 6015 (1961), amending 16 C.F.R. §§ 3.1-.4 (1960). See generally 1 DAVIS, *op. cit. supra* note 4, § 4.02.

25 16 C.F.R. § 1.54 (1960). See also 1960 FTC ANN. REP. 90. See generally 1 DAVIS, *op. cit. supra* note 4, § 4.02.