Order denying respondent's request for an intra-agency document which allegedly dismisses a complaint based on facts similar to those in the instant case.

DISSENTING OPINION

By ELMAN, *Commissioner:*

While I am not in favor of opening all of the Commission's files to every member of the public who expresses a desire to examine them, I do not agree that this document should be withheld from respondent. The Commission has formally charged

respondent with violating the law, and we should not, without overriding reason, withhold any document from respondent which could assist in its defense. *Jencks* v. *United States,* 353 U.S. 657, 668–71; *Brady* v. *Maryland,* 373 U.S. 83, 86–88; *United States* v. *Andolschek,* 142 F. 2d 503, 506 (2d Cir. 1944). Respondent asserts—and the Commission apparently does not deny—that the subject-matter of the requested document is related to issues raised in the instant proceeding by way of defense. This constitutes "good cause" under our Rules of Practice. In discovery proceedings it is not necessary for respondent to show that the document will be introduced in evidence, but only that it may aid in preparing its defense. (*Associated Merchandising Corp.,* Dkt. 8651, Order of Sept. 23, 1965, p. 5 [68 F.T.C. 1175, 1178].) Respondent obviously cannot determine the document's usefulness until after it is inspected; and only respondent is competent to determine, after examining the document, what use if any should be made of it.

Like the other members of the Commission, I have not examined the requested document. I have no idea whether it does or does not contain anything that may be helpful to respondent's defense. I do not know—and I do not understand that the other Commissioners know—whether the "public interest considerations" involved in the prior closing were the same as or different from those involved here. Nor do I have any basis for determining whether the Commission's action in the prior matter would or would not "compel," or even justify, closing or dismissing this case. One cannot know any of these things unless he examines the document. We have not done so ourselves; the hearing examiner has not done so; and the majority does not propose to let respondent do so. Perhaps after seeing the document, respondent would have no further use for it. But that is something for respondent, not the Commission or the hearing examiner, to decide. Why should respondent have to take our word for it that this document could not conceivably aid in its defense? And how can we give respondent such word without examining the document?

One thing is clear: As a result of the Commission's ruling today, the requested document will never get into the record of this case. It will continue to gather dust in the Commission's archives, resting undisturbed. Respondent will never know whether it contains matter that would have been helpful in making its defense. And neither will the members of the Commission. Yet it is said, without any examination of the document, that it would have no relevance to any issue in this

case. How can one say this with assurance? This is a Section 5 case, which is now before a hearing examiner and in which no evidence has yet been taken. Other than the bare pleadings, the Commission has no record before it. Section 5 proceedings like this one, when they ultimately come before the Commission for final decision, generally present issues of discretion and law as well as fact: What representations were made by respondent? What impressions did they convey to the public? Were they false or deceptive in any material respect? Is there need for an order—or will the public interest be better served by some other disposition of the matter? If an order is to be entered, how far should we go in "fencing in" respondent? Has respondent shown an attitude of intransigent defiance of the law, or has it cooperated with the Commission in good faith? Did it rely upon, or did it disregard, informal advice of the Commission's staff in the advertising claims it made? These questions, and others, may be involved in a case like this. Particularly in regard to the fashioning of an appropriate remedy, the Commission—like a court of equity—takes a broad range of factors into consideration. How can one say with certitude, at the present early stage of the proceeding, that this document—which, I repeat, none of us has seen—could not possibly be of any help to respondent in preparing its defense here? Even if it were only the basis of a plea for mercy, I think respondent should not be denied the opportunity to make whatever use it can of the document in its defense.

If the Freedom of Information Act of 1966 means anything, it means that Congress wants a government agency to have some reason for withholding a relevant document from a respondent in an adjudicative proceeding, other than the mere fact that it is contained within the agency's "confidential" files. Respondent's interest in examining this document is obviously serious and substantial, and not based on idle curiosity. Its motion should not be denied without good reason. So far as appears, making this document available to respondent would in no way impair administrative efficiency. Nor would it involve any unwarranted disclosure of the Commission's "mental processes in arriving at a disposition of a matter before it"—even if we assume, as the majority apparently does, that the "mental processes" of an agency are something that it should not be required to disclose to the public. I would suppose, however, that, so far as practicable, an agency should take every opportunity to satisfy the public that its actions rest on a reasoned and reasonable basis. While it may not be feasible at present for the

Commission to publish an "opinion" or "decision" in every closing matter, this should not mean that the grounds on which we acted should forever, and in all circumstances, remain secret. Wherever appropriate, as in this instance, the lid of secrecy should be lifted—and I do not see how anybody would be harmed thereby. If anything, it should tend to make agency actions more responsible.

CONCURRING STATEMENT OF COMMISSIONERS JONES AND REILLY

The dissent seems to be arguing that the respondent's motion should be granted because the Commission has not shown good cause why the requested document should *not* be produced. We do not agree that any such burden is on the Commission in a discovery request of a respondent. The Commission's rules explicitly require that it is the respondent which must show good cause for the release of memoranda and documents in the Commission files. To establish such good cause respondent must demonstrate at the very least that the document will be relevant to its defense before any issue can arise as to whether confidentiality is a proper ground for its nonproduction. We have not reached this latter issue in this case.

While the dissenting Commissioner makes respondent's request here sound like an isolated instance, the majority of the Commission is aware of the problems that will arise if a respondent can show good cause to obtain a document by merely asserting it is necessary for his defense. It is ludicrous to suggest that the mere assertion that a document is needed in a defense is good cause.

The sole basis set forth by respondent in its motion for the production of the requested internal staff communication to the Commission is that it sets forth reasons why an investigation against its predecessor, based on what respondent claims were identical advertisements, should be closed and that this "memorandum is obviously relevant to Stateman's position that this advertising is not deceptive and that this proceeding is lacking in public interest" (Respondent's Motion, pp. 4–5). The issue before us in the instant proceeding relates solely to the question of whether respondent's advertising claims are or are not deceptive. Any attempt to determine why the Commission closed a prior proceeding would be to put the Commission's internal administrative decisions on trial rather than respondent's alleged practices and would have no relevance to any issue in this case. No such inversion of the administrative process is required either by any law presently in effect or by the Freedom of Infor-

mation Act of 1966. For this reason we concur in the majority's order that the motion for the production of this document should be denied.

ORDER DENYING PRODUCTION OF DOCUMENT

This matter is before the Commission upon the hearing examiner's certification of respondent's motion of October 21, 1966, requesting the production of a confidential document in the Commission's files.

The specific document requested is identified as "the Commission's closing memorandum in F.T.C. File No. 642 3244, Cosmopolitan Mutual Life Insurance Company." [1] As grounds for the request respondent refers to the following circumstances: It asserts that respondent herein, Statesman Life Insurance Company, is a successor of the Cosmopolitan Mutual Life Insurance Company; that before the latter became inactive on December 31, 1964, it (Cosmopolitan) received a letter from the Bureau of Deceptive Practices requesting certain information in connection with the investigation in File No. 642 3244; that the advertising materials supplied to the Commission were identical with those now set forth in the instant complaint except for the name of the insurer appearing on the letter; and that the Commission advised Cosmopolitan that the matter was closed because the information developed was not considered sufficient to justify further action. Respondent's argument is that the memorandum referred to is relevant to its position that the challenged advertising is not deceptive and that this proceeding is lacking in public interest.

Under the Commission's Rules respondent must show good cause for the document requested.[2] In an effort to show good cause, respondent has asserted that it is believed the document requested would show reasons why the Commission decided not to proceed in the Cosmopolitan Mutual Life Insurance Company matter and that such reasons would be relevant to the defense

[1] Respondent states that it "understands that in all docketed investigational files which are closed a report and recommendation of closing is made by the [Commission's] staff." Of course, it does not necessarily follow from the fact that a file is closed that the staff so recommended.

[2] Respondent has made its request pursuant to § 3.11 of the Commission's Rules of Practice and § 1.133(a) of the Commission's General Procedures. However, a request for production of confidential documents in the files of the Commission made during the course of a hearing is considered as a request pursuant to § 1.134 of the Commission's General Procedures relating to the release of confidential information. *R. H. Macy & Co., Inc.*, Docket No. 8650 (order issued September 30, 1965) [68 F.T.C. 1179]; *The Sperry and Hutchinson Company*, Docket No. 8671 (order issued April 15, 1966) [69 F.T.C. 1112]. See also the discussion in *Viviano Macaroni Company*, Docket No. 8666 (order issued March 9, 1966) [69 F.T.C. 1104], and *The Seeburg Corporation*, Docket No. 8682 (order issued October 25, 1966, denying request for production of documents) [p. 1809 herein].

the respondent wishes to make in this case. Although respondent has alleged that there are great similarities in its advertising and the advertising of Cosmopolitan Mutual Life Insurance Company, it does not follow that the Commission's decision to close the file in the Cosmopolitan matter would compel the Commission to close or dismiss this case. The parties are different, the circumstances are different and the public interest considerations which perhaps influenced the decision to close the earlier file were not the same as those underlying the Commission's consideration of this case to this date.[3] We conclude that respondent has failed to sustain its burden of showing "good cause" as required by the Commission's Rules.

The Commission is also of the view that intra-agency memoranda of the type requested, at least to the extent that such would consist of the Agency's mental processes in arriving at a disposition of a matter before it, are not the proper subject of discovery. *United States* v. *Morgan,* 313 U.S. 409, 422 (1941); *North American Air Lines* v. *Civil Aeronautics Board,* 240 F. 2d 867, 874 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 941; *Coro, Inc.* v. *Federal Trade Commission,* 338 F. 2d 149, 152–153 (1st Cir. 1964); *Graber Manufacturing Company, Inc.,* Docket No. 8038 (order issued December 13, 1965, slip opin., p. 7) [68 F.T.C. 1235, 1240]; *Inter-State Builders, Inc.,* Docket No. 8624 (order issued April 22, 1966) [69 F.T.C. 1152]; *R. H. Macy & Co., Inc.,* Docket No. 8650 (order issued September 30, 1965) [68 F.T.C. 1179]; *The Sperry and Hutchinson Company,* Docket No. 8671 (order issued April 15, 1966) [69 F.T.C. 1112]; and *The Seeburg Corporation,* Docket No. 8682 (order issued October 25, 1966, denying request for production of documents) [p. 1809 herein]. Nor do we believe, as respondent seems to suggest, that this is contrary to the policy reflected in the Freedom of Information Act of 1966 (Public Law 89–487, 80 Stat. 250 (1966)), an amendment to the Administrative Procedure Act. See discussion in *The Seeburg Corporation,* Docket No. 8682 (order issued October 25, 1966, denying a motion to vacate complaint, slip opin., pp. 11–14) [pp. 1827–1830 herein]. Accordingly,

It is ordered, That respondent's motion for the production of

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[3] Respondent makes no claim that the Commission acted arbitrarily in issuing the complaint in this proceeding while closing the file in the prior matter. The earlier matter was closed, according to the letter transmitted to the Cosmopolitan Mutual Life Insurance Company, on the basis that the information developed in the investigation was not considered sufficient to justify any further action. The Commission, of course, is vested with discretion as to whether or not it will issue a complaint or dispose of a matter by some other administrative action. *R. H. Macy & Co., Inc.,* Docket No. 8650 (order issued September 30, 1965, slip opin., p. 5) [68 F.T.C. 1179, 1182], and cases there cited.