plaint counsel be required to produce or permit them to inspect and copy certain books and papers which they contend are non-privileged, constitute evidence relevant to the subject matter of this proceeding, and are in the possession, custody or control of complaint counsel.

Specifically, the motion encompasses "all books, records and other documents" obtained by complaint counsel, or any employee or agent of the Federal Trade Commission in conjunction with

this proceeding or the investigation preceding complaint from the following companies:

American Artists Group, Inc.;
Detecto Scales, Inc.;
Fleck Bros.;
Frolick Specialties;
Gibson Greeting Cards, Inc.;
Johnson & Johnson;
Protex Products Company;
The Richelieu Corp.;
Royal Typewriter Company, Inc.;
SCM Corporation.

Excluded from the request are those records obtained from the respondents or which have been previously offered for inspection to the respondents.

Respondents contend their request meets the good cause standard under § 3.11 of the rules in effect prior to July 1, 1967. They assert, in this connection, that they had been informed during pretrial discovery that complaint counsel had secured a number of documents from the files of these companies prior to issuance of complaint and that many of the documents previously examined by complaint counsel had been destroyed in the ordinary course of business. Many of these documents, according to the motion, relate to specific transactions described in complaint counsel's tabulations and have a bearing upon the question of whether the tabulations reflect the actual net prices at which the merchandise was sold. In addition, respondents assert that they have reason to believe that complaint counsel has omitted from his exhibit list documents which would aid in the preparation of respondents' defense. The motion concludes that since all the data involved in this request came from the suppliers "whose dealings with respondents comprise the entire case against respondents" they are necessarily relevant.

Complaint counsel by answer filed October 4, 1967, opposes the motion for production on the ground that the documents involved are confidential and that respondents have failed to establish the relevancy of their request.

The hearing examiner recommends that in the absence of a more clear and definite showing on the part of complaint counsel, of the sensitive nature of the data requested, that they should be released for the inspection of respondents. This recommendation is made on the assumption that the requested materials merely relate to day-to-day sales transactions and routine correspondence.

§ 3.36 of the Commission's rules now in effect governs the release of confidential records from the Commission's files. Any request

for such data must meet the standards set forth in that rule. In this connection, the rule states that motions made pursuant to this provision shall specify as exactly as possible, the material to be produced and the nature of the information to be disclosed. The rule also requires that the motion shall contain a statement showing the general relevancy of the material or information involved and the reasonableness of the scope of the application, together with a showing that such material or information is not available from other sources by voluntary methods or through other provisions under Part 3 of the rules.

Respondents' request was not made pursuant to § 3.36 and their motion does not meet the standards set forth therein. The rule requires that the material to be produced or the information which is to be disclosed shall be identified as exactly as possible to permit a determination of whether the request meets the prerequisites to disclosure specified by the rule. In short, the rule contemplates review by the Commission of the applications made thereunder and that they contain sufficient information to insure that the review be an intelligent one. Respondents' request broadly defining the material they desire as all books, records and documents obtained from the suppliers listed in their motion can only be evaluated with difficulty, if at all, against the standards of the rule. Another relevant consideration is the fact that the Commission's files contain all manner of documents and information, some of which would have no relevance to the issues involved in litigation. The necessity for adhering to the procedures set forth in § 3.36 is accordingly clear.

Further, some of the information secured in the course of a Commission investigation is necessarily more sensitive than other data obtained through the Commission's investigative processes. At this juncture, on the basis of respondents' motion of September 22, 1967, the Commission is not in a position to determine whether all books, records and other documents obtained from the ten companies are in fact non-privileged as respondents assert.

Finally, it seems evident on the basis of the assertions in respondents' motion alone, that they could specify far more explicitly the materials they desire than the description in their application of September 22, 1967. In this connection, respondents have had, as they assert, pretrial discovery of the ten suppliers involved in this case and were in fact informed by these companies that a number of documents from these suppliers were turned over to the Commission and that certain material had been destroyed by the suppliers. On the basis of these contentions, it is reasonable to assume that respondents should be able to specify with greater

exactitude the identity of or at least the categories of documents which they desire. In this connection, respondents should also set forth with more precision than in their motion the issues with respect to which the material they desire is relevant. Accordingly, the motion for production will be denied without prejudice. Respondents may renew the motion pursuant to § 3.36 of the Commission's rules in conformity with the views expressed above. Accordingly,

It is ordered, That respondents' motion for production of documents filed September 22, 1967, and certified by the examiner on October 5, be, and it hereby is, denied without prejudice.

Commissioner Elman dissenting.

STATESMAN LIFE INSURANCE COMPANY

Docket 8686. Order and Opinion, Dec. 21, 1967

Order denying motion to defer issuance of press release on initial decision. Interprets Freedom of Information Act, Sec. 3.

ORDER AND OPINION DENYING MOTION TO DEFER ISSUANCE OF PRESS RELEASE

Respondent, Statesman Life Insurance Company, has filed a motion with the Hearing Examiner requesting the Commission to defer issuance of all further press releases in this matter pending final hearing and adjudication by the Commission or until final action favorable to the Commission by the United States Court of Appeals for the District of Columbia Circuit in *Federal Trade Commission* v. *Cinderella Career and Finishing School, Inc.*, No. 21,118, 1967 Trade Cases ¶72,072 [8 S.&D. 470, 660].

The Hearing Examiner has now filed his initial decision in this matter in which respondent was charged with engaging in false and deceptive advertising of life insurance policies in violation of Section 5 of the Federal Trade Commission Act. The initial decision has been served on respondent. Respondent argues that if such decision is adverse to it, issuance of a press release announcing the facts of this decision might cause policy holders in respondent to cancel their policies and thus prejudice and cause injury to respondent. Respondent asserts in its brief without any supporting documentation that the issuance by the Commission of a press release concerning the Commission's filing of the complaint in this matter caused many of respondent's policy holders to cancel their policies to the injury of respondent and perhaps also of the policy holders in question. However, no objection was ever made by respondent to the issuance by the Commission of this press

release nor of that issued by the Commission making public respondent's answer to the complaint.

Complaint counsel opposes the instant motion of respondent on the ground that the initial decision of the Hearing Examiner is a public document and that the granting of the motion would therefore be contrary to the public interest.

The Hearing Examiner has certified the motion to the Commission without recommendation.

Under Section 3 of the Administrative Procedure Act as amended by the recent Freedom of Information Act, administrative agencies are required to make available for public inspection and copying, in accordance with the published rule "all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases." Section 8(b) of that Act requires that "all decisions (including initial, recommended or tentative decisions) shall become part of the record."

The Commission's Procedures and Rules of Practice provide expressly that the adjudicative proceedings of the Commission are public unless otherwise ordered by the Commission and that the initial decisions of the Hearing Examiners are part of the public record and are available to the public without charge. (Sec. 3.41 and 4.9 (a), (d), and (e)(4).) It should be noted that all Commission news releases respecting publication of initial decisions of its hearing examiners contain the following express explanation of the status of these decisions:

This is not a final decision of the Commission and may be appealed, stayed or docketed for review. (Emphasis in original.)

It is difficult to understand that respondent or its policy holders could be prejudiced by the publication of the initial decision in this case which publication will simply record the findings and conclusions of the examiner all of which are matters of public record. This is particularly true in this case where the facts of the complaint and respondent's answers have already been made public. We cannot understand how publication of the initial decision of the hearing examiner can constitute prejudgment of these issues by the Commission. The granting of the instant motion, in our judgment, would contravene both the Freedom of Information Act and the Commission's own rules. Initial decisions by hearing examiners in publicly conducted adjudicative proceedings are matters of public interest of which the public has a right to be informed. The Commission's news releases containing such information are designed to be entirely factual and objective. It is an unwarranted libel on the Commission to suggest that it is thereby

attempting to "smear" respondents or to try its cases in the newspapers. No special or unusual circumstances having been shown by respondent in support of its motion, we are constrained to deny the motion and are issuing our order to this effect.

ADVISORY OPINION DIGESTS*

No. 133. Agreement among members of trade association to comply with government ruling

A trade association requested an advisory opinion as to its proposal to hold joint discussions among its members as to the proper description of the industry's product looking toward a possible agreement among all concerned to comply with ruling of a government agency as to how the product should be labeled. The Association assured the Commission that the discussion would be for this limited purpose only and that there would be no price fixing, monopoly or other antitrust question involved.

The Commission advised that there could be no objection to a discussion among the members looking toward a limited agreement to comply with this ruling on a voluntary basis. The members were further advised, however, that nothing in this opinion was to be construed as approval of any steps which might be taken by the members, acting in their private capacity, to enforce this ruling themselves as to any members who might not be inclined to agree. Such approval as was given was limited to the simple agreement in principle to comply with the ruling, with enforcement being left to the properly constituted government authorities. (File No. 673 7104, released July 13, 1967.)

No. 134. Proposed lease of patented industrial machine

A manufacturer of a patented industrial machine designed to produce a nonpatented end product has requested an advisory opinion as to the legality of its proposed form of lease.

The manufacturer posed two specific questions pertaining to the lease and requested an opinion as to any other phase which the Commission might feel should be covered. The first question related to the lease term and royalty provisions, which provide that the lease shall continue in effect for three years with the lessee having the right to terminate upon 90 days notice during the second and third years and that the rental shall be 2.2 percent of the gross sales of products produced on the machine by the lessee.

* In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are public record. Digests of advisory opinions are currently published in the Federal Register.