# THE HEARST CORPORATION, ET AL.

*Docket 8832. Order and Opinion, Dec. 6, 1971*

Order and opinion denying interlocutory appeal by two of the respondents from examiner's order granting motion to quash subpoena of newspaper reporter's records.

## Opinion of The Commission

By Jones, *Commissioner:*

This matter is before the Commission on the interlocutory appeal of respondents, Hearst Corporation and Periodical Publishers' Service Bureau, Inc., from the hearing examiner's order of September 22, 1971, granting a motion to quash a subpoena *duces tecum* to Arthur E. Rowse, a syndicated columnist specializing in articles of interest to consumers. Respondents are appealing this ruling on the ground that it involves substantial rights and will materially affect the final decision in this case. Since matters of discovery and claims of First Amendment violations are involved, we have concluded that a decision now on the merits of the appeal will substantially further the expeditious handling of this proceeding.[1]

The subpoena which is the subject of this appeal was requested by respondents on July 13, 1971, and seeks production by Mr. Rowse of all of the documents upon which he based a newspaper article written by him about Congressman Fred B. Rooney's efforts to eliminate abuses in the magazine sales industry.[2] In addition, respondents' subpoena also asked for the production of all documents communicated between Mr. Rooney or his staff and the Federal Trade Commission, all documents dealing in any way with the efforts of Mr. Rooney or his staff to cause any government agency to take action against respondents and all documents reflecting positions by Mr. Rooney or his staff in regard to the Paid During Service (PDS) Code, a self-regulatory industry program to eliminate selling abuses in the magazine subscription industry.

Respondents contend that this material may be relevant to three of their defenses to the pending Commission complaint against them

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[1] Section 3.35(b) of the Commission's Rules of Practice provides that appeals to the Commission from rulings on motions to limit or quash process will be entertained by the Commission on a showing that:

[T]he ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice.

[2] The article entitled, "New Magazine Guidelines Set," appeared in the Washington Star on July 11, 1971.

charging them with violation of Section 5 of the Federal Trade Commission Act. These defenses briefly are that the Commission's Advisory Opinion No. 128 [71 F.T.C. 1735; 16 C.F.R. § 15.128] approving the legality of the industry's self-regulatory PDS Code barred the Commission from bringing the instant complaint while the Advisory Opinion was still in effect. This defense is the subject of a separate motion to dismiss the complaint brought by respondents which has recently been ruled on by the Commission adversely to respondents.[3]

Respondents contend that the Rowse material may also be relevant to their other two defenses that the Commission has prejudged this matter and hence has deprived them of an opportunity to obtain a fair and impartial adjudication of the matters alleged in the complaint and that improper *ex parte* communications have been made to the Commission.

Mr. Rowse moved to quash the Commission subpoena issued by the examiner on respondents' request, claiming *inter alia* that the subpoena was defectively overbroad and in effect a "fishing expedition" and that the First Amendment provides him with a journalistic privilege to refuse to disclose information obtained as a result of his efforts as a reporter.

The hearing examiner granted Mr. Rowse's motion to quash the subpoena on the basis of his finding that the deposition of Mr. Rowse was not "essential" for discovery purposes and that even if Mr. Rowse's article was accurate in stating that Congressman Rooney "spurred" the Commission into action, this in itself would not "constitute a defense" to the complaint in this proceeding, since such action on the part of the Congressman would not be improper.

Respondents' appeal seeks a reversal of the examiner's ruling and contends that the examiner erred in applying the wrong test in ruling on the motion to quash and in failing to deal with the First Amendment arguments urged by both parties.

## Respondent's Contention that the Examiner Adopted an Erroneous Rule of Law

The essential issue raised by this portion of respondents' appeal is whether the documents and information sought by respondents

[3] Order Denying Interlocutory Appeal from Denial of Motion to Dismiss Complaint, FTC Docket No. 8832 (October 29, 1971) [p. 989 herein].

under this subpoena are relevant to the proceedings and should be ordered to be produced.[4]

In dealing with this issue, it is essential that we consider respondents' documentary requests in the subpoena in the light of each of the defenses which they assert form the basis for their need—and indeed right—to the requested material.

1. *Respondents' Advisory Opinion Defense*

Respondents' principal ground in arguing their need for the material sought under the subpoena rests on that portion of their defense directed to their claim that the Commission's Advisory Opinion relating to the legality of their self-regulatory PDS Code barred the Commission from bringing the instant complaint without first rescinding the Advisory Opinion.[5]

On its face, we can find no relevance of any of the material sought under the subpoena to the issues raised by respondents under this defense as to whether the Commission intended, led respondents to believe, or, in fact, committed itself not to issue any complaint against respondents or the industry in general while the advisory opinion

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[4] The Commission's rule which governs the rights of parties to use subpoenas *duces tecum* is Section 3.34(b)(2) which provides:

Subpoenas duces tecum may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which *constitute or contain* evidence relevant to the subject matter involved and which are in the possession, custody, or control of such person (emphasis added).

Respondents argue that these words have been interpreted both by the Commission and by the courts in decisions dealing with analogous discovery rules of the Federal Rules of Civil Procedure, as embodying production of materials which may "lead" to evidence rather than simply to materials which may "constitute or contain" evidence. We do not believe these distinctions, if they exist, are significant for the purpose of determining this particular motion. Our consideration of the arguments of counsel, therefore, will be based squarely on the issue of relevancy as it may be interpreted in the broadest possible sense without determining whether the Commission's rule represents, in fact, a somewhat narrower view of relevancy than that embraced in Rules 26(b) and 34 of the Federal Rules of Civil Procedure.

[5] Thus respondents' brief states that their need for thorough discovery "is supported by far more than bare charges of prejudgment or mere suspicion of the propriety of the Commission activities." (Res. App. Br. at 17.) The "far more" is stated to consist of their four contentions with respect to the Commission's Advisory Opinion which formed the basis for their motion to dismiss the complaint. The facts are enumerated by respondents to consist of the following:

"1. The Commission is presently attacking practices which it approved in Advisory Opinion No. 128.

2. No notice to respondents of rescission of Advisory Opinion No. 128 has ever been given.

3. Hearst and Periodical have been given no opportunity to effect voluntary compliance in conjunction with the rescission of Advisory Opinion No. 128.

4. The press reports that Congressman Fred B. Rooney has brought pressure to bear upon the Commission during the three-year period which the Commission had approved for the operation of the PDS Code." (Res. App. Br. at 17.)

was still in effect. Nor can we find anything in the documentary request of the subpoena bearing on the question of whether the Commission, through the issuance of this advisory opinion, did or did not approve any of the industry's sales practices challenged in the complaint. Nothing in respondents' brief helps us in this respect.

Respondents argue that the article by Mr. Rowse asserts that Congressman Rooney and his staff "spurred" government agencies to take action against them.[6] We do not see the relevance of this assertion to respondents' arguments that the Commission's Advisory Opinion barred it from bringing the instant complaint against respondents or approved any of the practices challenged by the complaint. Clearly the validity of respondents' claims in this respect must stand or fall on whatever is ultimately decided about the intent and effect of the Commission's Advisory Opinion.[7] However, it is our view that the validity of respondents' contentions on this issue are neither supported nor detracted from by injecting into that issue the claimed actions of some third party *vis-a-vis* the Commission—whether he be a Congressman, a newspaper reporter or another member of the public.

Respondents argue that whether Congressman Rooney "required" the Commission to bring this complaint, and if so, how and through what types of communications is somehow relevant to this issue. We disagree that discovery into these facts is relevant to respondents' defense concerning the Advisory Opinion. If the Commission was barred or had barred itself, as respondents assert, from bringing the instant complaint against respondents, the reasons why the Commission chose to bring the complaint are surely wholly irrelevant to that issue.

We cannot see, therefore, just how the subpoena request directed to Mr. Rowse bears in any respect on this precise issue. We conclude, that on the record before us the subpoena did not search for any information which was either essential or even remotely relevant to this part of their defense.

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[6] The reference in the Rowse article bearing on the activities of Congressman Rooney and the Federal Trade Commission's actions relating to the magazine subscription industry appeared in the following two paragraphs:

To him [Congressman Rooney] belongs much of the credit for successful government actions earlier this year resulting in elimination of numerous questionable practices by some of the largest firms selling long term subscriptions via monthly payments, a system known as PDS for "Paid During Service."

His lonely crusade eventually spurred the Federal Trade Commission and the Post Office Department into action against deceptive sales tactics in the industry. His persistent efforts also persuaded several companies to discontinue PDS business entirely.

[7] The Commission in its recent opinion [989 herein] denying respondents' motion to dismiss, which was based squarely on their contentions reflected in this defense, held that the Advisory Opinion was designed to exempt the magazine sales industry from prosecution by the Commission for antitrust violations and has no bearing on allegations of sales deceptions which are at issue in the instant proceedings. *See* note 3, *supra*.

2. *Respondents' "Prejudgment" Defense*

The second ground urged by respondents in support of their need for the requested information is their contention that these documents will in some way relate to their affirmative defense that the Commission has prejudged the case.

In addition to asserting that there has been "clear prejudgment" by the Commission, respondents include within this defense contentions that the Commission has been subject to undue political pressure and that public comment on the case has created an atmosphere of adverse and unfair publicity which make it impossible for them to have a fair and impartial trial.[8] We will consider each of these allegations in relation to respondents' subpoena of Mr. Rowse's files.

With regard to the assertion of "clear prejudgment," we fail to see how the documents sought by respondents' subpoena bear in any way on this defense.

Prejudgment occurs when there is evidence that a decision maker in an adjudicatory proceeding has irrevocably closed his mind on the specific facts of a case yet to be heard by him. *FTC* v. *Cement Institute*, 333 U.S. 683, 701 (1948). It has not been found to occur in the absence of some type of statement or expression of opinion by the decision maker as to an ultimate controverted issue in the pending case. *Safeway Stores, Inc.*, v. *FTC*, 366 F. 2d 795, 802 (9th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967). The test is whether a Commissioner or hearing examiner has "taken a position apparently inconsistent with an ability to judge the facts fairly. * * *" *Texaco, Inc.* v. *FTC*, 336 F. 2d 754, 764 (D.C. Cir. 1964). In short, evidence of prejudgment must rest on positions or statements made by a decision maker himself which indicate that he has in some measure decided the merits of a pending case in advance of hearing the matter.

We find nothing in the actions attributed to Congressman Rooney by Mr. Rowse's article which suggests that prejudgment as defined by the above cited case law has occurred in the instant proceeding.

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[8] Respondents phrase their argument in their brief in the following words:

That respondent is unable to obtain a fair and impartial adjudication of the matters alleged in the complaint because of a clear prejudgment by the Federal Trade Commission; that said prejudgment is a direct result of adverse and inaccurate newspaper and other publicity alleging directly and by implications that "all" members of the PDS industry have engaged in unlawful acts; similar adverse and inaccurate allegations in reports, speeches, press releases and other communications by legislators and other governmental personnel; and other unfair and inaccurate ex parte communications; that respondent has had and will have no opportunity to rebut such unfair communications and that said unfair communications and the Federal Trade Commission's resulting prejudgment violate the Commission's Rules of Practice, and the Administrative Procedure Act, and deny respondent the Due Process of Law guaranteed by the Fifth Amendment of the Federal Constitution. [Periodical's Ans., 9–10.]

The article indicates that the Commission took "action" against the magazine sales industry. This, in fact, was the case. The Commission filed complaints against several members of the industry, alleging that they had engaged in acts and practices which violated Section 5 of the Federal Trade Commission Act. The filing of a complaint by the Commission, however, has nowhere been held or even argued as providing any basis for a charge of prejudgment by the Commission. *See FTC* v. *Cinderella Career and Finishing Schools, Inc.*, 404 F. 2d 1308 (D.C. Cir. 1968).[9] The cases make it quite clear that allegations of prejudgment must rest upon statements by the Commission or by Commissioners or other decision makers and not upon the mere filing of a complaint.

Respondents in the instant case have pointed to no such statements for their assertion that prejudgment has taken place, nor have they even indicated whether the prejudgment exists in the minds of a single Commissioner or in the Commission as a whole or whether it exists rather in the mind of the hearing examiner. Certainly Mr. Rowse's article gives no indication that there has been any prejudgment on the part of the decision makers in this proceeding.

Accordingly, we cannot find any relevance which the background materials for Mr. Rowse's article might have to respondents' prejudgment defense, insofar as it relates to this type of asserted prejudgment of the issues in the instant complaint.

Respondents, however, do not confine their "prejudgment" defense to a claim that the Commission has taken a position indicating prejudgment of the instant case. They also seem to assert that prejudgment can also be shown through evidence of undue political pressure. Such pressure they maintain has occurred here. In this connection, respondents filed a supplemental appeal brief urging that a speech by Mr. Rooney before the Women's National Democratic Club on October 7, 1971, provides additional justification for their discovery application. In this speech Congressman Rooney stated that his "investigation of magazine subscription sales practices [has] to date produced Federal Trade Commission charges of deception and misrepresentation against 18 corporations. * * *" [Res. Supp. App. Br. at 2.]

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[9] In *Cinderella*, the court pointed out:

Congress has, as a general practice, vested administrative agencies with both the specific power to act in an accusatory capacity through the initiation of an action designed to enforce compliance with or prevent further violations of a statutory provision and with the responsibility of ultimately determining the merits of charges so presented. * * * "It is well settled that a combination of investigative and judicial functions within an agency does not violate due process." 404 F. 2d 1308, 1315 (footnotes omitted).

Respondents argue that:

> Under such circumstances, there can be little doubt that the Commission was and continues to be influenced by the positions taken by Congressman Rooney. *A fortiori*, these respondents cannot be given a fair hearing: regardless of the scrupulousness of any individual Commissioner. * * * No Commissioner could ignore the purport of Congressman Rooney's October 7th speech any more than a Commissioner could have ignored the purport of Senator Kefauver's public remarks in connection with the *Pillsbury* case. [Res. Supp. App. Br. at 3.]

Thus, respondents contend that they have been precluded from the possibility of a fair hearing of their case, such as occurred in *Pillsbury Co.* v. *FTC*, 354 F. 2d 952 (5th Cir. 1966). A review of the law and facts in that case is, therefore, warranted.

The decision in *Pillsbury* was not based on a finding of prejudgment, but rather on a finding that powerful Congressional influence had sacrificed the appearance of impartiality in an adjudicatory proceeding before the Commission. The court found that two of the four Commissioners who participated in the final decision of the case had been substantially exposed to interference in their role as Commissioners during the course of extensive congressional hearings. The facts of the case revealed that the Commission had handed down an opinion on an interlocutory appeal reversing the hearing examiner's ruling to dismiss the complaint. Following that interlocutory opinion, but while the case was still pending, the Commission was called to testify at hearings before the antitrust subcommittees of the Judiciary Committees in the Senate and House of Representatives. During the hearings the Chairman of the Commission was asked to explain the reasons and rationale for the opinion in the interlocutory appeal. A "barrage" of questions directly relating to the Commission's views about the issue involved in the appeal were put to the Chairman, and a number of committee members challenged the correctness of the Commission's ruling. 354 F. 2d at 955–6. As a result of such questioning, the Commission Chairman disqualified himself from the case with the following statement which he read into the record at the House subcommittee hearing:

> [B]ecause of some of the penetrating questions [during the Senate hearings] I felt compelled to withdraw from the case because I did not think I could be judicial any more when I had been such an advocate of its views in answering questions. 354 F. 2d at 963.

The respondents in *Pillsbury* moved to dismiss the complaint on the ground that the Commission had become disqualified to hear the case since none of the Commissioners could have remained free to consider the issues on their merits after this display of Senate belief as to the

error of the Commission's interlocutory decision. *Pillsbury Mills, Inc.*, 57 F.T.C. 1274, 1376 (1960). On appeal the court found that the Congressional influence was improper and sacrificed the appearance of impartiality when a congressional investigation such as occurred in that case focused "directly and substantially upon the mental decisional processes of a Commissioner in a case which [was] pending before it. * * *" 354 F.2d at 964. The gravaman of the court's conclusion is reflected in this excerpt from its opinion in which it concluded:

> To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the "wrong" decision, as the Senate subcommittee did in this case, sacrifices the appearance of impartiality * * *. *Id.*[10]

Thus, the improper influence which the court found in *Pillsbury* involved the substantial probing of the minds of the decision makers on a single and crucial issue in a pending case. It also involved the clearly and publicly enunciated view of a Senator as to what he viewed as the proper decision to be reached.

In the instant case, respondents provide no grounds for their assertions that improper political interference has occurred here as occurred in *Pillsbury*. Certainly nothing in Mr. Rowse's article indicates that Congressman Rooney has in any way been probing the minds of Commissioners or the hearing examiner on any issue involved in this complaint.

All that is attributed to Mr. Rooney either by Mr. Rowse's article or by Mr. Rooney himself in his own speech is that he spurred the Commission to take action against the magazine subscription industry. Nothing in these papers implies that even Mr. Rooney himself has reached any conclusions on the merits of the Commission's complaint, let alone that Mr. Rooney has pressured the Commission to reach a particular conclusion. Nor is there anything in respondents' documentation which raises the slightest implication of improper influence on the judicial functioning of the Commission within the meaning of *Pillsbury*.[11]

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[10] In so concluding, the court referred to Senator Kefauver's statement during the hearing that he was "shocked and surprised" with the interpretation which had been given to the statute at issue in *Pillsbury*. 354 F.2d at 964 n. 5.

[11] Respondents also rely upon *D.C. Federation of Civic Associations* v. *Volpe*, No. 24, 838 (D.C. Cir. October 12, 1971) to support their contentions of improper congressional pressure. That case held that a non-judicial or quasi-judicial decision by the Secretary of Transportation to approve plans for the construction of a bridge would be invalid if based in whole or in part on the pressures emanating from a Congressman who had stated publicly that he would do everything in his power to withhold appropriations from an area-wide rapid transport system until the bridge project was approved (slip op. at 25–27). We believe the decision in that case adds little to our consideration of the instant appeal since we are here concerned with a quasi-judicial proceeding unlike the case cited, and since again we find nothing in Mr. Rowse's article which touches this point.

Respondents' argument, however, seems to extend even beyond their allegations of improper influence by Mr. Rooney and suggests that as a result of his concerns, there has been created a public atmosphere against the activities of respondents which are the subject of this complaint as to render a fair adjudication of these issues impossible. Respondents rely for this aspect of their argument on various newspaper reports of the case and of Mr. Rooney's concerns. Clearly the mere fact of public discussion of matters which ultimately may find themselves to be the subject of FTC actions, whether by Congressmen or members of the public could hardly be grounds for quashing the FTC action. Indeed some of the press articles cited by respondents in this connection are simply newspaper accounts of their instant subpoena request directed to Mr. Rowse.

Respondents' argument is akin to claims asserted by defendants in criminal proceedings that they cannot get a fair trial before a jury in matters which have received substantial publicity. An administrative proceeding could hardly be likened to a jury trial. Moreover, the article by Mr. Rowse and the other articles generated by respondents' subpoena request hardly constitute the type of inflammatory publicity which could possibly give rise to an issue of fair trial even if this were a criminal proceeding, which it quite obviously is not.

We cannot see, therefore, that this argument adds any greater relevance of the Rowse documents to the issues in this case. In short, insofar as the Rowse article, and the documents, if any, on which it is based are concerned, we find nothing in these papers to warrant our granting the requested subpoena with all of the attendant First Amendment issues which this subpoena raises.

Respondents imply, however, that there may have been covert political pressure on the Commission from Congressman Rooney about which Mr. Rowse knows or has evidence in his possession. On the basis of Mr. Rowse's article, however, we find not even the slightest implication that he has such evidence. Moreover, respondents have directed a subpoena *duces tecum* to the Secretary of the Commission to search for these precise documents. The Commission placed this motion on its docket for consideration and simultaneously with this opinion is issuing its opinion on this matter. Under its decision, the Commission has determined to treat respondents' motion as a request for documents under the Freedom of Information Act, and pursuant to this opinion will search its files and produce all documents to which respondents are entitled under the Information Act which reflect communications dated between January 15, 1971 and the present time between the Commission and its staff and Congressman Rooney and his staff re-

lating to the PDS magazine subscription industry, Hearst and Periodical. In light of this decision, we find no need for respondents to seek these documents from Mr. Rowse. Whatever influence Congressman Rooney has had on the Commission during the pendency of this proceeding can be gleaned by respondents from the documents in the Commission's files and need not be obtained from Mr. Rowse.

As for Mr. Rooney's public statements reflecting his opinions or activities in this area, there is likewise no need for respondents to obtain those statements from Mr. Rowse. Respondents cannot expect Mr. Rowse to do their research for them. *Keogh v. Pearson*, 35 F.R.D. 20, 23 (D.D.C. 1964). These materials are in the public domain and readily available to respondents without the need for compulsory process.

3. *Respondents' Defense of Ex Parte Communications*

Respondents' final argument in support of their need for these documents from Mr. Rowse's file is that they are relevant to respondents' third defense that the Commission has engaged in improper *ex parte* communications. While respondents do not specify any time period when the alleged *ex parte* communications were supposed to have taken place, it is quite clear that the only improper communications by third parties with the Commission members or the hearing examiner which could possibly be relevant would have to be communications occurring after the final complaint was issued, in this case after Januray 15, 1971. *See* Section 4.7 of the Commission's Rules of Practice.

Mr. Rowse's article, on which respondents' motion is grounded, stated only that communications from Congressman Rooney to the Commission had occurred regarding the magazine sales industry. This statement by itself can hardly constitute a basis for the sweeping dragnet of the documentary search which respondents are asking for in this subpoena designed to search out improper *ex parte* communications.

Clearly an *ex parte* communication does not embrace statements appearing in the press which are read by the public. They involve private communications involving some aspect of the issues of a pending case which are communicated to the Commission which are not made available to both parties. It is obvious, therefore, that any publicly made observations by third parties about matters in issue in an FTC proceeding hardly constitute *ex parte* communications to the Commission. To so regard them would indeed put the Commission's right to discharge its decision-making obligations in a proceeding completely at the mercy of members of the public, any one of whom is entitled

to comment publicly on any matter pending before the Commission.

Moreover, respondents' subpoena does not even appear to search for *ex parte* communications. It does not specify communications directed to the Commission or to individual Commissioners or the hearing examiner after the complaint was issued in the instant case, clearly the only *ex parte* communications relevant to this proceeding. No such time limitation is contained in the subpoena. Thus, this asserted basis for the requested materials must fall as do the other grounds advanced by respondents.

Not only do we find the materials requested irrelevant to the defenses of respondents to which they purport to relate, but we are also of the view that the subpoena suffers from a fatal defect in that it is so broad in its scope as to require us so to strike it down on that additional ground.

For example, the first category of requested documents includes *all* materials upon which Mr. Rowse based his article, "New Magazine Guidelines Set." Yet the article contained matters not at all relevant to this proceeding, such as an explanation of the PDS Code, references to communications by Congressman Rooney to members of the industry and descriptions of actions by industry members. That portion of the article which respondents emphasize in support of their request for relevant document or materials which contain or constitute evidence are two short excerpts from that article referring to a Congressman's "lonely crusade" which "eventually spurred the Federal Trade Commission and the Post Office Department into action against deceptive sales tactics in the industry." As we have shown above, these two statements appear to have no relevance to any of the asserted defenses of respondents. Clearly, the entire article as a whole has even less connection with the issues in this case. Discovery of all documents upon which the article was based, therefore, appears to be largely a dragnet operation by respondents in the hope of finding something useful.

The second category of specific requested documents in the subpoena covers *all* documents communicated between Congressman Rooney and his staff and the Commission and its staff. It thus includes all correspondence whether or not related to the PDS industry or respondents and without any limitation as to a relevant time period. Again, this request is fatally defective in its far-ranging scope.

In the third category of documents, respondents seek documents reflecting communications from Mr. Rooney to "any government

agency" causing it to take action against respondents. Since we are concerned in this proceeding only with actions by the Federal Trade Commission, respondents' request includes materials which would appear to have no bearing whatsoever on this case. Finally, respondents seek *all* documents pertaining in any way to positions taken by Congressman Rooney and his staff in regard to the PDS selling code. Again, this request is overbroad since positions taken by Congressman Rooney are not in themselves pertinent to the Commission's actions in this case or to respondents' asserted defenses. Thus, we conclude that respondents' subpoena on its face is defective. Each of the four categories of requested documents ranges far beyond information which is relevant to this proceeding. Moreover, it is impossible to relate the requested documents to the specific defenses of respondents for which the information is claimed to be relevant.

Respondents nevertheless argue that the Commission's decision in *Koppers Co., Inc.* FTC Docket No. 8755 (July 2, 1968 [74 F.T.C. 1579]) laid down the rule that respondents are entitled to an opportunity prior to trial to obtain information for purposes of discovery and that under the decision of that case, they have made a sufficient showing that their requested subpoena could produce documents which might, in turn, lead to evidence relevant to their case. Certainly, our *Koppers* decision cannot be interpreted as respondents seek to do here as having created an open door to the production of any and all materials which respondents simply assert will lead to certain evidence. Subpoenas are not issued on bare suspicions. *Coro, Inc.* v. *FTC*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). Nor was *Koppers* designed to lay down a new standard of discovery not contained in the Commission's rules which would eliminate any need whatsoever for a respondent seeking discovery to make some showing as to the relationship between the materials sought and the issues in the case.

In the instant case, we find that respondents have failed to make this showing of relevancy. Certainly the materials being sought under the subpoena have no bearing on the issue raised by respondents as to whether the Commission's Advisory Opinion precluded the Commission from proceeding against respondents by formal complaint. Equally clearly they appear to have no bearing on whether the Commission as a whole or individual Commissioners have prejudged some or all of the issues in this case. Finally, they can have only the most tenuous connection with the issues of whether improper *ex parte*