

the rule, transcripts resulting from an investigational hearing also constitute appropriate evidentiary material to support or oppose a summary decision motion. The thrust of Rule 3.24 is to permit the use of material which has been obtained under oath and which is reliable data. Clearly transcripts from investigational hearings fall into this category of material and should be permitted under the rule. In so interpreting Rule 3.24 we merely implement the purpose of the rule which is to prevent the creation of issues that are not well grounded or pertinent to resolution of the proceeding.

ORDER DENYING INTERLOCUTORY APPEAL

Respondent International Magazine Service of the Mid-Atlantic, Inc. (IMS) having filed an interlocutory appeal from the hearing examiner's ruling of October 27, 1971, denying IMS' Motion to Dismiss And/Or For Summary Decision; and

The Commission having considered said appeal and the answer of complaint counsel in opposition thereto, and having determined, in accordance with the views expressed in the accompanying opinion that IMS' appeal should be denied;

It is ordered, That respondent IMS' appeal from the hearing examiner's October 27, 1971 ruling be, and it hereby is, denied.

Chairman Kirkpatrick not participating, and Commissioner MacIntyre abstaining.

J. J. NEWBERRY CO.

Docket 8849. Order and Opinion, March 15, 1972

Order granting complaint counsel's appeal from the hearing examiner's decision denying a motion to quash a subpoena *duces tecum* issued to Charles A. Tobin, Commission Secretary. The order further denies respondent's appeal from the hearing examiner's order denying application for a subpoena *duces tecum*. The subpoena on the Commission Secretary was quashed and the case was remanded to the hearing examiner for further proceedings.

ORDER AND OPINION GRANTING COMPLAINT COUNSEL'S APPEAL AND DENYING RESPONDENT'S APPEAL

This matter is before the Commission upon (1) the appeal of complaint counsel, filed January 20, 1972, from the order of the hearing examiner denying a motion to quash subpoena *duces tecum*; and (2) the appeal of respondent, filed January 12, 1972, from the hearing examiner's denial of an application for subpoena *duces tecum*. Both parties have filed respective answers, and, in the case of respondent's appeal, a reply to complaint counsel's answer has been filed by respondent.

Both of the appeals deal with the issue of the production of certain information from the Commission's files relating to affirmative defenses of the respondent. Among these defenses is respondent's fourth affirmative defense, which is to the effect that it has been improperly singled out for an adjudicative proceeding as among all other retailers, including those who purchased the fabrics involved in this proceeding, and that by virtue of such Commission actions this proceeding assertedly is "arbitrary, capricious and outside the perimeter of Commission discretion."

I

The appeal by complaint counsel is from the hearing examiner's ruling on the record January 6, 1972, denying their motion to quash a subpoena *duces tecum* issued to Charles A. Tobin, Secretary of the Commission. There is only one specification in this subpoena, remaining after others were withdrawn, and it reads as follows:

Records, documents or memoranda reflecting the percentage or amount of textile product recall or return achieved by those retailers, other than J. J. Newberry, who have been investigated by the Federal Trade Commission and who have been identified in Federal Trade Commission press releases during the period January 1, 1970 to July 14, 1971 as having purchased and/or sold, but not having directly imported, dangerously flammable articles of wearing apparel or fabric for use in wearing apparel, and the dates and amounts of the relevant purchases; or a summary thereof. (Hearing examiner's order amending subpoena *duces tecum*, January 6, 1972.)

Complaint counsel, in their appeal, make basically two points: (1) that the request comes within the principles of the *Moog* case¹ to the effect that the Commission is empowered to develop the enforcement policy best calculated to achieve the ends contemplated by Congress, and (2) that the information is not readily available and that it would be a burdensome task to produce it.

The hearing examiner in issuing this subpoena and denying a motion to quash apparently did so on the basis that the information was related to respondent's affirmative defenses and that the issue presented was whether or not it is in the public interest to issue an order to cease and desist.²

¹ *Moog Industries v. F.T.C.*, 355 U.S. 411 (1958).

² The following is part of the examiner's statement on the record:

"The question is, as the Examiner sees it, whether the facts and circumstances, proposed to be adduced, the objective facts and circumstances, proposed to be adduced, may raise a question about the issuance of a cease and desist order in this case.

"I think it is part of the public interest concept, that is developed in second and third affirmative defenses.

"I think the fourth affirmative defense, really gets into that same area, where it is in the public interest now in the light of these facts, to issue an order to cease and desist, against this particular Respondent." (Tr. 230-231.)

Respondent is seeking this information as a matter of discovery.³ It should be noted that respondent already has a substantial amount of information in the general area of discovery it is pursuing. It has all the information previously sought in specifications withdrawn because the information was voluntarily supplied by complaint counsel. Respondent additionally has the press releases containing the names and other information of concerns involved in flammable fabrics matters in the period it has designated.

We believe the request of respondent in this first subpoena comes squarely under the rule set out in *Coro, Inc. v. Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). The court therein articulated the issue, which appears to be remarkably similar to that raised here, as follows:

The long and short of petitioners' argument is that having given up their business with catalog houses without any intention of resuming it, they should have been allowed on the basis of prior decisions of the Commission in other cases to close this case by stipulation and hence could only have been denied the privilege of stipulation by the arbitrary, capricious, etc. fiat of the Commission *which could only be discovered by a general exploration of the Commission's action in other cases. Id.* at 152. (Emphasis supplied.)

The court decided the issue in the following language:

The petitioners cite no authority in support of this argument and we have not found any. Nor have they pointed out any specific action by the Commission in other practically identical cases on which to base a belief that the Commission's denial of the privilege of stipulation might have been arbitrary or capricious. All they have shown is a bare suspicion which if well founded might support their assertion of error. *But subpoenas are not issued on bare suspicion.* They are not licenses for extended fishing expeditions in waters of unknown productivity in the vague hope of "catching the odd one". *Id.* at 152-153.⁴ (Emphasis supplied.)

Respondent here has made no showing of other "practically identical cases" on which to base its claim that the Commission might have been arbitrary or capricious. Nor has it shown any other sufficient circumstance to support such position. Its assertions are based on suspicion only, which will not justify general access into Commission confidential files under Rule 3.36 of the Commission's rules. Accordingly, it was error for the hearing examiner to grant the

³ The following is a part of a statement by respondent's counsel in the record:

"We would want to see how many of them purchased wearing apparel, or fabric, which clearly was purchased for us in wearing apparel, because as part of our fourth affirmative defense we want to show as the Universal-Rundle situation seemed to involve, that Newberry, if it violated less than anybody else, therefore, should be the last person to be sued, not the first * * *." (Tr. 170.)

⁴ See also *R. H. Macy & Co., Inc.*, Docket 8650, 68 F.T.C. 1179 (1965); *Sterling Drug, Inc. v. F.T.C.*, 450 F.2d 698, 705 (D.C.Cir. 1971). Cf. *Moog Industries v. F.T.C.*, 355 U.S. 411 (1958); *United Biscuit Co. of America v. F.T.C.*, 350 F.2d 615, 623-624 (7th Cir. 1965).

respondent's request for a subpoena requiring production of such Commission documents. Complaint counsel's appeal will be granted.⁵

II

Respondent's appeal is from the hearing examiner's order filed January 5, 1972, denying application for subpoena *duces tecum* addressed to the Secretary of the Commission.⁶ It contains four remaining specifications, 5-8 (the first four having been withdrawn during the pretrial conference), which are as follows:

5. All documents or memoranda prepared or issued by the Commission as a whole that relate to the Commission's determination to formally proceed against J. J. Newberry in this proceeding.

6. That portion or portions of documents or memoranda prepared by individual Commissioners or Commission Staff which were mentioned or reflected in the documents or memoranda identified in Item No. 5 above.

7. All documents or memoranda prepared or issued by the Commission as a whole that relate to the Commission's determination not to formally proceed against those retailers identified in Item Nos. 1 and 3 above [those retailers other than respondent who were identified in Commission press releases during 1/1/70 to 7/14/71 as having purchased dangerously flammable textile products from domestic suppliers].

8. That portion or portions of documents or memoranda prepared by individual Commissioners or Commission Staff which were mentioned or reflected in the documents or memoranda identified in Item No. 7 above.

Respondent, in its appeal, argues that the hearing examiner erred in applying a "good cause" standard and that respondent in any event had met all of the requirements of the Commission's rules for the issuance of the subpoena namely, relevancy, reasonableness of scope and unavailability from other sources. Respondent further argues that it has defined its requests so that it is seeking only those kinds of documents which the court held in *Sterling Drug*⁷ to be available under the Freedom of Information Act, 5 U.S.C. § 552, and that in denying the application the hearing examiner violated the requirements of that Act.

The hearing examiner, in his order denying the application, stated that his denial was for reasons on the record at the prehearing con-

⁵ This is not a ruling on the merits of respondent's affirmative defenses, and respondent is not by this order foreclosed from presenting such defenses.

It is further noted respondent has not sought, at least expressly, to obtain these documents alternatively under the Freedom of Information Act as in the case of the other subpoena, herein considered. (See discussion under part III, *infra*, for correct procedure for applications under such Act.)

⁶ Respondent makes its appeal pursuant to Section 3.36(d), which provides for appeals only from "rulings on motions to limit or quash subpoenas," neither of which motions were filed by complaint counsel. The hearing examiner considered the matter to be in a posture somewhat as if such a motion had been filed. In the circumstances, although respondent claims it also has satisfied Section 3.35(b), we will review the matter under the provisions of Section 3.36(d).

⁷ *Sterling Drug, Inc. v. F.T.C.*, 450 F.2d 698 (D.C.Cir. 1971).

ference held December 22, 1971, and he refers to a substantial number of pages in the record. The respondent, in its appeal brief, has characterized the hearing examiner's reasons as follows: "* * * he ruled that respondent had not made a proper showing of 'good cause' necessary to obtain what he characterized as confidential documents involving the 'mental processes of the Commissioners'" (page 4); and "* * * [he] further stated that respondent had not made a necessary showing of bias or prejudice on the part of the Commission to obtain the requested documents" (page 5).

Respondent relies primarily for its request in this second subpoena on the court's decision in *Sterling Drug, Inc., supra*. In that case the court, to the extent it required the disclosure of certain documents in the Commission's records, ruled in part as follows:

Thus, to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it. *See generally* Davis, *supra*, at 797. *Id.* at 708.

The *Sterling* decision concerns the Freedom of Information Act. So far as the court discusses discovery, that is, where it construes the phrase "not * * * available by law to a party other than an agency" contained in Section 552(b)(5) of the Act, it clearly holds that discovery of such documents as here sought will not be granted, at least routinely. The court states in part:

The question for decision is thus whether "a private party—not necessarily the applicant—would routinely be entitled to [the Commission memoranda] through discovery." *Davis, supra*, 796. The clear answer is that he would not be so entitled. While some cases suggest that government memoranda containing legal analyses and recommendations may in some circumstances be subject to discovery, it is beyond question that granting discovery of such documents is a very extraordinary step, not a routine one. Accordingly, we conclude that the Commission memoranda in question here are the type which should be exempt under § 552(b)(5). (Footnote omitted.) *Id.* at 705.

In this case no showing has been made which would justify the granting of general access to internal, confidential memoranda and documents of the Commission under Commission Rule 3.36. See also the *Coro, Inc.* case, *supra*. In the circumstances the Commission will deny respondent's appeal.

III

Respondent, in its reply brief, requests that the Commission consider the issue involved in respondent's appeal alternatively as a petition directly to the Commission and addressed to the Secretary under the Freedom of Information Act. The Commission's long-standing policy has been to consider Freedom of Information Act petitions separate and apart from adjudicative cases. See *The Seeburg*

Corporation, Docket 8682 (October 25, 1966) [70 F.T.C. 1818]; *Ash Grove Cement Co.*, Docket 8785 (July 15, 1970); and *The Hearst Corporation, et al.*, Docket 8832 (December 6, 1971) [79 F.T.C. 1020, 1021-2]. We noted in the latter proceeding in part as follows:

The Information Act was intended to enlarge and to clarify the right of access by the public to documents in administrative files. It is not concerned with discovery procedures applicable to adjudicative proceedings, and does not authorize the issuance of subpoenas. * * *

While respondents in Commission proceedings are members of the public and consequently may request access to Commission records under the Information Act like any other member of the public, such requests should not be confused with subpoenas for Commission records under § 3.36 of the rules. As the Commission has previously noted, 'requests for documents and information under the Freedom of Information Act are inappropriate when made within the framework of an adjudicative proceeding.' Thus a respondent's request for access under the Information Act should not take the form of a motion to the examiner. The application should be made * * * directly to the Commission, addressed to the Secretary. (Footnotes omitted.)

In light of this policy the request made under the Freedom of Information Act to the hearing examiner, even though made in the alternative, is inappropriate. Nevertheless, to avoid the possibility of delay if the request is not processed expeditiously, the Secretary of the Commission is directed, in accordance with the provisions of Section 4.8 of the Commission's Rules of Practice, treating the subpoena as a request made under the Freedom of Information Act, to make available to the respondent all documents called for in the four specifications of the subpoena *duces tecum* here under consideration, which come within the criteria for making documents available set out in the *Sterling* decision to the extent any such may exist which are not already public documents. A request under the Freedom of Information Act is no ground for postponement in the adjudicative proceeding. Thus, the hearing examiner, upon the service of this order, should reschedule hearings as quickly as possible. Accordingly,

It is ordered, That the appeal of complaint counsel, filed January 20, 1972, from the decision of the hearing examiner denying a motion to quash a subpoena *duces tecum* be, and it hereby is, granted.

It is further ordered, That the subpoena *duces tecum* issued by the hearing examiner on December 27, 1971, directed to Charles A. Tobin and subsequently amended by order of January 7, 1972, be, and it hereby is, quashed.

It is further ordered, That the respondent's appeal from the hearing examiner's order filed January 5, 1972, denying respondent's application for subpoena *duces tecum* be, and it hereby is, denied.