

IN THE MATTER OF
HORIZON CORPORATION

Docket 9017. Interlocutory Order, Oct. 5, 1976

Commission affirms ALJ's order denying respondent's claim of "self-evaluative privilege" for certain internal corporate records.

Appearances

For the Commission: *Alan N. Schlaifer, Eugene Kaplan, Paul L. Chassy, Lemuel W. Dowdy, and John M. Tifford.*

For the respondent: *Basil Mezines, David U. Fierst, Joel P. Bennett, Stein, Mitchell & Mezines, Washington, D.C., and Samuel Pruitt, Jr., J. Michael Brennan, Gibson, Dunn & Crutcher, Los Angeles, Calif.*

ORDER AFFIRMING ADMINISTRATIVE LAW JUDGE'S ORDER
RULING ON RESPONDENT'S CLAIM OF PRIVILEGE FOR
CERTAIN INTERNAL CORPORATE RECORDS

The administrative law judge on August 10, 1976, issued an order denying respondent's claim of a "self-evaluative privilege" for certain internal corporate documents responsive to a subpoena duces tecum issued on July 1, 1976. The documents concern internal corporate programs which investigated and evaluated the sales practices of respondent's sales offices and sales representatives. Respondent submitted the documents to the ALJ for *in camera* inspection and asked that the documents not be disclosed to complaint counsel. The ALJ subsequently authorized respondent to file an interlocutory appeal from his ruling pursuant to Section 3.23(b) of the Rules of Practice.

Respondent claims that disclosure would be contrary to the public interest because it would discourage efforts by firms to investigate and evaluate their compliance with the law. According to respondent,

A lack of confidentiality inevitably will result in serious cramping of the investigative process simply because the incentives for any institution or business entity to engage in self-evaluative investigations pale considerably with the knowledge that the results may be used against it. A company probably will initially decide not to investigate, or if an investigation is held, there will at least be an unconscious effort to tailor the findings with an eye toward eventual litigation.¹

While the public interest may justify a refusal to permit inquiry into particular matters of discovery, we believe that the public policy must be compelling before it can outweigh the interest in full disclosure. We agree with respondent that efforts by businessmen to monitor the

¹ Application for Review of Administrative Law Judge's Order Ruling on Respondent's Claim of Privilege for Certain Internal Corporate Records at 6.

Order

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legality of their practices are clearly in the public interest. However, we are not persuaded the possibility that internal corporate documents will be the subject of a discovery order would lead businessmen to cease taking steps necessary to assure themselves of the legality and propriety of their conduct and to avoid practices that would subject them to law enforcement action. Respondent's arguments are, therefore, too speculative to warrant the withholding of relevant documentary evidence.² Accordingly,

It is ordered, That the administrative law judge's Order Ruling on Respondent's Claim of Privilege for Certain Internal Corporate Records be, and it hereby is, affirmed.

Commissioner Dole did not participate by reason of absence.

² Even if a "chilling effect" could be demonstrated, we doubt that the public interest would require non-disclosure. In *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973), relied on by respondent, the court upheld a claim of privilege with respect to reports prepared by a hospital staff committee. The court held that confidentiality was essential to the effective functioning of hospital staff meetings and that these meetings were in turn necessary to continued improvement in the care and treatment of patients. In *Jolly v. Superior Court of Pinal County*, 540 P.2d 658 (Ariz. 1975) also relied on by respondent, the court declined to "judicially create" a privilege "absent an overriding matter affecting public interest as found in several of the hospital cases." *Id.* at 662.

SOUNDTRACK CHEVELL INDUSTRIES, INC., ET AL.

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Complaint

IN THE MATTER OF