

Interlocutory Order

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IN THE MATTER OF
GENERAL FOODS CORPORATION

Docket 9085. Interlocutory Order, March 10, 1980

Order denying respondent's motion for review of ALJ's order of Sept. 6, 1979 removing certain exhibits from *in camera* status.

ORDER

General Foods Corporation applies for review of the administrative law judge's order of September 6, 1979, removing certain exhibits from *in camera* status. Pursuant to Commission Rule Section 3.23(b), the law judge certified this appeal to the Commission.

General Foods contends that certain exhibits which disclose cost and profitability information for 1971-1977 for brands of General Foods coffee, a cost accounting manual and an accounting and financial manual used by General Foods constitute trade secrets or confidential commercial information, and that their disclosure is prohibited by Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f). Even if they are not trade secrets within the meaning of Section 6(f), General Foods contends that the documents contain confidential information which 18 U.S.C. 1905 forbids the Commission from disclosing unless the disclosure is authorized by law. General Foods argues that the Commission has disclaimed Section 6(f) as a source of authority for disclosures in adjudicative proceedings, citing our opinions in *Bristol-Myers Company*, 90 F.T.C. 455 (1977), and *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961). Finally, General Foods claims that even if disclosure is not prohibited by Section 6(f) of the FTC Act or 18 U.S.C. 1905, application of the criteria in *Bristol-Myers* and *Hood* warrants *in camera* treatment.

We hold that the exhibits at issue do not contain "trade secrets" within the meaning of Section 6(f). As we have recently stated, the legislative history and purposes of the FTC Act demonstrate that the phrase "trade secrets" is primarily limited to secret formulas, processes, and other secret technical information. See *Statement Concerning Nonpublic Disclosure to State Attorneys General of Information Obtained by the Commission*, in *Interco, Inc.*, D. C-2929, at 12-20 (November 9, 1979); *Hood, supra*, 58 F.T.C. at 1188-89. See also *Interco, Inc. v. FTC*, Civ. Action No. 78-2486 (D.D.C. December 21, 1979), where the court accepted the Commission's interpretation of "trade secrets" within the meaning of Section 6(f).¹

¹ In any event, we reiterate here that the prohibition on disclosure of "trade secrets" contained in Section 6(f) does not apply to adjudicative proceedings. *Bristol-Myers*, 90 F.T.C. at 456 n. 2; *Hood*, 58 F.T.C. at 1185-86 and n. 1.

It is also doubtful that this information falls within 18 U.S.C. 1905. Both the House Committee on Government Operations and the Justice Department have stated that Section 1905 should not be construed more broadly than the three relatively narrow statutes that were consolidated into Section 1905. Accordingly, they have stated that Section 1905 applies only to narrow categories consisting of tax information, trade secrets, and confidential information acquired for statistical purposes. See H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. 58 (1978); Supplemental brief for defendants-appellees at 1-16, filed in *Chrysler Corp. v. Brown*, No. 76-1907 (3d Cir.) on July 17, 1979. Thus, these exhibits do not appear to come within Section 1905.

We need not reach a definitive resolution of the Section 1905 question, however, since Section 1905 only prohibits disclosure of information "to any extent not authorized by law." *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). The FTC Act, 15 U.S.C. 41, *et seq.*, provides inherent authority for disclosure of information in the course of adjudicative proceedings. See *E. Griffiths Hughes, Inc. v. FTC*, 63 F.2d 362 (D.C. Cir. 1963). For example, Section 5(b) of the Act allows interested parties to intervene and requires the Commission to report its findings in adjudicative proceedings. Because disclosure of evidence is necessary to carry out our duties under Section 5 of the FTC Act, such disclosures are authorized for purposes of 18 U.S.C. 1905.

General Foods' alternative claim is that these exhibits warrant *in camera* treatment. The administrative law judges have broad discretion in determining what information should be placed *in camera* and we do not ordinarily disturb their determinations "except on the basis of a showing of abuse." *Eaton, Yale & Towne*, 79 F.T.C. 998, 1001 (1971); *Hood*, 58 F.T.C. at 1185.

The ALJ denied *in camera* treatment to a number of charts prepared by an expert witness and to General Foods documents showing profits, breakdowns of various costs, sales, and assets relating to several brands of General Foods coffee for the years 1971-1977 (data are provided through March 1977). General Foods contends that these data were compiled at great expense and that they would give competitors significant insights into General Foods' strengths and weaknesses. However, as the law judge correctly noted, we place a greater burden on a respondent when the information is old; here, most of the information is more than three years old. The Commission has usually denied *in camera* treatment for data of that vintage.² General Foods does not make a convincing showing that such data

² See, e.g., *Crown Cork & Seal Company*, 71 F.T.C. 1714, 1715 (1967) (two-and-a-half to six-year-old sales data denied *in camera* treatment); *Columbia Broadcasting System, Inc.*, 72 F.T.C. 27, 177-180, 334-35 (1967) (*in camera* treatment for sales data, especially five-year-old data, criticized by Commission); *Reuben H. Donnelley Corporation*, D. 9079 (order of Oct. 25, 1977) (*in camera* treatment of relevant two-year-old revenue data denied); see also *United*

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would provide significant insight into its strengths and weaknesses. Indeed, General Foods consented to placement on the record of similar data for 1971 through 1973.

With regard to detailed profit and expense information for 1976-1977, there is evidence that estimates of these figures may be available to competitors from outside sources, and that General Foods has access to similar data about its competitors.³ It is possible that General Foods might have made a sufficient showing to warrant *in camera* treatment for a temporary period⁴ had it provided more detailed information concerning the following factors, *inter alia*:

(1) Whether General Foods knows what estimates of its sales, profits, and costs are available and generally how accurate those estimates are.

(2) What degree of detail may be obtained from public sources, such as General Foods' financial statements⁵ or estimates based on known frequency of and rates for public media advertising.

(3) How many employees have how much information about current financial data, and whether such employees have recently left General Foods' employ.⁶

With regard to General Foods' financial and accounting manuals, respondent's showing is rather conclusory. Certainly if these manuals represented a significant work product, compiled at great expense, disclosure of which would give other companies the benefit of General Foods' labors, *in camera* treatment might be warranted. *Bristol-Myers*, 90 F.T.C. at 456. We are unable to discern from the evidence before us whether similar procedures are likely to be employed by other companies or, if there are significant differences, whether these procedures are so uniquely adapted to General Foods' operations that they would be of little use to other companies. *Id.* Thus, we cannot disagree with the ALJ's determination on this issue.

States v. International Business Machines Corp., 67 F.R.D. 40, 47-49 (S.D.N.Y., 1975) (*in camera* treatment denied for three-year-old revenue, sales and manufacturing data). General Foods' assertion of confidentiality based on complaint counsel's belief that the data are relevant is frivolous.

³ General Foods argues that the fact that complaint counsel sought information directly from it rather than relying on generally available information demonstrates that such information is not useful to competitors. We do not believe, however, that General Foods would disagree that sound administrative practice may require that a Commission order be based when possible on information that is more accurate than estimates upon which a competitor might reasonably rely in conducting its business.

⁴ Where serious competitive injury may result from disclosure, or even where the issue is a close call, a useful procedure that may be employed is to grant *in camera* treatment for a period of years unless earlier public disclosure is deemed relevant in an opinion on the merits. See, e.g. *Brunswick Corp.* (Dkt. 9028, order of Jan. 12, 1977). The Commission also noted the availability of this procedure in *Bristol-Myers*, *supra*, at 457.

⁵ We note that many corporations are now obliged to break down their financial information by broad product category rather than publishing only data for the whole company. See Financial Accounting Standards Board, *Statement of Financial Accounting Standards No. 14, Financial Reporting for Segments of a Business Enterprise* (Dec. 1976).

⁶ An administrative law judge may provide that such showings may be made *in camera* if the discussions themselves would be tantamount to revealing the allegedly injurious information at issue.

We note that there may be some uncertainty about our statement in *Bristol-Myers* concerning the elements of the “clearly defined, serious injury” that must be shown in order to warrant *in camera* treatment, and it seems appropriate to take this opportunity to clarify the *Bristol-Myers* test. We reaffirm here that the showing required to warrant *in camera* protection is the *Hood* standard, i.e., that public disclosure of the information in question will result in “clearly defined, serious injury.” 58 F.T.C. at 1188. In *Bristol-Myers* we stated that such serious injury requires that the information in question is secret and material to the applicant’s business and would be less likely to be produced if it were known that the information had to be publicly disclosed. 90 F.T.C. at 456. It is this latter, third prong of the *Bristol-Myers* standard that, we believe, raises troublesome problems of application.

In *Bristol-Myers*, the purpose of this third factor was to effect a balance between the need for a public record and the interest of businesses in avoiding disclosure of sensitive information. *Id.* It seems, however, that this balance can be struck without attempting to ascertain whether businesses will be less likely to produce and retain the kind of documents for which *in camera* treatment is sought if the contents of such documents are disclosed to competitors. Since many records that may be of value to competitors are essential to a firm’s operations, it is unlikely that this consideration will adequately serve to differentiate which information should be granted *in camera* protection and which should not be so treated. In our view, if disclosure of confidential business information is likely to cause serious competitive injury, the principal countervailing consideration weighing in favor of disclosure should be the importance of the information in explaining the rationale of our decisions. It is unnecessary and not particularly helpful to require as an additional consideration an assessment of the likelihood that businesses will continue to produce that type of information even if disclosed. For these reasons, we hereby modify the *Bristol-Myers* standard by eliminating the third criterion of the test set forth in that decision.

In all other respects, we reaffirm the *Bristol-Myers* order. Thus, in determining future requests for *in camera* treatment, ALJs should require applicants to make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury. *Bristol-Myers* lists several particular factors that should be weighed by ALJs in determining whether the required showings of secrecy and materiality have been met. If there is doubt as to whether particular kinds of business records deserve *in camera* treatment, the ALJs may also find it useful to refer to recent court decisions dealing with the

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scope and subject matter of Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4) ("FOIA"). *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Categories of business records that courts have judged to be exempt from mandatory disclosure under the FOIA may be suited to *in camera* treatment, although a final determination must, of course, be made on the adequacy of the applicant's showings in light of the "serious injury" standard set forth in *Bristol-Myers* and *Hood* where we noted that confidentiality is not itself sufficient to warrant *in camera* treatment. 58 F.T.C. at 1189. Conversely, court decisions holding that specific types of business records are *not* exempt from mandatory disclosure should help ALJ's to quickly identify records that are presumptively inappropriate for *in camera* protection.⁷

We reiterate that the *Hood/Bristol-Myers* standard best serves the overall public interest because it strikes the balance between the need for a public understanding of the Commission's adjudicative actions and the interest of business in avoiding competitive injury from public disclosure of information.

Accordingly, General Foods' motion is denied. This order is without prejudice to the administrative law judge's discretion to revise his order should General Foods make a more detailed showing or to consider the effect of our clarification of *Bristol-Myers*.

⁷ Recognizing that in some instances the ALJ or Commission cannot know that a certain piece of information may be critical to the public understanding of agency action until the Initial Decision or the Opinion of the Commission is issued, the Commission and the ALJs retain the power to reassess prior *in camera* rulings at the time of publication of decisions.

IN THE MATTER OF
SHELL OIL COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-3012. Complaint, March 12, 1980—Decision, March 12, 1980

This consent order requires, among other things, a Houston, Texas oil company to cease failing to terminate the liability of a credit card holder for any unauthorized use of the card, after being properly notified by the card holder that third-party use was no longer authorized.

Appearances

For the Commission: *Robert C. Cheek.*

For the respondent: *A.M. Minotti, Houston, Texas.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth In Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Shell Oil Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and the implementing regulation promulgated under the Truth In Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITIONS: For purposes of this complaint, the terms "card issuer," "cardholder," "consumer credit," "credit," "credit card," "creditor," "customer," and "unauthorized use" shall be defined as provided in Regulation Z, 12 CFR 226, the implementing regulation of the Truth In Lending Act, 15 U.S.C. 1601, *et seq.*, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 1. Respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Shell Plaza in the City of Houston, State of Texas.

PAR. 2. Respondent is now and for sometime has been engaged in the offering for sale and sale of gasoline and automotive products and services to the public at retail and to dealers.

PAR. 3. In the ordinary course and conduct of its business, respondent