

Interlocutory Order

96 F.T.C.

IN THE MATTER OF

GENERAL FOODS CORPORATION

Docket 9085. Interlocutory Order, Aug. 18, 1980

ORDER DEFINING PERMISSIBLE SCOPE OF TESTIMONY OF WILLIAM
H. SPRUNK UNDER QUARTERLY FINANCIAL REPORTS
CONFIDENTIALITY RULES

By order of March 20, 1980, the Commission stayed, pending its review of the matter, the return on the subpoena issued to a Commission employee, William H. Sprunk, Assistant Director for Financial Statistics, Bureau of Economics. The purpose of the stay was for the Commission to review the interpretation and application of the confidentiality rules governing the Quarterly Financial Reports (QFR)¹ and Line of Business (LB)² programs to the subpoenaed testimony of an employee of the Commission's Division of Financial Statistics, Bureau of Economics, in a Commission adjudicative proceeding. The crux of the instant order is the resolution of the apparent conflict between Mr. Sprunk's permissible functions under the QFR and Line of Business confidentiality rules and his testimony in response to the adjudicative subpoena.

The complaint in this case alleges General Foods' use of pricing practices and other policies to the injury of competitors in eastern coffee markets. Complaint counsel's expert witness used data obtained from published aggregate data in the QFR survey to establish a benchmark as to the existence of monopoly power, one of the issues in the case. The subpoena *ad testificandum* for Mr. Sprunk, who heads the Division of Financial Statistics, in which the QFR report is prepared, was issued by the Administrative Law Judge in order to

ha[ve] someone who knows what these figures are about testify as to the accuracy of the figures, how they are compiled, and why this contract was let to Standard and Poor's. [Tr. 5242]³

The Commission's order staying the subpoena return invited

¹ 38 Fed. Reg. 18720, 26162 (1973).

² 41 Fed. Reg. 28041, 34703 (1976); 40 Fed. Reg. 21542, 22318 (1975); 39 Fed. Reg. 30970 (1974). The subpoena issued to Mr. Sprunk appears to concern only QFR data, and the Commission's LB confidentiality rules are relevant here only insofar as they might suggest that no employee of the Division of Financial Statistics may appear in an adjudicative proceeding for any purpose. The Commission's order does not reach issues concerning the admissibility of LB reports or the privileged status of individual company data obtained in the LB program. See note 8, *infra*.

³ The transcript reflects discussion of a contract using a data tape prepared by Standard & Poor's leading to a "final report, including a statistical statement re QFR accuracy * * *." (Tr. 5237)

General Foods and complaint counsel to submit simultaneous memoranda on the following issues:

1. Whether response to a subpoena in a Commission adjudicative proceeding by an employee of the Division of Financial Statistics constitutes "engag[ing] in any activity of the Commission which involves regulation or investigation * * *"⁴ or "participat[ion] in any Commission investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission * * *,"⁵ within the meaning of the prohibitions established by the QFR and LB confidentiality rules;

2. If such activity is appropriate, whether it nevertheless remains the case that an employee of the Division of Financial Statistics may not give an answer concerning the QFR program which would disclose "the names of companies, financial data, and all other information which are obtained from the respondent companies" (i.e., individual company data) in connection with the QFR program; and

3. Whether substantial prejudice to any party will result if the confidentiality rules are interpreted as outlined in (1) and (2) above.

The first question posed in the Commission's order staying the subpoena return may be answered directly, and in the negative. The clear purpose of both the LB and QFR confidentiality rules is to ensure that the individual company data be kept confidential and used only for statistical purposes, and specifically, as stated in the Commission's QFR authorizing resolution, that the individual company data "not be available for use in any Commission adjudication or in connection with any investigation for the purpose of initiating adjudicative proceedings * * *."⁶ Both sets of rules prohibit employees of DFS, which in general has sole access to the data, from engaging in investigatory and law enforcement activities of the Commission. This division of internal agency functions is a preventative measure designed to avoid any appearance, or any remote possibility, that investigatory or enforcement decisions at the FTC would be made on the basis of individual company QFR or LB data. To the extent that Mr. Sprunk's testimony here would not be based on individual company QFR data, it would be consistent with the purpose of the confidentiality rules. Accordingly, insofar as the rules are concerned, Mr. Sprunk should be permitted to testify about matters such as the methods and procedures for compiling the QFR survey and its overall accuracy, but he should not be permitted to

* 38 Fed. Reg. at 26162 (1973).

* *E.g.*, 41 Fed. Reg. at 28041 (1976).

* 38 Fed. Reg. at 18720 (1973).

testify to the extent that he would be required to disclose, or to utilize his knowledge of, individual company data.

The second and third questions present related issues: (1) whether the QFR aggregate data meet tests of admissibility without inquiry into the underlying data, despite their arguably hearsay nature and respondent's right to "conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. 556(d); and (2) whether the privilege against disclosure created by the QFR confidentiality rules is outweighed by respondent's need for individual company data.

Respondent relies on *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518 (D.C. Cir. 1963) and *Powhatan Mining Co. v. Ickes*, 118 F.2d 105 (6th Cir. 1941), for the proposition that survey results may not be admitted into evidence unless the underlying data are made available to respondent's counsel. In both cases, the challenged survey results were tabulated specifically for use in administrative proceedings by officials who had exclusive access to the underlying material. The agency officials introduced the survey results into evidence during the administrative proceedings, but objected to discovery of the underlying survey data because of confidentiality provision. In neither case was the claim of privilege upheld.

The *Wirtz* and *Powhatan* cases may be distinguished on a number of grounds. First, while the Commission has followed the general rule making underlying data available when survey results are compiled for litigation, *Avnet, Inc.*, 78 F.T.C. 1562, 1563 n.1 (1971), there is no allegation here that tabulation of QFR data was in any way connected to this case. In fact, as the confidentiality rules make clear, QFR data are collected and reports prepared "for the purpose of preparing statistical compilations." 38 Fed. Reg. at 18720. Second, this is evidently not a case where a governmental party's introduction of survey results waives its right to a claim of privilege for underlying data to which it has access. See Wright & Miller, *Federal Practice and Procedure: Civil Section* 2019; *of. United States v. Reynolds*, 345 U.S. 1, 12 (1953). Rather, because of the strict confidentiality rules in effect, complaint counsel here have no access to the data General Foods is seeking; indeed, complaint counsel cannot produce the data because they have no authority to do so. See *United States v. International Business Mach. Corp.*, CCH 1975-2 Trade Cas. ¶ 60383, 66666-67 (S.D.N.Y. 1975). Third, should the preceding grounds for distinction not be deemed dispositive, the Commission notes that the *Wirtz* court held:

[D]ocuments supporting the tables and on which they are based must also be introduced or at least be made available to the opposing party to the extent that they

are necessary for purposes of rebuttal and cross-examination. 337 F.2d at 526. (Emphasis added.)

Thus, the respondent would be required to demonstrate why information on QFR methodology and procedures would be inadequate for rebuttal or cross-examination, and why individual company data are necessary.

It does not appear that the respondent has successfully made such a showing; and, as is discussed below, the record before the Commission is too limited to suggest whether or not this showing might be made in the future. The Commission will therefore not make a final determination on admissibility at this time, but will simply assume that the challenged QFR aggregate data may properly be introduced without necessarily requiring disclosure of individual company information.⁷

As to the issue of privilege, the Commission finds that the QFR rules create a qualified privilege for individual company data. This privilege is unique to government and may be termed a qualified confidential report privilege.⁸ See *Association for Women in Science v. Califano*, 566 F.2d 339, 346 (D.C. Cir. 1977). This privilege requires a balancing of "the need of the litigants for information possessed by the Government and the need of the Government to foster the free flow of information provided to it" recognizing that "clear and strong indication is required before it may be implied that the policy of prohibition is of such force as to dominate the broad objective of doing justice." *Id.* (citations omitted). See *Avnet, Inc.*, 77 F.T.C. 1686, 1687-88 (1970).

Respondent asserts a need for, and a basic procedural right to, unrestricted discovery of information as to the "validity, accuracy, reliability and composition" of QFR data for its "efforts to cross-

⁷ Issues of admissibility are, in any event, best determined initially by the law judge. Rulings on the admissibility of the aggregate QFR data should be made, however, not only in light of the foregoing discussion, but also with regard to circumstantial guarantees of the trustworthiness of QFR reports and the necessity for using QFR data in aggregate form.

⁸ As to the nature of the privilege created, the Commission recognizes that an absolute privilege against disclosure must be based on statutory language that at least specifically addresses the confidentiality of the material. The QFR confidentiality rules were based on Sections 6(f) and 6(g) of the FTC Act, 15 U.S.C.46(f), (g), and to some extent on confidentiality provisions of the Tax Reform Act of 1976, 28 U.S.C.6103, and prior tax law. While Section 6(f) does pertain specifically to confidential treatment of business information, it does not act as an absolute bar to the release of such data in adjudications. See *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1148, 1150 (1961). Section 6(g) generally empowers the Commission to make rules and regulations for the purpose of carrying out the Act, and thus does not readily appear to support a claim of absolute privilege. The tax statutes deal explicitly with confidential treatment and may therefore provide the basis of an absolute privilege for some QFR material. In view of its disposition of this interlocutory appeal, the Commission need not decide the applicability of the tax statutes at this time, and will assume *arguendo* that they too support only a qualified privilege.

By contrast, the Commission's Line of Business confidentiality rules are based directly on statutory language that expressly protects LB data from disclosure. See 41 Fed. Reg. 28041, 34708 (1976); 40 Fed. Reg. 21542, 22318 (1975); Section 6 of the Federal Trade Commission Act, 15 U.S.C.46, as amended by Pub. Law No. 96-252; see also 88 Stat. 1822, 1840 (1974); 89 Stat. 611, 634 (1975), and 90 Stat. 937, 956 (1976). Such authority provides more compelling justification for a claim of absolute privilege. The type of evidentiary privilege that may be claimed for LB data is not at issue in this proceeding, however.

examine and defend against a benchmark based on that data, arguing that the aggregate data is not otherwise admissible." General Foods notes its prior objection to "utilization of QFR data for computing a 'competitive benchmark' and to receipt in evidence of documents containing the QFR calculations" and its prior questioning of complaint counsel's witness as to "the percentage of companies in the 'QFR benchmark' which are engaged in the sale of branded consumer grocery products and the number of food companies comprising the 'QFR benchmark'." (Memorandum of Respondent General Foods Corporation, at 1, 2, 3-4.) General Foods cites to statements assertedly casting doubt on the validity of QFR data and argues that the confidentiality rules were not intended to foreclose a respondent's inquiry under these circumstances. We need not decide the question of the admissibility of the aggregate QFR data at this time, but will assume it is admissible and discuss the application of the QFR rules to the individual company data.

Balanced against respondent's claims of need are complaint counsel's arguments that: (1) respondent has other means at its disposal sufficient to challenge use of QFR data; and (2) the "overriding concern" of the QFR rules to protect individual company data, and the evident purpose of the rules to encourage compliance with the reporting requirements by assuring confidentiality. The parties have referred to such matters as the reliability of the QFR data, the adequacy of the information respondent has already obtained, and the degree to which the QFR data are relied on exclusively in this case. However, a full record is not before the Commission on these and other issues concerning the respondent's need for the data, nor should it be at this stage.

Rather, it is within the broad discretion of the ALJ to rule on discovery and evidentiary questions, including privilege, in light of the circumstances of the proceeding. *Missouri Portland Cement Co.*, 77 F.T.C. 1688, 1689-70 (1970). The purpose of Rule 3.36 (concerning subpoenas addressed to the Commission or its employees) may be understood in light of a predecessor provision, which required certification to the full Commission of requests for subpoenas to government officials. There, the Commission said that the purpose of the rule "is not to relieve the examiner of his essential role" concerning basic questions of discovery and evidence, but rather "to provide a means of informing the Commission of any such action to prevent the possibility of abuse" and to "give the Commission an opportunity to work out appropriate arrangements with other agencies involved if a request is found to be justified." *Avnet, Inc.*, *supra*, 77 F.T.C. at 1687-88, 1688 n.3. Here, although it is not obvious

from the papers before the Commission that inquiry into individual company data was contemplated by the ALJ in issuing the subpoena, and, if so, how he viewed the confidentiality rules, the Commission must make an interim decision on the scope of discovery, reserving to the ALJ (and to the Commission on review of the entire record of the proceeding) the ultimate resolution of this issue.

Based on the necessarily limited record, the Commission has determined that the agency's need for accurate, timely and complete individual company QFR data (including company names) is more compelling than respondent's need for that data. *See Association for Women in Science v. Califano, supra*, 566 F.2d at 346-47.⁹ Nor is respondent's need so evident from the materials before the Commission to require disclosure under a protective order. Therefore, the Commission will at this time construe the QFR confidentiality rules to create a qualified privilege, barring the testimony of Mr. Sprunk as to individual company data in connection with the QFR program.

Accordingly, *it is ordered*, That William H. Sprunk may, consistent with the Commission's LB and QFR confidentiality rules, appear and testify in response to the Administrative Law Judge's subpoena *ad testificandum* issued March 3, 1980, but that the inquiry be limited to only those questions which would not disclose "the names of companies, financial data, and all other information which are obtained from the respondent companies" as protected by the QFR confidentiality rules in connection with the QFR program. The General Counsel is directed to represent Mr. Sprunk for the purpose of asserting any other privileges arising out of his Commission employment.

Commissioner Bailey did not participate.

⁹ This conclusion is based, in part, on the nature of respondent's QFR criticisms. These criticisms relate to the methodology and procedures for compiling the QFR reports, aspects of the QFR program into which respondent can inquire of Mr. Sprunk without inquiring into individual company data. See *Avnet, Inc., supra*, 78 F.T.C. at 1563.

Moreover, given the agency's compelling need to obtain the QFR data, respondent must make a strong showing of need in order to overcome the qualified privilege and thereby compel disclosure of the individual company information. On the record as it now stands, respondent's showing is wholly inadequate.

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96 F.T.C.

IN THE MATTER OF
GENERAL FOODS CORPORATION

Docket 9085. Interlocutory Order, Aug. 19, 1980

ORDER ON FOLGER'S APPLICATION FOR REVIEW

The Folger Coffee Company and the Procter & Gamble Company (hereinafter collectively referred to as "Folger") have applied to the Commission for review of the Administrative Law Judge's order of April 9, 1980, denying continued *in camera* treatment of certain exhibits and related testimony. The law judge has certified Folger's appeal to the Commission pursuant to Rule 3.23(b). Complaint counsel have filed an answer opposing this appeal.

The exhibits in question consist primarily of Folger memoranda, written during the period of 1971 to mid-1976, concerning the company's then ongoing expansion into the markets of the eastern states. The law judge found that these documents analyzed the new markets, discussed the strengths and weaknesses of both Folger and its competitors, and described Folger's promotional activity, such as its use of advertising, discount coupons, and pricing allowances. These and other exhibits for which *in camera* treatment is sought also contain detailed information on Folger's sales, costs, revenues, and profits nationally and in specific areas. Finally, Folger asks that *in camera* status be given to testimony on these exhibits as well as to testimony on the results of a taste test comparing Maxwell House and Folger coffees and on the impact of a 1975 frost in Brazil.

The law judge concluded that the release of most of the exhibits and testimony covered by Folger's request would not be likely to result in "clearly defined, serious injury," as set forth in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1148 (1961). He therefore denied Folger's motion, subject to only two exceptions. First, he granted *in camera* treatment for testimony on Folger's northeast expansion, which he found would be of present value to competitors since Folger's expansion there is still underway. Second, he determined to retain *in camera* treatment of testimony and an excerpt from an exhibit (RX 1080) that disclosed Folger's profits on High Point coffee for the years 1976 through 1979. The High Point data were deemed particularly sensitive because the product is still being test marketed.

Folgers presents four arguments in support of its *in camera* request. First, in its motion before the law judge, Folger has contended that the information in the exhibits and testimony in question is secret and material to its business, and, taken as a whole, constitutes a "unique encyclopedia of marketing knowledge." Folger