

IN THE MATTER OF

THE GILLETTE COMPANY

Docket 9152. Interlocutory Order, Dec. 1, 1981

Granting complaint counsel's motion for review of ALJ's order.

ORDER UPON APPLICATION FOR INTERLOCUTORY REVIEW

This matter is before the Commission on Complaint Counsel's Application For Review Of The Order Granting Discovery Of Commission Records, filed August 17, 1981,¹ ("Complaint Counsel's Application") and Respondent's Answer In Opposition To Complaint Counsel's Application For Interlocutory Appeal, filed August 27, 1981 ("Respondent's Answer").

I. Appropriateness of Interlocutory Review

As the Commission has frequently stated, we generally disfavor interlocutory appeals, particularly those seeking Commission review of an ALJ's discovery rulings. *See, e.g., Bristol-Myers Co.*, 90 F.T.C. 273 (1977). The Commission believes that routine review of such rulings would substantially delay adjudicative proceedings. Moreover, resolution of discovery issues, as a general matter, should be left to the discretion of the ALJ. Section 3.23 of the Commission's Rules of Practice ("Section 3.23") reflects both of these policy decisions; however, it also recognizes that special circumstances may require narrow exceptions to this rule.

Section 3.23(a)(1) provides for discretionary Commission review of an ALJ's order which "requires the disclosure of records of the Commission . . . if such appeal is based solely on a claim of privilege." In this case the requirements of the Rule are technically fulfilled as the ALJ's Order requires disclosure of Commission records and Complaint Counsel's Application is based solely on claims of privilege. The Commission has determined that this matter is appropriately before it on review, not only because the requirements of the Rule are met, but also because the issues raised by Complaint Counsel's Application recur in our proceedings with some frequency.

Respondent requested that, in the event that the Commission entertained this appeal, it be permitted to file a brief and present

¹ The order entitled, Order Ruling on Respondent's Motion For Subpoena *Duces Tecum* Directed To The Federal Trade Commission ("ALJ Order"), was issued on August 11, 1981, by Administrative Law Judge Milcs J. Brown.

oral argument on the merits. Section 3.23(a), however, makes further briefing a matter of discretion. In this instance, the Commission believes that counsel on both sides have ably addressed the merits of a narrow set of issues in their briefs before the ALJ and the Commission. Therefore, we do not believe that the delay attendant to the filing of further briefs and additional oral argument is necessary and we proceed to a discussion of the merits of this appeal.

II. Discovery of Names of Informants

The ALJ's Order requires complaint counsel to reveal the names of all nonparties that were contacted in connection with the investigation or preparation of this case. ALJ Order at 2. The ALJ's Order also limits the availability of the informant's privilege only to complainants or to those who complaint counsel can show will be "prejudiced in their future business relations with Gillette." ALJ Order at 2.² Complaint counsel argues that the names of all persons contacted during its investigation and pretrial preparation are subject to the informant's privilege. Moreover, complaint counsel asserts that respondent failed to meet its burden to show a need for the names that outweighs the policy behind the informant's privilege. Complaint Counsel's Application at 3-4. The Reply of Respondent The Gillette Company to Complaint Counsel's Answer to Respondent's Motion for Subpoena *Duces Tecum* Directed to the Federal Trade Commission, filed on August, 1981, ("Respondent's Reply") states only that "respondent's need for the identities of those interviewed outweighs the interest of the free flow of information." Respondent's Reply at 7-8. Respondent, however, subsequently filed a supplemental affidavit with the ALJ that it now relies on to demonstrate its "need" for the names of the informants. Respondent's Answer at 5.

It is well established that the government may refuse to disclose the identity of its informants at trial. See *McCray v. Illinois*, 386 U.S. 300 (1967). The rationale for this privilege was described in *Roviaro v. United States*, 353 U.S. 53 (1957).

The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. 353 U.S. at 59.

See also *Graber Manufacturing Company, Inc.*, 68 F.T.C. 1235 (1965)

² Although not manifestly limited, this description is treated by both complaint counsel and respondent as encompassing only retailers of Gillette products contacted by complaint counsel.

citing *United States v. Deere & Co.*, 9 F.R.D. 523, 527 (D. Minn. 1949). However, the privilege is not applicable unless the information supplied relates to the commission of an unlawful act or is of a nature that would reasonably be expected to precipitate reprisals if it were revealed. See *Wirtz v. B. A. C. Steel Products, Inc.*, 312 F.2d 14, 16 (4th Cir. 1962), *United States v. Swift & Company*, 24 F.R.D. 280 (N.D. Ill. 1959). Nor is the privilege absolute. See *Roviaro v. United States*, *supra* at 60-61. The burden of overcoming the privilege, however, falls squarely on the party requesting disclosure. Thus the grounds on which disclosure is sought must be clearly articulated. See *United States v. Russ*, 362 F.2d 843 (2d Cir.), *cert. denied*, 385 U.S. 923 (1966); *United States v. Coke*, 339 F.2d 183 (2d Cir. 1964). A simple request by the moving party for disclosure is not enough to meet this burden. *United States v. Mainello*, 345 F. Supp. 863, 881-82 (E.D.N.Y. 1972).

Although the issue of protecting the identity of an informer usually arises in the context of criminal cases, the privilege is also applicable in civil cases. See *Westinghouse Electric Corp. v. City of Burlington*, 351 F.2d 762 (1965), *on remand City of Burlington v. Westinghouse Electric Corp.*, 246 F. Supp. 839 (D.D.C. 1965); *Mitchell v. Roma*, 265 F.2d 633 (3d Cir. 1959). The District Court in *Westinghouse Electric*, a private antitrust case, stated, "... The *Roviaro* balance should be struck in each case, civil and criminal, in deciding whether disclosure is essential to a fair determination of a cause." 246 F. Supp. at 769.

The ultimate determination of whether the informant's privilege is applicable in a given factual context depends on a balancing of two considerations: the public interest in protecting the information at issue and the moving party's need for that information in order to prepare a defense. As stated in *Roviaro v. United States*, *supra*:

... Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. 353 U.S. at 62.

The extent of the informant's participation in the events at issue is critical to finding disclosure necessary. See *Roviaro v. United States*, *supra*; *United States v. Lloyd*, 400 F.2d 414, 415-16 (6th Cir. 1968); *Portomene v. United States*, 221 F.2d 582, 583-84 (5th Cir. 1955). The materiality of the informant's testimony to the disputed substantive issues is also highly relevant. See *Encinas-Sierras v. United States*, 401 F.2d 228 (9th Cir. 1968); *United States v. Franzese*, 392 F.2d 954 (2d Cir. 1968), *vacated per curiam in other grounds sub nom.*

Giordano v. United States, 394 U.S. 310 (1969). Furthermore, the necessity for revealing the informant's identity may also depend on the stage at which discovery is sought. See *McCray v. Illinois, supra* at 307. In *United States v. Aluminium Limited*, 268 F. Supp. 758 (D.N.J. 1966), an antitrust case, defendant sought discovery of all names of persons contacted by the government. In that case, the District Court denied disclosure stating:

... a defendant is not entitled to every bit of disclosure which he feels would be helpful ... [A]lthough the information sought may be helpful ... it may still not be essential to a fair opportunity for defendant's trial preparation. And if it is not essential his interests will not overcome the privilege. *Mitchell v. Roma*, 265 F.2d 633, 636 (3rd Cir. 1959). 268 F. Supp. at 762.

Respondent implies that it would not need all of complaint counsel's contacts in an ordinary Section 2(d) case, but the theory of this case calls for unusual case preparation. Respondent's Answer at 6, footnote. However, respondent has not demonstrated nor has it specified how it plans to use the names of the individuals contacted by complaint counsel. It is clear that this need must be examined and weighed, in the first instance by the ALJ.

In this case, the Commission believes that the ALJ failed to make an explicit inquiry into the facts that would militate either in favor of overcoming or retaining the privilege. Moreover, the ALJ's Order did not provide a basis for satisfying Section 3.36, which requires a specific showing that the material sought cannot be reasonably obtained by other means. Therefore, that part of the ALJ's Order that deals with the informant's privilege is reversed and remanded to the ALJ to conduct a factual inquiry and make findings consistent with this Order.³

III. Discovery of Reports of Interview

Complaint Counsel's Application also seeks reversal of the directive in the ALJ's Order that compels production of "the factual content of any interview report on such contact prepared by complaint

³ The Commission believes that the type of hearing contemplated by the Supreme Court in its proposed Rule of Evidence 510 is an appropriate procedural model. Although this proposal ultimately was not adopted by Congress it, nevertheless, should be accorded considerable weight. Section 510(c)(2) of the proposed rule stated:

If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination ... of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit ... Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall be permitted to be present at every stage of proceedings under this subdivision except a showing *in camera*, at which no counsel or party shall be permitted to be present.

See generally 2 Weinstein, *Evidence*, Section 510-1-7, Section 510 [05] (1980).

counsel." ALJ Order at 2. Complaint counsel argues that production of the interview reports would disclose the names of informants⁴ as well as the contents of the communications without regard for the informant's privilege and work product privilege.⁵ Respondent argues that the informant's privilege and work product privilege are not applicable to the reports of interview since respondent has met its burden of showing a substantial need for the information.

Section 3.31(b)(3) provides for two layers of protection for materials sought in discovery by a party which were "prepared in anticipation of litigation or for hearing by or for another party." It requires that the ALJ "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party."⁶ However, the Rule also protects all work product against disclosure, absent a showing of "substantial need of the materials in the preparation of [the requesting party's] case," and a further showing "that he is unable without undue hardship to obtain the substantial equivalent of the material by other means."

The ALJ's Order makes no specific reference to the requirements of Section 3.31(b)(3) nor any explanation of how the requirements of that Rule or the established requirements of the work product privilege are satisfied by respondent's arguments. Furthermore, there is no indication that the ALJ weighed respondent's need for the information against the presumption that interview reports are privileged as work product. Rather, the ALJ simply held that, "Respondent is entitled to know the evidentiary substance of the Commission's investigation, including the documents which complaint counsel intend to offer into evidence as well as the documents which they do not intend to offer." ALJ Order at 1-2. Having reached this conclusion, the ALJ went on find that complaint counsel's files were the only available source of this information.

⁴ We believe that the names of potential witnesses in and of themselves are not ordinarily work product as contemplated by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). Therefore, discovery of the names is privileged, if at all, only under the informant's privilege.

⁵ Although the subpoena in question seeks reports of interviews with those who may be regarded as potential witnesses for complaint counsel in this proceeding, we are not concerned here with the application of the Jencks Act principle. See *U.S. Life Credit Corp.*, 91 F.T.C. 984 (1978). That principle supports production of complaint counsel's interview reports, if at all, only after a witness has actually testified, in order to aid cross-examination. *Inter-State Builders, Inc.*, 69 F.T.C. 1152, 1165-67 (1966). It also requires the strict application of criteria intended to ensure that the reports or statements sought are accurate and complete. *U.S. Life, supra*, at 1038-39. Neither the appropriate circumstances nor the requisite showings are presented here for the application of this principle, nor has respondent sought its application.

⁶ This provision is not at issue here, since the ALJ has authorized excision of such material. ALJ Order at 2. We note, however, a presumably inadvertent variance between the ALJ's formulation and that of the rule, in that the Order speaks of excision of "legal opinions" rather than simply "opinions." We also note that the Commission has previously indicated that interview reports may be entitled to protection under this "inner core" provision. See *Inter-State Builders, supra* at 1164. See also *Hickman v. Taylor, supra*. In view of our holding here, we deem it unnecessary to reach this question in the present context.

Second, we believe that the ALJ failed to articulate the appropriate legal standard and factual basis for reaching his conclusion regarding the reports of interview. As was stated in *Hickman v. Taylor, supra*, there must be "... a proper showing of the necessity for the production of any of this material or [a] demonstration that denial of production would cause hardship or injustice." 329 U.S. at 509. See also *Allied Chemical Corp.*, 75 F.T.C. 1055, 1057 (1969). There is no doubt that respondent may have a need for information relating to complaint counsel's case; however, discovery of the results of complaint counsel's investigation is not a "need" nor a right recognized by our rules or that of any other authority of which we are aware. In the orderly course of preparation for trial respondent will obtain witness and exhibit lists and can interview or depose intended witnesses to fully explore complaint counsel's contentions.⁷ Therefore, recognizing a categorical "need" for all information gathered during the investigation, without a showing, of "substantial need," would directly contradict the purpose of Section 3.31(b)(3), as well as the carefully defined limits of the Jencks Act principle. At best, respondent's strongest argument is merely one of convenience. See *Bell & Howell Co.*, Docket No. C-9099 (Order of April 11, 1978). This rationale, however, does not meet the "substantial need" test that has been long established as the cornerstone of the work product privilege. Indeed, as Justice Jackson stated in his concurring opinion in *Hickman v. Taylor, supra*,

Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary. 329 U.S. at 516

It is therefore ordered, That, upon consideration of the pleadings submitted by complaint counsel and respondent, complaint counsel's application for review be granted.

It is further ordered, That the Administrative Law Judge's August 11, 1981, Order be *Reversed* and *Remanded*.

⁷ Indeed, the ALJ's Order specifically contemplates such further discovery; however, it states, "Return on these specifications would be premature [at this time]." ALJ Order at 2.

IN THE MATTER OF
GODFREY COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5
OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE
CLAYTON ACT

Docket C-3066. Order, May 14, 1981—Modifying Order, Dec. 3, 1981

This order reopens the proceeding and modifies the Commission's order issued on May 14, 1981 (46 F.R. 29458; 97 F.T.C. 457), by modifying Paragraph I(G) of the Order to relieve respondent from the obligation of divesting a specified retail grocery store.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED MAY 14, 1981

The Federal Trade Commission having considered respondent Godfrey Company's petition filed on August 5, 1981 to reopen this matter and to modify the consent order to cease and desist issued by the Commission on May 14, 1981, and having determined that reopening and modification of the order is warranted:

It is ordered, That this matter be, and it hereby is reopened and that Paragraph I(G) of the Commission's order be and it is hereby modified to read as follows:

(G) The "disposition stores" means the following Godfrey ("G") stores and Jewel ("J") stores:

1. G-427 (3045 S. 13th St., Milwaukee, WI.)
2. G-607 (6077 S. Packard Ave., Cudahy, WI.)
3. G-810 (3939 S. 76th St., Milwaukee, WI.)
4. J-1201 (1201 N. 35th St., Milwaukee, WI.)
5. J-729 (719 S. Layton Blvd., Milwaukee, WI.)
6. J-15182 (N81 W. 15182 Appleton Ave., Menomonee Falls, WI.).