

Interlocutory Order

103 F.T.C.

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

File No. 821 0159. Interlocutory Order, Feb. 7, 1984

The Commission dismissed in part and denied in part Chrysler Corporation's petition seeking release of GM, Toyota and staff documents and analyses on which the Commission based its decision to provisionally accept the consent agreement permitting the GM/Toyota joint venture to manufacture new small cars in the U.S. The Commission noted that staff documents and the GM/Toyota memorandum of understanding were already on the public record. The Commission denied a request to disclose those portions of staff documents that contained trade secrets or commercial or financial information. In denying Chrysler's request for an extension of the 60-day comment period, the Commission stated that adequate time remains for interested persons to review the staff documents and complete their comments.

ORDER DISMISSING IN PART AND DENYING IN PART PETITION BY
CHRYSLER CORPORATION FOR DISCLOSURE OF CERTAIN NON-PUBLIC
INFORMATION AND EXTENSION OF PUBLIC COMMENT PERIOD ON A
PROPOSED CONSENT AGREEMENT

On January 10, 1984, Chrysler Corporation filed a petition in File No. 821 0159. That file concerns an agreement to a proposed consent order with General Motors Corporation and Toyota Motor Corporation that the Commission has provisionally accepted. The agreement has been placed on the public record for 60 days so that interested persons may comment on it [48 FR 57246 (Dec. 28, 1983)]. At the close of this period the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the proposed consent order, in accordance with its rules. 16 C.F.R. 2.34 (1983). [103 F.T.C. — (1984)]

The agreement concerns a joint venture between General Motors and Toyota which those firms proposed in a memorandum of [2] understanding dated February 17, 1983. The joint venture would manufacture small new automobiles in the United States.

Chrysler's petition requests the Commission to [1] "release the GM, Toyota and staff documents and analyses on which it acted [in provisionally accepting the agreement], and [2] provide that the 60-day comment period does not expire until 60 days after those documents have been released."

Chrysler's Contentions

The petition complains that the memorandum of understanding between General Motors and Toyota has been improperly redacted to

eliminate the formula by which the joint venture will price the vehicles to be manufactured, and that the staff analyses, including consultants' reports, have not been made available to the public at all. Without these documents, the petition contends, the comment process provided in the Commission's rules is meaningless. It asserts that there is no legal basis for deletion of any information from the memorandum of understanding or for the withholding of the other documents requested.

Specifically, Chrysler argues that Section 21(b) of the FTC Act, 15 U.S.C. 57b-2(b), is irrelevant because it applies only to material obtained by compulsory process for law enforcement purposes. It further contends that Section 7A(h) of the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. 18a(h), expressly permits the Commission to disclose such information, including confidential business information, "as may be relevant to any administrative or judicial action or proceeding," and that this provision authorizes such disclosure during public comment [3] on a proposed consent order under Commission Rule 2.34. Section 6(f) of the FTC Act, 15 U.S.C. 46(f), which denies the Commission authority to make public trade secrets or commercial or financial information that is privileged or confidential, is said to be inapplicable as a matter of law. Alternatively, this restriction is said to be inapplicable because disclosure of the information sought would not cause any submitter substantial competitive injury. This information, it is argued, meets neither the test for Section 6(f), nor the standards which would justify a protective order under the Commission's rule authorizing *in camera* orders in adjudications. 16 C.F.R. 3.45(b).

As we understand its petition, Chrysler does not actually request the Commission to make disclosures to public commenters under an order providing *in camera* treatment for confidential commercial information and trade secrets. Rather, Chrysler seeks public disclosure of all information contained in the documents at issue (Pet. at 13). It disavows, nevertheless, any purpose to cause the release of information in violation of applicable statutes and rules.¹

For the reasons set forth below, the petition is dismissed as moot insofar as it requests the release of the staff documents [4] and analyses on which the Commission acted, and portions of the GM/Toyota memorandum of understanding not initially released by the Commission. The staff documents were placed on the public record January

¹ The petition also refers to remarks allegedly made by the Commission's General Counsel during a meeting with Chrysler's counsel on December 19, 1983, supposedly stating that the GM-Toyota memorandum of understanding contains no confidential material. As the General Counsel explained in his letter to Chrysler's counsel of December 29, 1983, he was not discussing Sections 6(f) and other statutory limitations on disclosure, but Chrysler's possible discovery rights in a private antitrust suit. Moreover, the General Counsel's opinion does not bind or estop the Commission.

25, 1984. The full text of the memorandum of understanding was also placed on the public record on February 3, 1984 after it was revealed by General Motors Corporation in a public filing February 1, 1984 in Chrysler's antitrust suit challenging the proposed joint venture (D.D.C. No. 84-115). The petition is denied insofar as it seeks disclosure of material contained in the staff documents and analyses which are trade secrets or commercial or financial information that remains confidential and privileged within the meaning of Section 6(f) of the FTC Act, or which were obtained by compulsory process, or obtained in lieu thereof and designated confidential by its submitters as provided in 16 C.F.R. 4.10(d) (1983). The request for extension of the 60-day comment period is also denied on the ground that adequate time remains for interested persons to review the staff documents and complete their comments.

Our decision is based upon our evaluation of relevant policies governing the disclosure of confidential business information obtained by compulsion of law or the threat of such compulsion, and the controlling statutes and regulations. We have also considered the appropriateness of disclosing confidential information to commenters in this consent order proceeding subject to some form of protective order. [5]

1. Confidential business information is subject to an important but qualified right of privacy.

At the outset we note that the information sought concerns nontrial materials obtained from the parties to the joint venture, GM and Toyota, and numerous third parties in the automobile industry for purposes of the Commission's investigation of the transaction. These materials, moreover, were obtained under government compulsion, *i.e.*, either under the compulsion of the Hart-Scott-Rodino Act, or by virtue of subpoena or voluntarily in lieu of subpoena. To the extent that information thus furnished to the government involves trade secrets and commercial or financial information that is privileged and confidential, it implicates an important interest in privacy recognized in discovery rules (Fed. R. Civ. P. 26(c)(7)), statutes (*e.g.*, Sections 6(f) and 21(d)(1)(B) of the FTC Act and 18 U.S.C. 1905); the Freedom of Information Act, 5 U.S.C. 552(b)(4); and the common law (Restatement of Torts Section 759). It has also been held (*Tavoulareas v. The Washington Post Company, et al.*, D.C. Cir. No. 80-3032, decided January 6, 1984, slip op. 27-28):

Given the long tradition of common law protection of confidential commercial information * * * and the crucial importance of such material to continuing business operations, a company's sensitive commercial documents not yet in the public domain fall within the constitution's protection of corporate privacy interests. Few categories of business

information are more analogous to individuals' constitutionally protected personal affairs than trade secrets and related commercial information.

This privilege is not absolute. It must give way to the government's lawful needs for information where necessary to [6] allow adequate policing of corporate behavior. *United States v. Morton Salt Co.*, 338 U.S. 632, 651–652 (1950). But the government's need to intrude upon business privacy must be balanced against the severity of the intrusion. The more severe the intrusion the more compelling must be the interests invoked to justify it. "Severe intrusions include public dissemination of confidential information as opposed to disclosure of such information only to the government or other litigants." *Tavoula-reas, supra*, slip op. at 27. We need not, however, undertake on this petition an *ad hoc* balancing of constitutional factors. Congress and our regulations have struck the balance for us.

2. Tentative consent agreements are non-adjudicative reports under Section 6 of the FTC Act.

We are concerned here with a demand for general public disclosure of information in aid of public comments we have invited under a non-adjudicative procedure. That procedure is not required by statute, but rather, is established only by discretionary regulations (16 C.F.R. 2.34 (1983)) that are not based on statutes authorizing release of confidential business information. *Cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 303–312 (1979) (agency regulation insufficient to authorize disclosure absent statute).

Our procedure contrasts sharply with the adjudicative procedures Congress has authorized in the Tunney Act before an Article III court may enter an antitrust consent judgment agreed to by the Department of Justice. 15 U.S.C. 16(b)–(h).² Those procedures are necessary because the tribunal that may enter such [7] a consent judgment—a United States District Court—does not have access to the investigation conducted by the Department of Justice. When the Commission accepts a consent, however, it has full access to its staff's investigation, and acts initially on the basis of that access. The purpose of the public comment period under our regulations is not to provide new evaluations of the staff's investigation by other interested persons, but to bring forth additional facts or objections that might indicate to the Commission that a proposed consent order is not in the public interest, but that further negotiation or formal adjudication might be. *See e.g., Ford Motor Co. v. Federal Trade Commission*, 547 F.2d 954 (6th Cir. 1976); *Johnson Products Co. v. FTC*, 549 F.2d 35 (7th Cir.

² Under the Tunney Act, the court, in determining whether a proposed consent agreement is in the public interest, may take testimony, appoint consultants or expert witnesses, or authorize participation by interested persons as amici, intervenors or otherwise. 15 U.S.C. 16(f).

1977). Thus, a consent order proceeding under the Commission's Rules 2.31-2.34 does not provide interested persons with any of the procedural rights available in administrative adjudication, such as compulsory process against the Commission or third parties, or the right of intervention. *Bristol Myers Co. v. FTC*, 469 F.2d 1116, 1119-1120 (2d Cir. 1972) (Mansfield J. concurring); *Action on Safety and Health et al. v. FTC*, 498 F.2d 757 (D.C. Cir. 1974). [8]

To disclose publicly confidential business information obtained from GM and Toyota under the compulsion of Hart-Scott-Rodino, and from other automobile firms under threat of subpoena, would be to grant indirectly to commenters rights of discovery to which they are not directly entitled under the law. Cases like *Bristol Myers* and *Ford, supra*, confirm the informal and non-adjudicative nature of a consent order negotiation, including the public comment period.

This Commission observed nearly two decades ago that, "consent negotiations are not a stage in adjudication but a means of establishing whether adjudication can be avoided altogether. Like investigations, consent negotiations are distinct from the adjudicative process and hence not governed by the standards which control adjudicative procedure." *William H. Rorer Inc.*, 64 F.T.C. 1446, 1447 (1964). Accordingly, the Commission has expressly provided in its rules that the term "adjudicative proceedings" refers to formal proceedings required by statute to be determined on the record after an opportunity for an agency hearing, but "does not include other proceedings such as negotiations for the entry of consent orders * * *." 16 C.F.R. 3.2 (1983). The consent order procedures themselves are set forth in Part 2 of our rules, governing non-adjudicative procedures. 16 C.F.R. 2.31-2.34 (1983). And our adjudicative rules expressly provide that if a consent agreement settlement is proposed while a case is in adjudication, the matter is to be withdrawn from adjudication and treated as being in a non-adjudicative status. 16 C.F.R. 3.25(e) (1983). In the consent [9] order proceeding "there is no examination or cross examination of witnesses, no findings of fact and no conclusions of law." *Bristol Myers, supra* at 1119. Public comment serves to inform the Commission further, which is why the Commission retains the right to withdraw from its provisional agreement in light of new facts or objections brought to its attention. *Ford Motor Co. v. FTC, supra*, *Johnson Products Co. v. FTC, supra*. The information disclosed for purposes of public comment under Rule 2.34, therefore, is not information relevant to an adjudication, but a report to the public on the tentative results of the Commission's investigation and tentative settlement that is published under Section 6 of the FTC Act.³ As reports

³ In *Bristol Myers, supra*, Judge Mansfield persuasively rejected the argument that because a final consent order is an adjudicative act, the process leading to it is adjudicative as well. *Accord, Action on Safety and Health v. FTC, supra*.

to the public under Section 6, published documents pertaining to proposed consent agreements are limited by the provisions of Section 6(f), which denies the Commission any authority to make public in such reports trade secrets or commercial or financial information that is privileged and confidential, however obtained. *See* discussion *infra* at 13-17. *See also* Section 21(d)(1)(B) of the FTC Act, 15 U.S.C. 57b-2(d)(1)(B). Such information includes all that "would be likely to cause substantial harm to the competitive position of the person from whom the information was obtained," *National Parks and Conservation Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). *See* S. Rep. 96-500, 96th Cong., 1st Sess. 10-12 (1979). [10]

Because the comment period serves simply as a means to supplement the Commission's investigation, the Commission's consent order regulations make no provision whatever for discretionary disclosure of confidential business information obtained under legal compulsion or the threat thereof. They provide only that if an agreement is accepted, the Commission will place the order contained therein on the public record together with an explanation of its provisions and the relief it will offer, "and any other information which it deems helpful in assisting interested persons to understand the terms of the order." 16 C.F.R. 2.34, 3.25(f). After the agreement, order and explanation are published in the *Federal Register*, the Commission undertakes only to "receive and consider any comments or views concerning the order that may be filed by any interested persons." *Id.*

The Commission has historically refrained from making public in consent order proceedings any trade secrets or confidential commercial or financial information obtained from any person. Indeed, when the Commission briefly experimented with the voluntary disclosure of material pertaining to consent order settlements obtained from the investigated party, it expressly confined such disclosures to matter that was routinely available for disclosure under the Freedom of Information Act. It excepted from disclosure all material exempt, from mandatory disclosure under FOIA, particularly "documents which would reveal trade secrets or confidential commercial or financial information, or documents the disclosure of which would interfere with a related [11] enforcement proceeding." 42 FR 39658 (1977); 43 FR 3088 (1978).⁴

Against this background, we turn to the specific provisions of the statutes and regulations governing disclosure of confidential business information by the Commission.

⁴ Even this provision for limited disclosure was withdrawn after one year's experience because the segregation of documents into exempt and nonexempt categories resulted in substantial delays in the placing of consent agreements on the public record while documents were segregated into exempt and nonexempt categories. The Commission's experience also demonstrated a lack of public interest in the material being made available. Accordingly, Rules 2.34 and 3.25 were revised to delete the disclosure requirement. 43 FR 51757 (1978).

3. The Hart-Scott-Rodino Act does not authorize the Commission to make public trade secrets and confidential business information in order to enhance the effectiveness of public comment under its consent order regulations.

The premerger notification provisions of the Hart-Scott-Rodino (H-S-R) Act requires parties proposing major transactions subject to Section 7 of the Clayton Act to submit such documentary material and information relevant to a proposed acquisition as is necessary to enable the Commission or the Antitrust Division to determine whether the acquisition, if consummated, would violate the antitrust laws. 15 U.S.C. 18a. Section 7A(h) of that Act, 15 U.S.C. 18a(h), provides that any information or documentary material so submitted "shall be exempt from disclosure [under the Freedom of Information Act], and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding." [12]

On its face, this provision does not authorize the disclosure of material required by other statutes or regulations to be kept confidential. Rather, it prescribes a general prohibition against discretionary disclosure of *any* premerger data submitted under H-S-R, without regard to its possibly confidential status under other law. The statute's sweeping prohibition—and only that prohibition—is lifted by the exception clause to the extent that such data actually is used by the Commission in administrative or judicial proceedings.

The process of soliciting and considering public comment on a proposed consent agreement, while not adjudicative in nature, constitutes an administrative action or proceeding under this section. *Cf.*, *Cf.*, 5 U.S.C. 551(13) (defining "agency action" for purposes of the Administrative Procedure Act). Thus information derived from Hart-Scott-Rodino submissions is not barred by Section 7A(h)'s prohibition from disclosure in consent order proceedings under the Commission's Rule 2.34. Nothing in the language of Section 7A(h), or its legislative history,⁵ however, indicates that by creating an exception to the statute's bar to disclosure for the purpose of administrative or judicial proceedings, Congress intended to override other legal bars to disclosure, either directly or by implication. Had Congress intended to repeal or modify existing legal bars to disclosure, or except premerger data from subsequently enacted protections [13] for confidential business information, it was well aware of how to do so.

Indeed, after the Hart-Scott-Rodino Act was enacted, Congress tightened the restrictions on disclosure of confidential information in

⁵ See 122 Cong. Rec. H. 6294 (daily ed. Sept. 16, 1974 (Remarks of Ch. Rodino)).

the FTC Improvements Act of 1980, 94 Stat. 374, by revising Section 6(f), and by adding the confidentiality provisions now in Section 21, of the Act, 15 U.S.C. 57b-2. There is no evidence to suggest that when it did so it somehow considered pre-merger submissions or consent orders under Section 7 of the Clayton Act to be an exception to the safeguards it was enacting.

An interpretation of Section 7A(h) permitting disclosure of confidential business information in the context of merger consent orders, notwithstanding other legal barriers, would lead to a complete anomaly. Disclosures in consent order proceedings would be subject to different standards depending on whether they involved a transaction under Section 7 of the Clayton Act or under other provisions of that antitrust laws. For example, a joint venture subject only to the prohibitions in Section 5 of the Act (*e.g.* one not involving an acquisition of stock or assets) would remain subject to other legal prohibitions against disclosure, while those subject to Section 7 of the Clayton Act would not. There is no rational explanation why Congress would want to draw such a distinction or why we should adopt such a bizarre construction of Section 7A(h).⁶ []

4. Sections 6(f), 21(d)(1)(B) and Rule 4.10(d) bar disclosure.

The principal statutory prohibitions against disclosure of confidential business information are Sections 6(f) and 21 of the FTC Act, as amended in 1980. 15 U.S.C. 46(f) and 57b-2. Section 6(f) empowers the Commission to make public information the disclosure of which it believes to be in the public interest, but expressly provides "that the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential * * *." Section 21 not only complements this prohibition, but provides in Section 21(e) that "[n]othing in this section shall supersede any statutory provision which expressly prohibits or limits particular disclosures by the Commission * * *."

Under Section 21(b), all material obtained by compulsory process must be given confidential treatment and may be publicly disclosed only with the consent of the submitter. Section 21(c) bars disclosure of material marked confidential not obtained by compulsory process in a law enforcement investigation, unless the Commission determines that the marked material does not fall within the protection of

⁶ For these reasons we cannot accept the mechanical application of the maxim that when two statutes conflict, the specific prevails over the general. Since the exception to the disclosure prohibition in Section 7A(h) applies only to that prohibition, there is no conflict.

It is also significant that the Antitrust Division of the Department of Justice has never construed Section 7A(h) to authorize public disclosure of information subject to prohibitions on disclosure other than those contained in that provision.

Section 6(f), and the Commission provides the submitter 10 days' notice of its intention to disclose. Under [15] Section 21(d)(1)(B), the Commission may disclose the results of any investigation or study it has carried out or prepared, "except that no information shall be identified nor shall information be disclosed in such a manner to disclose" material protected by Section 6(f).

The disclosure of the results of a negotiation for the purpose of public comment on a proposed consent order is governed by Section 21(d)(1)(B). This is so because, as noted above, a consent order proceeding is not an adjudication, and publication of pertinent documents concerning it constitutes "making [information] public" under Section 6. This conclusion is underscored by the contrasting language in Section 21(d)(2), which provides: "any disclosure of relevant and material information *in Commission adjudicative proceedings* or in judicial proceedings to which the Commission is a party shall be governed by the rules of the Commission for adjudicative proceedings or by court rules or orders, except that the rules of the Commission shall not be amended in a manner inconsistent with the purpose of this section" (emphasis added). The legislative history of Section 21(d)(2) makes clear that this language refers to the provisions in the Commission's rules providing for the entry of protective orders in on-the-record proceedings before an administrative law judge (16 C.F.R. 3.45) or before a presiding officer conducting an on-the-record proceeding under Section 18 of the FTC Act, 15 U.S.C. 57a (16 C.F.R. 1.18(b)) *See, e.g.*, S. Rep. No. 96-500, 96th Cong., 1st Sess. 27-28 (1979). Congress' restriction of Section 21(d)(2) to "adjudicative" and [16] "judicial" proceedings, and the legislative history cited above clearly indicate that it did not authorize disclosures of confidential business information subject to Section 6(f) in nonadjudicative consent order proceedings.⁷ Even in this auspicious year 1984, we cannot agree that when Congress said "adjudicative," it meant "nonadjudicative."

Also relevant to the confidentiality protection provided by Section 21 is Section 21(f), which expresses a congressional policy that material obtained in a law enforcement investigation either by compulsory process or voluntarily in place of such process is not subject to mandatory public disclosure under the Freedom of Information Act. It is within the discretion of agencies, however, to waive FOIA exemptions except to the extent that other statutes, such as Sections 6(f) and 21(b), bar such waiver. As already noted, section 21(b) of the Act provides that information obtained by compulsory process may be publicly

⁷ In this connection, Chrysler purports to quote (Pet. 11-12) the Commission's explanation of its final rules under Section 21 at 46 FR 26,284 (1981). The quotation is incorrect and incomplete. It substitutes the term "administrative proceeding" for the term the Commission actually used: "adjudicative proceedings" and omits the Commission's observation that the legislative history quoted corresponds with prior Commission use of *in camera* orders in "Commission adjudications."

disclosed *only* with the consent of the submitter. Information voluntarily submitted to avoid the need for compulsory process, therefore, would have been subject to waiver of the FOIA exemption in Section 21(f) because it was not within the express statutory prohibition in Section 21(b). To encourage voluntary submissions, the Commission intentionally closed the gap between [17] Sections 21(b) and 21(f) by binding itself at 16 C.F.R. 4.10(d) not to disclose voluntary submissions otherwise subject to Section 21(f) and marked confidential, without the submitters' consent. See 45 FR 26,284. The Commission must adhere to this regulation while it is in effect. See e.g., *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *United States v. Nixon*, 418 U.S. 683, 693-696 (1974); *Pacific Molasses Co. v. FTC*, 356 F.2d 386, 387, 389-390 (5th Cir. 1966).

In sum, Section 21(d)(1)(b) expressly bars the disclosure of confidential information subject to Section 6(f) in consent order proceedings because requests for comments in such proceedings are reports under Section 6, not adjudicative actions. Section 21(b) bars the disclosure of material obtained by compulsory process except, per Section 21(d)(2), in Commission adjudicative proceedings under rules providing the submitter an opportunity for *in camera* protection of confidential business information. As pointed out, however, consent order proceedings are not adjudicative proceedings within the meaning of this section. Sections 21(b), 21(f) and Rule 4.10(d) together bar disclosure of material obtained in a law enforcement investigation either by compulsory process, or voluntarily in place of such process that is marked confidential, except by consent of the submitter. These provisions, particularly Rule 4.10(d), apply to almost all of the material submitted by the joint venturers and third parties in the GM-Toyota investigation. Almost all of the material obtained by the Commission from GM, Toyota and the other [18] automobile companies was so marked. It therefore cannot be disclosed.

5. Disclosure is a subject of negotiation in
consent order proceedings.

It might be objected that under the above construction of Sections 6, 21 and Rule 4.10(d), the Commission is prohibited from releasing in the context of consent agreement proceedings almost all information obtained in premerger investigations, no matter how trivial, simply because it has been obtained either by compulsory process or, if marked confidential, under threat of compulsory process. This overlooks the essential nature of the consent order process. It is, as already noted, a negotiation for the purpose of avoiding adjudication. The Commission's rules call for "an explanation of the provisions of the [proposed] order and the relief to be obtained thereby, and [release]

of any information which it deems helpful in assisting interested persons to understand the terms of the order." 16 C.F.R. 2.34, 3.25(f) (1983). One of the subjects for negotiation contemplated by these rules necessarily is consent to disclosure of information which the Commission is otherwise barred from releasing by Sections 6, 21 and Rule 4.10(d). The object of such negotiations is to provide the Commission with meaningful public comment concerning the proposed consent. Such a negotiation occurred in this case. Disclosure of the memorandum of understanding and related information was a bargaining issue between the Commission's staff and the joint venturers. [19]

This negotiating process is what the consent order process is about. As Commissioners Dole and Dixon observed in dissenting from the Commission's experiment briefly making public nonexempt materials pertaining to consent order settlements (42 FR 39659 (1977):

The negotiations process is by nature delicate; successful negotiations depend in large part upon good faith, give-and-take discussions. Ideas and possible order provisions are discussed by counsel often without the respondents' prior review. Some proposals are rejected and others are accepted in the process of fashioning a consent order which would serve the public interest. Staff advises that respondents' counsel often produce facts which would be hotly contested in litigation.

To impose upon respondents in such negotiations unconsented disclosure of competitively sensitive material that could put at risk the commercial success of the firms involved would place insuperable burdens on the ability of the Commission to obtain consent orders in the public interest. This is particularly important in cases raising complex and difficult competitive issues in which significant remedies can be negotiated without imposing on society the costs of prolonged litigation. The consent order procedure is expressly contemplated by the Administrative Procedure Act, 5 U.S.C. 554(d). Congress left to the agencies the power to develop informal procedures that might be used to achieve consent orders because it recognized "that the formalism of trial-type proceedings might not be conducive to successful settlement negotiations." *Bristol-Myers Co. v. FTC, supra*, at 1119. It is therefore hardly surprising that [20] disclosure of otherwise confidential material becomes a subject of negotiation.⁸

⁸ The parties to a proposed transaction frequently make public information the Commission cannot initially disclose. General Motors Corporation on February 1, 1984 disclosed the full text of its memorandum of understanding with Toyota in a public filing in Chrysler's antitrust suit against it. Since this action eliminated the formerly confidential status of the redacted portions of the memorandum, we then placed the complete text on the Commission's public record. The substance of the items cited by Chrysler (Pet. 7-8) as having been disclosed in the statement by Chairman Miller and Commissioners Douglas and Calvani were reported in the press before their statement was released on December 22, 1983.

6. Protective orders are unsuited to public comment on consent agreements.

Because consent decree negotiations are not adjudicative proceedings under Section 21(d)(2) of the FTC Act, we cannot agree with Chrysler that Rule 4.10(g) sets at naught all of the safeguards for confidential information reflected in Section 6, Section 21 and Rule 4.10(d). Subsection (g) of Rule 4.10 specifies that material obtained by the Commission may be disclosed in Commission "administrative or court proceedings" subject to appropriate Commission or court protective *in camera* orders, and subject to reasonable prior notice to the submitter affording an opportunity to seek such an order. This rule implements the exception to the other prohibitions in Section 21 embodied in Section 21(d)(2) of the FTC Act. As we have noted, the language and legislative history of that provision limit disclosure under protective orders to "adjudicative proceedings." At most, this includes on-the-record proceedings in Commission adjudications and rulemakings before an administrative law judge or a presiding officer. [21]

Moreover, use of protective or *in camera* orders during public comment on consent agreements would be wholly inconsistent with the informal nature and purpose of consent order negotiations, as well as totally impractical. Either the Commission would have to devise a procedure by which each commenter seeking access to confidential information signed a pledge not to disclose it, or the Commission would have to attempt to allow disclosures on the basis of each individual commenter's "interest" in the proceeding. The latter would convert the 60-day comment period into a prolonged litigation over disclosure. The former is completely unfeasible. It would result in broadcast disclosure to an unpredictable number of commenters. Furthermore, the distinction between client and counsel which is essential to safeguard *in camera* disclosures to competitors like Chrysler, could not be maintained. Unlike *in camera* orders in litigation, which can be confined to the litigants' outside counsel, many commenters are not represented by counsel, or if they are, are represented by house counsel or management officials.

In addition, *in camera* disclosures would deter respondents from entering into consent orders, because by doing so they would be subject to an obligation to make much wider disclosure than in an adjudication. If the Commission were to initiate a formal adjudication, the *in camera* order would be limited to complaint counsel and necessary experts, and (insofar as confidential business information of third parties were concerned) to respondents' outside counsel and necessary experts. But if [22] "*in camera*" disclosures were used in consent

proceedings, then by accepting a consent order respondents would put themselves at the risk of exposing sensitive competitive information to many more persons than in an adjudication.

7. The Commission's "in camera" standard of confidentiality is inapplicable.

Chrysler urges that insofar as confidential information is concerned, the Commission should not apply the standard of Section 6(f) in consent order proceedings, but instead should utilize the criterion applicable for the entry of *in camera* orders in adjudicative proceedings. Although consent orders are not adjudicative, we think it appropriate to address this contention briefly.

In effect, Chrysler urges that under the Commission's decision in *General Foods Corp.*, 96 F.T.C. 168, 169 (1980), Section 6(f) does not bar the disclosure of business data as evidence in consent order proceedings. *General Foods*, however, addressed disclosures in adjudications, not in consent proceedings, and concerned only the standard for *in camera* orders in such cases. Even if Section 6(f) were not applicable, however, the Commission's standard for the entry of protective orders in adjudications would not permit us to make public sensitive confidential business information exacted either from the parties to the joint venture or from third party automobile companies.

The standard for *in camera* orders was originally announced in *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961), in which the Commission held that good cause justifying entry of a protective [23] order "requires a showing that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved." *Id.* at 1188. In later cases the Commission ruled that injury under the *Hood* standard occurs only if the documents are (1) secret and (2) material to the applicants business. *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977); *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). The showing of competitive injury depends on the materials. In a subsequent order involving *General Foods*, the Commission ruled:

We do not believe that a showing of serious injury necessarily requires a specific demonstration of the manner in which other firms would use the material to cause competitive disadvantage * * *. Instead, when certain information is found to be materially valuable and secret to a firm's competitive business activities, it is proper for the administrative law judge to infer, without a specific showing of how a competitor would use it, that the loss of the information would seriously affect the possessors' commercial position." *General Foods Corporation*, Docket No. 9085, Order Denying in Part and Remanding in Part *General Foods Application for Review* entered August 18, 1980 (unpublished).

Significantly, the same approach was adopted in *National Parks and Conservation Association v. Morton*, the judicial standard applied under Section 6(f), and in *Touvalareas v. The Washington Post Co.*, *supra*, Slip Op. at 29 (“the proponent of confidentiality must show only that the disputed documents contain a given category of confidential information, and that disclosure of that kind of information will harm the proponent’s competitive position”). [24]

Grounds for the inference of injury are obvious here, and no further showing is required. It is difficult to imagine items of business information more sensitive than the future production and marketing plans, cost and profit data,⁹ trade secrets and production technology to which we have had access in our review of this matter. That data constitutes the most significant competitive information possessed by General Motors, Toyota, and the other major automobile companies from which we required information—literally the “corporate jewels” of those firms. Even assuming for argument that there is a difference between the “clearly defined, serious injury” standard of our decision in *Hood*, and the “substantial harm to the competitive position” standard of *National Parks and Conservation Association v. Morton*, as incorporated into Section 6(f) by the 1980 Amendments (see S. Rep. 96-500, *supra*, at 10-12), under either standard the pricing and other competitively sensitive information we have obtained should not be disclosed.

Conclusion

We emphasize, as we did at the outset, that we do not deal here with trial material necessary to explain an adjudicated Commission decision. Rather, we are concerned with investigatory information obtained under the compulsion of statute, process, or the threat of process that is being used in a consent negotiation [25] for the purpose of avoiding adjudication in the public interest. The balance tips much more strongly against disclosure of such materials than if they were used in a trial record that formed the basis for a Commission decision. We have endeavored to achieve disclosure of as much material as we can within the limits of the law. To this end, we have authorized release of our own staff analyses and consultants’ reports in redacted form. We have deleted information obtained from the joint venturers and third-party firms that is competitively sensitive, and information marked confidential whose disclosure has not been consented to by the submitters. To the extent that this publication reveals the Commission’s own internal deliberative material and attorney work

⁹ Such cost data included the pricing formula in the memorandum of understanding that is to determine the price at which GM will purchase joint venture vehicles after the 1985 model year. That formula, however, was subsequently disclosed by GM and is therefore no longer confidential.

product ordinarily privileged from disclosure, we waive these privileges. We cannot, however, in law or fairness disclose confidential information of others that has been entrusted to us for purposes of our investigation and consent negotiations.

Commissioners Pertschuk and Bailey voted in the negative.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

I dissent from the Commission's decision to refuse to release more information to the public concerning the GM/Toyota joint venture. I also dissent from the Commission's decision to deny Chrysler's request for an extension of the comment period.

I. The Commission's Refusal to Release More Information

It is important for the public to understand the actual legal standard the Commission has adopted concerning release of information in a consent agreement proceeding. The standard applied in releasing some GM/Toyota materials on January 25 and the standard adopted by the majority for all future consent agreement proceedings is that we are *prohibited* from releasing *all* material "obtained in a law enforcement investigation either by compulsory process, or voluntarily in place of such process that is marked confidential, except by consent of the submitter." (Majority Statement at 17) As the majority statement points out, almost all of the material obtained by the Commission from GM, Toyota and the other automobile companies was marked confidential. Since it is typically the case that companies submitting information to the Commission mark most or all of what they submit as "confidential," the standard adopted by the Commission is sweeping indeed. The practical effect of the standard is that essentially *no* information obtained in an investigation not otherwise public can be released, no matter how trivial or how central to the Commission's decision, unless the companies agree.¹

A good example of the breadth of the majority's standard is the expurgation of a staff discussion about *past* exchanges of information between GM and Toyota that appear highly questionable. (See the almost totally expurgated pages at VIII-17-19 of the BC staff memo.) While this information would be useful to the public in understanding how potentially anticompetitive exchanges of information can easily take place in a joint venture setting even if companies exercise good faith, it is inconceivable that revealing this information can cause *commercial, competitive* harm to the companies. I concede it may be

¹ This severe limitation on the FTC's discretion was not reflected in Chairman Miller's statement of January 25 when he commented on our release of materials. He stated: "The information required by law to be deleted was confined to only the *most competitively sensitive* data associated with the joint venture." (emphasis added) In fact, the staff followed the standard set out in the majority's statement, which resulted in substantially greater deletions.

embarrassing, but preventing embarrassment is not within our legal mandate.

The majority's statement attempts to explain away the problem which follows from its legal standard—that companies will control the flow of information to the public in a consent agreement proceeding—by saying that the Commission will negotiate with companies about release of information before a consent agreement is signed. In other words, we would refuse to enter into a consent agreement unless the companies agreed to release of information sufficient to “provide the Commission with meaningful public comment concerning the proposed consent.” (Majority Statement at 18) But companies can still dictate limits on disclosure as indicated by what occurred when the staff negotiated the GM/Toyota consent agreement. Until shortly before the meeting to consider the proposed agreement, it was generally understood that the entire Memorandum of Understanding would be released at the time any agreement was made public. Yet when the staff negotiated the agreement, they agreed to a request by GM and Toyota to excise key aspects of the pricing formula—the contract provision most directly relevant to antitrust concerns.

As to the majority's analysis of legal constraints in releasing information, there are two principal flaws. First, even though it is conceded that the Hart-Scott-Rodino Act specifically authorizes release of H-S-R submissions in consent agreement proceedings, the majority argues that the more general prohibitions of Section 21 prohibit release. (Majority Statement at 12)² Thus, the majority's reliance on a more general statute nullifies the specific Congressional authorization to release information in Section 7A(h) of the Clayton Act. The second mistake is that the Commission interprets Section 21(d)(2) of the FTC Act and Rule 4.10(g) of our rules to allow release of information submitted in investigations only in adjudicatory proceedings under Part III of our rules and in rulemaking proceedings before an administrative law judge or presiding officer. (Majority Statement at 20) The Commission's past interpretation of those provisions as well as the legislative history of Section 21(d)(2) show that they allow release in consent agreement proceedings as well as adjudicatory opinions.

In order to understand the majority's analysis, it is necessary to review our confidentiality rules, which are hardly models of clarity. The majority's statement sets out the basic scheme and I will not repeat it in detail here except to note certain essential points. Section 21(b) limits release of information submitted pursuant to a subpoena. Most materials at issue here, however, were submitted pursuant to

² Section 7A(h) of the Clayton Act (the Hart-Scott-Rodino provision) provides for release of information “as may be relevant to any administrative . . . proceeding.”

H-S-R procedures. Submissions under H-S-R procedures are treated as submitted voluntarily in lieu of subpoenas and, consequently, are exempt from release under the Freedom of Information Act under Section 21(f). Thus, Section 21(f) simply creates an exemption from the FOIA Act; it does not affect our discretionary release of material. Section 6(f) of the FTC Act bars release of "commercial or financial" information which is "privileged or confidential." Finally, the Commission has adopted Rule 4.10(d) which limits our discretion to release information which is submitted in a law enforcement investigation even if not under subpoena.

The principal question in this case is: What provision *bars* release of H-S-R material? As I have argued above, the express authorization in the Hart-Scott-Rodino Act should make the FTC Act irrelevant. But assuming *arguendo* that FTC Act provisions apply, all four provisions to which the majority point—Section 21(b), Section 21(f), Section 6(f), and Rule 4.10(d)—don't bind the Commission's hands to the extent argued by the majority.

The proper interpretation of Section 21(d)(2) and the Commission's Rules of Practice is that they authorize the disclosure of this type of information in administrative proceedings including the formulation of consent orders. Commission Rule 4.10(g) explicitly authorizes the disclosure of material obtained by the Commission in "Commission administrative . . . proceedings." The use of the word "administrative" in the rule is a clear indication that the Commission interprets its own statute to permit it to disclose submitted documents in circumstances other than APA adjudications. This interpretation is consistent with the legislative intent of the confidentiality provisions of the FTC Improvements Act.

While Section 21(d)(2) authorizes disclosure in "Commission adjudicative proceedings," that phrase was not intended and should not be construed to be limited to adjudications as defined by the Administrative Procedure Act.³ Even the General Counsel concludes that it is not so limited, arguing that it includes at least "on-the-record" rulemaking proceedings under Section 18 of the FTC Act. But there is no logical reason to include rulemaking and not consent order proceedings within the scope of Section 21(d)(2). Both are administrative proceedings.⁴

³ It is a familiar principle of statutory construction that the same phrase used in different statutes can have different meanings depending on the context. See, e.g., *Goland v. CIA*, 607 F.2d 339, 345, n.30 (D.C. Cir 1978), *cert. denied*, 445 U.S. 927 (1980). This is especially true in this case where the term in Section 21(d)(2) ("Commission adjudicative proceeding") is not the same as the term in the APA ("adjudication") and the two statutes have vastly different scopes and purposes.

⁴ The General Counsel's description of Section 18 rulemaking as "on-the-record" is clearly wrong. It is informal rulemaking with additional procedural safeguards. It is not "formal" or "on-the-record" rulemaking and therefore not within the APA's definition of adjudication. See S. Rep. No. 93-1408, 93d Cong., 2d Sess. 32 (1974) (Conference Report on Magnuson-Moss); see also *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

A broad construction of Section 21(d)(2) to permit disclosure in consent order proceedings is supported by the legislative history of the Improvements Act. The Senate report on the bill that became the FTC Improvements Act states that Section 21(d)(2) allows the Commission to disclose Section 21 material "in administrative or judicial proceedings." S. Rep. No. 96-500 96th Cong., 1st Sess. 27 (1979). Congressman Preyer, a conferee, also stated:

The Commission may disclose trade secrets and confidential commercial and financial information in the following circumstances * * * relevant and material information may be disclosed in Commission administrative proceedings or in judicial proceedings, but it may be made subject to appropriate protective orders * * * 126 Cong. Rec. H3870 (May 20, 1980).

See also 126 Cong. Rec. S5678 (May 21, 1980) (Remarks of Senator Ford).

This broader interpretation of Section 21(d)(2) is the one adopted by the Commission in Section 4.10(g) of its Rules of Practice. That rule, which was issued in final form after an opportunity for comment, would be accorded deference by a court as a contemporaneous interpretation by the agency of its own organic statute. See *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In explaining its rules, the Commission stated that "under amended Rule 4.10(g) information will not be disclosed in administrative or adjudicatory proceedings without affording the submitter an opportunity to obtain a protective or *in camera* order." 46 FR 26287 (May 12, 1981). Thus, I conclude that Section 21(d)(2) and Rule 4.10(g) both allow the Commission substantial discretion in releasing materials obtained in the course of a Commission investigation when the Commission is explaining to the public why it accepted a consent agreement.

Even though the FTC Act, the Hart-Scott-Rodino Act, and the Commission's rules give us wider discretion than the majority argues, I do not believe the Commission should release all information no matter how sensitive or how unrelated to the relevant issues in a particular proceeding. The Commission, in past cases, particularly the *Hood*⁵ and *General Foods*⁶ decisions, has adopted a standard which should be applied. These past decisions represent the Commission's recognition that there is some equitable standard which should limit release of information even if not specified in a statute.

⁵ *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). Requests for *in camera* treatment must show "that the public disclosure . . . will result in a clearly defined, serious injury to the person or corporation whose records are involved."

⁶ *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). The showing can be made by showing the documentary material is sufficiently confidential that its release would result in "serious competitive injury." Further, the degree of injury should be balanced against the "importance of the information in explaining the rationale of [Commission] decisions."

II. *Refusal to Extend the Comment Period*

The majority also rejects Chrysler's request for an extension of the 60-day comment period. I disagree for the reasons stated below.

The issue in extending a comment period is whether the public interest in receiving further comment outweighs the parties' understandable desire for the Commission to make its final decision as soon as possible.⁷ Here, several factors militate in favor of extending the comment period. The transaction is probably the most significant antitrust matter we have faced during this administration. The matter is complex. Staff recommendations were not unanimous and the Commission was sharply divided on provisional acceptance. The Bureau staff took several months in preparing recommendations, but one of the companies took several months to comply with discovery requests and, in fact, has still not fully complied with the Hart-Scott-Rodino second request. The Commission placed additional material on the public record to aid public comment but not until January 25, when almost half the comment period had run. For all these reasons, I would favor extending the comment period for 30 days.

⁷ The Commission not infrequently grants extension of the comment period. In the last few weeks, for example, the Commission voted to grant an extension of time for comment for an order modification provision and a request for prior approval of a merger pursuant to a Commission order. *Armstrong Cork Co.*, C-1010; *ARA Services, Inc.*, C-2360.

IN THE MATTER OF
BELTONE HEARING AID COMPANY

ORDER TO SET ASIDE IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 3 OF THE CLAYTON ACT

Docket 5825. Final Order, Feb. 16, 1956—Order To Set Aside, Feb. 10, 1984

The Final Cease and Desist Order issued against Beltone Hearing Aid Company in Docket 5825 (52 F.T.C. 830 (1956)), has been set aside in light of the Commission's dismissal of the complaint in *Beltone Electronics Corp.* (100 F.T.C. 68 (1982)), which challenged the use of the same exclusive dealing arrangements prohibited by the order in Docket 5825.

ORDER TO SET ASIDE ORDER TO CEASE AND DESIST

On February 16, 1956, the Federal Trade Commission issued an order against Beltone Hearing Aid Company (currently known as Beltone Electronics Corporation) in Docket No. 5825 prohibiting Beltone, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements upon its dealers. [52 F.T.C. 830]

However, on July 16, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.*, Docket No. 8929 challenging, among other things, Beltone's use of the same exclusive dealing arrangements prohibited by the order in Docket No. 5825. [100 F.T.C. 68]

On December 7, 1983, the Commission pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued to Beltone an order to show cause why the proceeding herein should not be reopened to set aside the final cease and desist order in Docket No. 5825, prohibiting Respondent's use of exclusive dealing arrangements. Respondent was provided an opportunity to object to the proposed set aside of the order against it, and having failed to do so, is now deemed to have consented to such action. In view of the Commission decision in *Beltone*, the Commission believes that this set aside is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened and that the order herein shall be set aside as of the effective date of this order.