

not required to be a participant in such litigation and his absence does not render the action infirm.

Since the district court treated the adoption of the revisions by the Council as staying the required closure despite the absence of approval by the EPA, we must reverse the judgment that has been entered. We remand for further consideration of this case in light of our opinion.

So ordered.



ASH GROVE CEMENT COMPANY,
Appellant,

v.

FEDERAL TRADE COMMISSION
et al.

ASH GROVE CEMENT COMPANY, a
corporation, Appellant,

v.

FEDERAL TRADE COMMISSION
et al.

Nos. 73-2212, 74-1144.

United States Court of Appeals,
District of Columbia Circuit.

Argued 21 Nov. 1974.

Decided 16 April 1975.

Rehearing and Rehearing En Banc
Denied June 23, 1975.

A company subject to an agency complaint pending before the Federal Trade Commission brought an action against the Commission for discovery of certain documents which the company asserted were necessary to substantiate its defense that the Commission had prejudged all of the allegations in the complaint. The United States District Court for the District of Columbia, 371 F.Supp. 370, Charles B. Richey, J., inspected in camera two of the four categories of documents involved, declined to inspect

the remaining two categories, and denied access to the documents, and the company appealed. The Court of Appeals, Wilkey, Circuit Judge, held that the trial court erred in not making at least a random examination of all of the documents in question, and that portions of chronological minutes of the Commission described as containing "policy determinations" were subject to disclosure.

Remanded.

1. Records ⇐ 14

Records which Federal Trade Commission designated as "investigatory files" and Commission minutes designated as "staff directives" or "blue minutes" were protected from disclosure under Freedom of Information Act. 5 U.S.C.A. § 552(b)(5), (7).

2. Federal Civil Procedure ⇐ 1600.3

In proceeding by company subject to agency complaint pending before Federal Trade Commission for discovery of certain documents from Commission's files, trial court erred in denying discovery without inspecting at least a random sample of documents sufficient to provide objectively verifiable basis for determining whether Commission's descriptions of documents as "internal memoranda" were conclusory or instead reasonably accurate and specific. 5 U.S.C.A. § 552(b)(5).

3. Records ⇐ 14

Chronological minutes of Federal Trade Commission proceedings, described as containing "policy determinations", were prima facie subject to disclosure under Freedom of Information Act. 5 U.S.C.A. § 552(b)(5).

4. Records ⇐ 14

Federal Trade Commission's one paragraph, 77-word description covering all its agency chronological minutes was clearly conclusory and insufficient in itself to shield minutes from disclosure under Freedom of Information Act as internal memoranda. 5 U.S.C.A. § 552(b)(5).

Appeals from the United States District Court for the District of Columbia (D.C. Civil 1298-71).

Robert L. Williams, Washington, D. C., with whom David J. McKean, Washington, D. C., was on the brief for appellant.

Leonard Schaitman, Atty., Dept. of Justice, with whom Carla A. Hills, Asst. Atty. Gen., Earl J. Silbert, U. S. Atty., and Donald Etra, Atty., Dept. of Justice, were on the brief for appellees.

Karl H. Buschmann, Washington, D. C., also entered an appearance for the F. T. C.

Before DANAHER, Senior Circuit Judge, WILKEY, Circuit Judge, and JUSTICE,* United States District Court Judge for the Eastern District of Texas.

Opinion for the Court filed by Circuit Judge WILKEY.

WILKEY, Circuit Judge:

This is an action arising under the Freedom of Information Act (FOIA)¹ as an outgrowth of an investigation by the Federal Trade Commission of Ash Grove Cement Company, plaintiff-appellant here, and others. Rather than remain on the defensive in the FTC proceeding, Ash Grove took the offensive by filing an action in the District Court for the discovery of certain documents in the possession of the agency, which Ash Grove asserted were necessary to substantiate its defense that the Commission has prejudged all of the allegations in the agency complaint now before the

Commission for adjudication. Of the four categories of documents involved, the District Court inspected two *in camera*, declined to inspect two categories, and ultimately determined that plaintiff was entitled to access to none of the documents. Finding that the District Court based its classification of some of the documents on inadequate information and that it should have made further inspection, we remand to the District Court for action in accordance with this opinion.

[1] The two categories which the District Judge did inspect were those the FTC designated as "investigatory files" and those Commission minutes designated as "staff directives," the so-called "blue minutes." After inspection *in camera* the District Judge concluded that these documents had been properly classified by the agency and that under Exemptions 7 and 5 of the FOIA² they were protected from disclosure. We agree.³

The District Judge likewise determined, but without *in camera* inspection, that the third and fourth categories of documents were exempt from disclosure. Regarding these we have difficulty.

[2] Documents of the third category were defined by the FTC as "internal memoranda," asserted to fall under Exemption 5 of the FOIA.⁴ After the usual interchange of demands and a partial agreement between counsel, the agency released some documents to Ash Grove for inspection, but balked at releasing

* Sitting by designation pursuant to Title 28, U.S. Code, Section 292(d).

1. 5 U.S.C. § 552 (1970).

2. 5 U.S.C. §§ 552(b)(5) and (7):

(b) This section does not apply to matters that are—

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(7) investigatory files compiled for law enforcement purposes except to the extent

available by law to a party other than an agency;

3. The four investigatory files and the seventeen directive-type minutes submitted for *in camera* inspection by the agency were found to be exempt from disclosure under Exemptions 7 and 5, respectively, by order of the District Court on 22 December 1973. This action is made the subject of the appeal in No. 74 1144, which is affirmed. The appeal from the opinion and order of 24 October 1973 is No. 73 2212, which is the subject of our remand for reconsideration in accordance with this opinion.

4. 5 U.S.C. § 552(b)(5).

forty-two to which plaintiff's demand had been narrowed. These were listed and described in an affidavit by an attorney in the Commission's Office of General Counsel as "internal memoranda." Ash Grove asserts that the description of each document given by the FTC affidavit is so conclusory as to be of little aid to the trial court and, therefore, legally insufficient under *Vaughn v. Rosen*⁵ and others of our FOIA decisions. The District Judge found, on the other hand, that "[t]hese descriptions are more than mere conclusions."

Our review of the descriptions of the forty-two documents indicates that Ash Grove may well be right; we could not be satisfied by these general descriptions that each of the forty-two documents is properly defined as "internal memoranda," and that each falls within Exemption 5. The District Judge could not have reached any more definite and secure conclusion than we are able to on appeal, since he did not inspect *in camera* any of the forty-two documents. Had he verified the accuracy of at least a few of the agency's descriptions, his acceptance at face value of the accuracy of the rest would have stood on more solid ground. In the absence of more specific document analysis by the agency, we think such a procedure was necessary to meet the requirement of *Vaughn v. Rosen* that judicial determinations under the FOIA be based upon a detailed record. Therefore, on remand we direct that the District Judge inspect at least a random sample of these forty-two documents sufficient to provide an objectively verifiable basis for deciding whether the agency descriptions are indeed conclusory or instead reasonably accurate and specific.

The fourth category of documents is described as the Commission's "chronological minutes," and is asserted by the Commission likewise to fall under Ex-

emption 5 of the FOIA. In an affidavit, the Secretary of the Commission described these chronological minutes as

. . . accounts of the Commission's executive meetings and conferences . . . the deliberations of the Commission such as exchange of opinions between individual Commissioners, their recommendations, motions, discussions and statements. They also contain staff recommendations and involve pending cases, internal reorganization procedures, personnel actions, *policy determinations* and generally reflect the Commission's decision-making process.⁶

This description was relied on by the District Judge in his Second Memorandum Order of 22 February 1973⁷ and Memorandum Opinion of 24 October 1973.⁸ Significantly, the District Judge thought that "[p]laintiff . . . apparently accepts the characterization of chronological minutes as set forth above,"⁹

[3] Ash Grove sharply disputes the Commission's characterization of its chronological minutes, points to pleadings in the record in which it has done so, and asserts that it has described these minutes more accurately as

stenographic and other detailed recordings of transactions, voting decisions, binding opinions, policies, interpretations and other actions of the Commission or of individual Commissioners [relating to the actions taken by the Commission during its 1964-1967 Trade Regulation Rule Proceeding Concerning Vertical Integration in the Cement Industry].¹⁰

Ash Grove argues that these chronological minutes contain "secret law" and proof positive of its defense in the FTC proceeding that its fate is foreordained and its case has been prejudged by covert decisions of the Commission growing

5. 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

6. Joint Appendix II at 283 (emphasis supplied).

7. Joint Appendix I at 45.

8. Joint Appendix I at 87.

9. *Ibid.*

10. Appellant's Br. at 29.

out of a previous trade regulation rule-making proceeding in 1961-1967. Ash Grove also asserts, and we think correctly, that where the agency Secretary and the trial judge described the chronological minutes as containing "policy determinations," such minutes or portions thereof were subject to disclosure under *Sterling Drug, Inc. v. Federal Trade Commission*,¹¹ in which we held that such determinations are *prima facie* disclosable.¹²

[4] The agency's one-paragraph description of seventy-seven words of all the agency chronological minutes, not just the minutes demanded by the plaintiffs, is clearly conclusory under the standard of *Vaughn v. Rosen*,¹³ *Cuneo v. Schlesinger*,¹⁴ and *Pacific Architects and Engineers, Inc. v. Renegotiation Board*.¹⁵ The affidavit relied upon by the agency and the District Judge does not assert that any of these minutes have ever been examined by any agency employee to determine their exact content; there has been no inspection by the trial court *in camera*; and no sample of the minutes has been examined.

We remand for these reasons: First, we think that "policy determinations" at least, and perhaps other matters included, are subject to public scrutiny. Second, before ruling whether the chronological minutes are protected against disclosure by Exemption 5, the District Judge should examine *in camera* a representative portion of the minutes.¹⁶ Third, the District Judge should require an itemized description to be made of

these minutes as he required for the forty-two staff memoranda.

The case is remanded for action in accordance with this opinion.

So ordered.



UNITED STATES of America,
Appellant,

v.

Felipe DE DIEGO.

No. 74-1769.

United States Court of Appeals,
District of Columbia Circuit.

April 16, 1975.

In prosecution for conspiracy to covertly and unlawfully enter offices of a psychiatrist with intent to search for confidential information concerning a patient, defendant moved to dismiss indictment on ground that under grants of immunity from states of Florida and California he had provided testimony which related to involvement in the conspiracy and which came into the hands of the Government. The United States District Court for the District of Columbia, Gerhard A. Gesell, J., granted the motion and Government appealed. The Court of Appeals, Rives, Senior Circuit

11. 146 U.S.App.D.C. 237, 450 F.2d 698 (1971).

12. [T]he policy of promoting the free flow of ideas within the agency does not apply here, for private transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus, to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it.

Id. at 247, 450 F.2d at 708.

13. 157 U.S.App.D.C. 340, 484 F.2d 820, cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

14. 157 U.S.App.D.C. 368, 484 F.2d 1086, cert. denied, *Rosen v. Vaughn*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

15. 164 U.S.App.D.C. 276, 505 F.2d 383 (1974).

16. From the record we have derived no concept of what volume of documents is involved.

As previously indicated, I believe that the powers vested in the Commission, other than its authority to collect and compile reports of contributions and expenditures and its duties incidental thereto, involve the exercise of powers beyond those allocated to the legislative branch by the Constitution. Thus I would answer Questions 8, 8(a) and 8(c) in the affirmative, and Questions 8(b) and 8(d) in the affirmative to the extent the powers involved relate to functions other than the collection of reports. In my opinion, Question 8(e) must also ultimately be answered in the affirmative although it may not presently be ripe for review.

Subject to the exceptions discussed above, I otherwise join in the responses to the certified constitutional questions contained in the court's order entered today.



ASH GROVE CEMENT COMPANY,
Appellant,

v.

FEDERAL TRADE COMMISSION
et al.,

Nos. 73-2212, 74-1144.

United States Court of Appeals,
District of Columbia Circuit.

June 23, 1975.

A company subject to an agency complaint pending before the Federal Trade Commission brought an action against the Commission for discovery of

of the Senate, and the Clerk of the House of Representatives shall continue to carry out their responsibilities under title I and title III of the Federal Election Campaign Act of 1971 as such titles existed on the day before the date of enactment of this Act.

certain documents which the company asserted were necessary to substantiate its defense that the Commission had prejudged all of the allegations of the complaint. The United States District Court for the District of Columbia, 371 F.Supp. 370, Charles R. Richey, J., inspected in camera two of the four categories of documents involved, declined to inspect the remaining two categories, and denied access to the documents. After the Court of Appeals, Wilkey, Circuit Judge, held in its initial opinion, 511 F.2d 815, that the trial court erred in not making at least a random examination of all of the documents in question and that portions of chronological minutes of the Commission described as containing "policy determinations" were subject to disclosure, the court went on, in response to a petition for rehearing, to hold, *inter alia*, that a "policy determination" subject to public disclosure under the Freedom of Information Act is a final agency decision which is utilized as a touchstone for future administrative action.

Petition for rehearing denied.

On Petition For Rehearing

1. Records ⇌ 14

"Policy determination" subject to public disclosure under Freedom of Information Act is final agency decision which is utilized as touchstone for future administrative action. 5 U.S.C.A. § 552(b)(5, 7).

See publication Words and Phrases for other judicial constructions and definitions.

2. Records ⇌ 14

Exemption under Freedom of Information Act for inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency can never apply to "final opinions," whereas memoranda and

If so, the clearly legislative functions would continue to be performed by these three designated officials and the formulation of policy and enforcement of the criminal provisions would be left to the executive branch in the same manner as with all other criminal statutes.

CHARLES RIVER PARK "A", INC. v. DEPARTMENT OF H. & U. D. 935

CITE AS 519 F.2d 935 (1975)

records of oral discussions leading up to final opinion or binding decision are protected from disclosure by such exemption. 5 U.S.C.A. § 552(b)(5).

Before DANAHER, Senior Circuit Judge, WILKEY, Circuit Judge, and JUSTICE *, U. S. District Judge for the Eastern District of Texas.

ORDER

On consideration of appellees' petition for rehearing, it is

Ordered by the Court that appellees' aforesaid petition is denied.

PER CURIAM:

[1] Appellees have filed a petition for rehearing of our 16 April 1975 decision in this case. They take primary issue with our ruling that those portions of the Commission's chronological minutes which it described to the District Court as containing "policy determinations" must be disclosed to the appellant. We deny appellees' petition. To our mind, a "policy determination" denotes a final agency decision which is utilized as a touchstone for future administrative action. Such decisions must be made available to the public, as this court held in *Sterling Drug, Inc. v. Federal Trade Commission*, "to prevent the development of secret law within the Commission."¹

[2] We take this opportunity to emphasize, however, that our opinion leaves open the possibility on remand that the District Court may find, with the benefit of a more adequate record, that the Commission's own characterization of the chronological minutes as containing "policy determinations" was inaccurate. Nothing in our opinion requires that the policy discussions or recommendations of FTC Commissioners be revealed to the public.² If the agency, in spite of its own description of portions of the chron-

ological minutes as "policy determinations," can satisfy the District Court—through the procedure outlined in our opinion—that no final agency opinions or binding decisions are found therein, the disclosure rationale of *Sterling Drug* will not be applicable to this case. For, as the Supreme Court so recently held in *NLRB v. Sears, Roebuck & Co.*,³ Exemption 5 can never apply to "final opinions," whereas memoranda (and records of oral discussions) leading up to a final opinion or binding decision are protected from disclosure by Exemption 5.



CHARLES RIVER PARK "A", INC.,
et al.

v.

The DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT et
al., Appellants.

No. 73-1930.

United States Court of Appeals,
District of Columbia Circuit.

Argued Dec. 9, 1974.

Decided March 10, 1975.

As Amended June 17, 1975.

Rehearing Denied Sept. 10, 1975.

Department of Housing and Urban Development appealed from an order of the United States District Court for the District of Columbia, June L. Green, J., 360 F.Supp. 212, enjoining HUD from disclosing certain financial information submitted to it by operators of multi-family housing projects whose mortgages were insured by the Federal Housing

* Judge Justice did not participate in this opinion.

1. 146 U.S.App.D.C. 237, 247, 450 F.2d 698, 708 (1971).

2. Cf. *Renegotiation Board v. Grumman*, — U.S. —, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975).

3. — U.S. —, 15 S.Ct. 1504, 44 L.Ed.2d 29 (1975).