

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MITSUBISHI ELECTRIC :
CORPORATION, et al., :
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Plaintiffs, :
 :
v. :
 :
UNITED STATES DEPARTMENT :
OF JUSTICE, et al., :
 :
Defendants. : .

FILED

APR 1 1977

JAMES E. DAVEY, Clerk

Civil Action No. 76-0813

MEMORANDUM AND ORDER

This Freedom of Information Act [FOIA] 1/ action is before the Court upon the defendants' motion for summary judgment. Pertinent facts concerning the background and development of the present litigation have been set forth in our previous memoranda and, therefore, will not be repeated here.

The documents at issue consist of the responses of several multinational corporations 2/ to certain investigatory survey requests 3/ of the Foreign Commerce Section, Antitrust

1/ 5 U.S.C. §552 (Supp. IV 1974).

2/ Twenty-two corporations were contacted during the course of this survey, each of which was assigned a letter identification code from A through V by the Foreign Commerce Section. To date, fifteen firms have responded to survey requests.

3/ A typical survey request cover letter, attached to the second Sheldon Affidavit, states, in pertinent part, as follows:

As an aid to its duty to enforce the American antitrust laws as they apply to the foreign commerce of the United States, the Antitrust Division of the United States Department of Justice requests that your company produce, or make available for copying, within ninety days of receipt of this letter, all documents listed in the attached schedule.

APPENDIX O
Civil Action No. 77-1997

Division, Department of Justice, relating to areas of international territorial restraints in patent and know-how licensing, joint ventures, and membership in foreign-based cartels. ^{4/} Responses to these survey requests were made on a voluntary basis. Most documents were provided in reliance upon or written assurances, sought and obtained from the Foreign Commerce Section, that they would be disclosed only to department personnel and returned, together with copies made, upon completion of the investigation. All of the submitting firms expressed strong concern about the competitive sensitivity of the materials and the adverse effects which could result from their release.

The specific records generated by the survey requests, indexed by subject matter in an attachment to the Neshkes Affidavit, are joint venture formation agreements, patent, know-how, and trademark licensing agreements, and in certain instances, articles of incorporation and patented or secret processes related to the various agreements. Materials furnished by one corporation pursuant to a more extensive follow-up investigation include SEC 10K forms, additional licensing agreements, preliminary inter- and intra-company communications concerning specified proposed agreements, lists of trademarks licensed and used, annual sales records, patents registered in the United States and foreign countries, and various catalogues and manuals provided pursuant to engineering and know-how licensing agreements with foreign affiliates.

^{4/} These investigations commenced on February 4, 1974, with the mailing of questionnaires to eight multinational firms. On January 7, 1975, a second series of questionnaires, slightly modified from the first, was forwarded to eight additional firms. Subsequent to receipt of plaintiffs' initial FOIA agency request, that is, on June 10, 1976, a third series of questionnaires was sent to six companies.

Defendants base their withholding of these documents upon three FOIA exemptions -- 5 U.S.C. §552(b)(7)(A) [Exemption 7(A)], 5 U.S.C. §552(b)(7)(D) [Exemption 7(D)], and 5 U.S.C. §552(b)(4) [Exemption 4]. For reasons discussed infra, we are of the opinion that such exemptions permit non-disclosure under the present circumstances.

EXEMPTION 7(A)

Under Exemption 7(A), the FOIA's disclosure requirements are made inapplicable to matters which are "investigatory records compiled for law enforcement purposes", to the extent that their production would "interfere with enforcement proceedings". The legislative history of the 1974 Amendments to the FOIA indicates that this exemption applies "whenever the government's case in court -- a concrete prospective law enforcement proceeding -- would be harmed by the premature release of evidence or information not in the possession of known or potential defendants . . . [or] where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding." 120 Cong. Rec. S9330 (daily ed., May 30, 1974) (Remarks of Senator Hart).

The Court of Appeals for this Circuit, in Rural Housing Alliance v. United States Dept. of Agriculture, 498 F.2d 73 (D.C.Cir. 1974), has concisely articulated the test which must be applied in determining whether "investigatory files" have been "compiled for law enforcement purposes", as follows:

It is now established that the Government need not show "imminent adjudicatory proceedings or the concrete prospect of enforcement proceedings". What the Government is required to show is that the investigatory were compiled for adjudicative

or enforcement purposes. Whether the adjudication or enforcement has been completed is not determinative, nor is the degree of likelihood that the adjudication or enforcement may be imminent

* * *

The purpose of the "investigatory files" is thus the crucial factor. . . . If the purpose of the investigation was . . . not customary surveillance . . . , but an inquiry as to an identifiable possible violation of law, then such inquiry would have been "for law enforcement purposes" 498 F.2d at 80-82. (Emphasis in original).

On the basis of the entire record in this case, and particularly the two Sheldon Affidavits filed in support of defendants' summary judgment motion, the Court is convinced that the Foreign Commerce Section's purpose in obtaining the documents in question was to examine them with a view toward possible enforcement actions under the antitrust laws. ^{5/} Consequently, such materials constitute "investigatory records compiled for law enforcement purposes" within the purview of Exemption 7(A).

As to the second requirement under Exemption 7(A), viz., that production of the records would "interfere with enforcement proceedings", we are in agreement with the defendants that premature disclosure of the materials sought by plaintiffs would reveal to all interested parties the enforcement intentions of the Antitrust Division and, once alerted, potential defendants might attempt to disguise violations, destroy or alter incriminating data, or refuse to voluntarily produce germane information. As stated in the first Sheldon Affidavit:

The questionnaires sent out as of this date are part of a more comprehensive study of the joint venture and patent-license agreements of multinational corporations. The Division anticipates that, once the documents currently

^{5/} The second Sheldon Affidavit indicates that documents supplied in response to the survey requests are analyzed by Antitrust Division Attorneys "for possible violations of the Federal Antitrust laws" and that suspect corporations are investigated further "and may eventually be prosecuted".

in our possession have been adequately examined, more questionnaires will be sent to additional companies. If those companies to which questionnaires are to be directed in the future are given advance notice of precisely the types of documents which we feel indicate violations of the antitrust laws, they may take measures to avoid detection of their own violations. By comparing those documents which the Division has determined do not provide sufficient evidence of violations of law (those documents relating to individual investigations which have been closed) with those documents which we have determined do evidence violations of law (those documents which relate to investigations which remain open), they will be put on notice as to precisely the quantity and quality of evidence which we feel is determinative in making a decision to further pursue an investigation. This advance information would be invaluable to a company which is trying to avoid prosecution under the antitrust laws.

In addition, since the Antitrust Division has relied upon non-compulsory compliance with the instant survey requests, production of the documents sought would have a predictably adverse impact upon further cooperation by investigatory sources, as well. Under such circumstances, the Division would be compelled to resort to cumbersome procedures such as Civil Investigative Demands [CID's] under 15 U.S.C. §1313.

It is, therefore, the opinion of the Court that the release of these investigatory records, compiled for law enforcement purposes, would be likely to result in interference with on-going investigations and future enforcement proceedings of the Antitrust Division. For those reasons, Exemption 7(A) permits non-disclosure. See Title Guarantee Company v. National Labor Relations Board, 534 F.2d 484 (2d Cir. 1976); Goodfriend Western Corp. v. Fuchs, 535 F.2d 145 (1st Cir. 1976).

EXEMPTION 7(D)

Investigatory records compiled for law enforcement purposes, such as the records involved in the present case, by virtue of Exemption 7(D), need not be disclosed to the extent that production would reveal "the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, . . . confidential information furnished only by the confidential source." Defendants have asserted this exemption in order to protect the identities of the fifteen multinational companies which have supplied information to the Foreign Commerce Section in response to its survey requests.

The legislative history of Exemption 7(D) reveals Congress' desire to protect not only the "paid informer", but also the "simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential". 120 Cong. Rec. S9330 (daily ed, May 30, 1974) (Remarks of Senator Hart); see also Conference Report, S. Rep. No. 93-1200, 93d Cong., 2d Sess., at 12. Sources of information certainly would be reluctant to provide information to law enforcement agencies if they had reason to believe that their identities or the data which they supplied in confidence would be subject to disclosure. See e.g., Evans v. Department of Transportation, 446 F.2d 821 (5th Cir. 1971), cert. denied, 405 U.S. 918; see also Wellman Industries, Inc. v. National Labor Relations Board, 490 F.2d 427, 431 (4th Cir. 1973). It is, therefore, essential that federal law enforcement authorities be able to give binding assurances, where necessary, that the identity of a confidential source supplying information for law enforcement purposes will not be publically disclosed. This is plainly the purpose of Exemption 7(D):

As we have noted previously, most of the documents at issue were furnished by companies in specific reliance upon oral or written pledges of confidentiality and all such submitting firms cautioned that the materials are competitively sensitive. The totality of circumstances surrounding their responses to the Foreign Commerce Section's survey requests justified a reasonable belief on the part of submitting companies that their identities would be kept in strict confidence. Moreover, the defendants' affidavits indicate that the Antitrust Division itself regarded such sources as confidential.

Disclosure of the documents which plaintiffs here seek, even with deletions of names and identifying information, 6/ would be likely to reveal the identities of these confidential sources. Accordingly, the defendants have properly invoked Exemption 7(D).

EXEMPTION 4

The final exemption relied upon by the defendants, Exemption 4, relates to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." For purposes of this exemption, trade secrets and commercial or financial information is "confidential" if not generally disclosed to the public, see Sterling Drug, Inc. v. Federal Trade Commission, 450 F.2d 698 (D.C. Cir. 1971), and its production is likely to either impair the Government's ability to obtain necessary information in the future or 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); Parkas v.

6/ See first Sheldon Affidavit at ¶21.

Staats, 501 F.2d 887, 889 (D.C. Cir. 1974); Pacific Architects and Engineers, Inc. v. Renegotiation Board, 505 F.2d 383, 384 (D.C. Cir. 1974).

It is, admittedly, impossible to determine on the present record what portion, if any, of this information is a trade secret. However, the defendants' affidavits and attachments thereto do establish that all of the materials in question fall within the category of commercial or financial information not generally disclosed to the public.

Since the Court has previously held that the release of these documents would seriously jeopardize the possibilities of future voluntary cooperation with Antitrust Division investigations, see p. 5, supra, defendants' claim to Exemption 4 is fully justified for the above reasons alone. There is, nevertheless, an additional basis upon which the Court concludes that the commercial or financial information at issue satisfies confidentiality requirements under this exemption.

The uncontroverted first affidavit of Thomas E. Sheldon plainly indicates that release of these documents would be likely to cause substantial harm to the competitive positions of the submitting companies:

15. My experience with multinational firms and with the documents involved here would indicate that the competitive position of the various firms supplying information would be seriously impaired by the release of the multinational documents. The dissemination of technical information related to patent and know-how licensing, and the terms of joint venture agreements would be invaluable to competitors. Although the existence of such agreements may be known by competitors, their specific terms are not. Joint venture agreements indicate the locus of control within a newly formed entity. Licensing agreements contain royalty rates, the disclosure of which would facilitate estimates of profit margins and divulge sensitive provisions for safeguarding secrecy and effecting quality control. Disclosure of the terms of one such agreement could impair

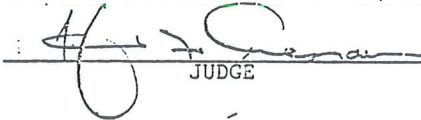
a company's bargaining position in negotiating future agreements. Some know-how licenses produced in this study contain highly confidential diagrams of chemical process plant construction. these are but a few ways in which the release of these documents could be competitively harmful to the firms supplying them.

For the aforementioned reasons, we find that Exemption 4 applies to the survey request responses which are the subject of the plaintiffs' FOIA request.

ORDER

It is, accordingly, by the Court this ^{15th} day of April, 1977,

ORDERED that defendants' motion for summary judgment should be, and the same hereby is, granted.


JUDGE