12/5/78

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v. Civil Action No. 77-1997

CENTRAL INTELLIGENCE AGENCY,
et al.,

Defendants.

_____/

MOTION TO QUASH SUBPOENAS AND TO
ISSUE A PROTECTIVE ORDER

Defendants and prospective individual deponents, by their undersigned attorneys, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, hereby move the Court for an order quashing the subpoenas served on James J. Angleton, Charles A. Briggs, Robert W. Gambino and Gene F. Wilson and barring plaintiff from taking any depositions or other discovery in this litigation absent further order of the Court. Alternatively, defendants move that any discovery in this action be by interrogatories rather than deposition.

In support of this Motion the Court is respectfully referred to the Memorandum filed herewith and the entire record herein.

Respectfully submitted,

Barbara Allen Babcock

BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v. Civil Action No. 77-1997

CENTRAL INTELLIGENCE AGENCY,
et al.,

Defendants.

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO QUASH SUBPOENAS, AND TO ISSUE A PROTECTIVE ORDER

STATEMENT

Plaintiff brought this action pursuant to the Freedom of Information Act, 5 U.S.C. § 552, seeking to obtain judicially compelled access to certain Government records. On May 26, 1978, defendants filed a Motion for Summary Judgment which has been supported by 15 detailed affidavits specifically identifying all materials withheld from plaintiff, and setting forth the bases upon which access to such information has been denied. That motion has been fully briefed and argued by both parties and is now submitted to the Court for a determination.

Although that motion is still pending, plaintiff has noticed the deposition, scheduled for Friday December 8, 1978[1/] of three current CIA employees and one former CIA employee who retired on December 31, 1974, a year and a half prior to plaintiff's request of June 11, 1976. On November 9, 1978, the United States Marshal served subpeonas on Charles A. Briggs, Gene F. Wilson and Robert W. Gambino, current employees of the CIA. On November 27, 1978, the United States Marshal served a subpoena on James J. Angleton, a retired CIA employee. None of the individuals served are parties to this action.

1/ By stipulated filed herewith, the parties have agreed to a continuance of that deposition pending a determination of this Motion for a Protective Order.

While two of the prospective deponents Messrs Wilson and Gambino have submitted 4 of the 15 affidavits in this case, defendants respectfully submit that the further testimony of these gentlemen is not necessary to a resolution of this litigation. Plaintiff's interest in Messrs. Briggs and Angleton is neither apparent from the notice and subpoenas nor from the record in this case. In fact, defendants respectfully submit that they can conceive of no legitmate line of inquiry contemplated by plaintiff as regards any of the prospective deponents and that, at a minimum, plaintiff should be required to demonstrate such a line of inquiry to the Court before being permitted to go forward with any discovery.

At present, defendants can only view plaintiff's attempt to depose these four individuals as a manifestly unwarranted burden on the progress of this litigation and as an improper harassment of busy Government officials who should not lightly be removed from their critical national security responsibilities as well as of a private citizen who has no conceivable relationship to this litigation. Moreover, such depositions would be not only burdensome but would provide plaintiff with relief beyond the jurisdictional basis plaintiff cites in bringing this action. It is defendants' position that the case is now ripe for resolution on the merits, and that further discovery should await the Court's disposition of defendants' pending motion for summary judgment. Should the Court ultimately find discovery to be necessary, that discovery should be limited to written interrogatories of the parties. Such discovery should further be limited in scope, i.e., to specifically identified lines of inquiry,

and in duration. For these reasons, defendants respectfully submit that the noticed depositions should not go forward, that the subpoenas should be quashed and that further discovery should be barred absent further order of the Court.

ARGUMENT

I. Discovery At This Time Is Both Unnecessary And Inappropriate

The discovery rules vest broad discretion in the District Courts with respect to control of the discovery process, and where necessary, the Courts may grant appropriate orders to deny, limit, or qualify discovery, in order to protect a party from undue burden or expense or to promote the ends of justice. Rule 26(c), Federal Rules of Civil Procedure; General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1234 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974); Galella v. Onassis, 487 F.2d 986, 997 (2d Cir. 1973); Chemical and Industrial Corp. v. Druffel, 301 F.2d 126 (6th Cir. 1962); Bowman v. General Motors Corp., 64 F.R.D. 62 (E.D. Pa. 1974); Dolgow v. Anderson, 53 F.R.D. 661, 664 (E.D. N.Y. 1971).

One familiar basis for the Court's issuance of such a protective order is that discovery should be postponed until there has been a determination on a motion that may be dispositive of the case. See, e.g., Brennan v. Local Union No. 639, 494 F.2d 1092 1100 (D.C. Cir. 1974); Taylor v. Breed, 58 F.R.D. 101 (N.D. Cal. 1973); Simons-Eastern Co. v. United States, 55 F.R.D. 88 (N.D. Ga. 1972); O'Brien v. Avco Corp., 309 F. Supp. 703, 705 (S.D. N.Y. 1967); Klein v. Lionel Corp., 18 F.R.D. 184, 165 (D. Cal. 1955).

Defendants filed a motion for summary judgment on May 26, 1978 which is pending before this Court for decision.

Defendants submit that the materials filed in support of that motion fully discharged the Government's responsibility to provide a detailed account of the non-disclosed agency records and the basis for withholding, and clearly demonstrate the absence of genuine issue as to any material fact. For the reasons stated therein, in defendants' reply memorandum of July 19, 1978, and in defendants' supplemental reply memorandum of October 17, 1978, defendants are entitled to judgment in their favor. Therefore, discovery is totally unnecessary.

To allow plaintiff to pursue discovery before the Court has considered defendants' Motion for Summary Judgment and supporting affidavits would place a substantial and undue burden not only on the defendants but also on the individuals subpoenaed. Obviously, should defendants prevail upon their pending motion, absent a protective order the noticed individuals will have been unnecessarily subjected to the burden of plaintiff's depositions. The significance of such an imposition is apparent both from the perspective of the deponents as individuals and, as to three of the deponents, as Government employees with official responsibilities. The involvement of a private citizen who retired over a year before plaintiff's FOIA request and who therefore has no knowledge of any facts or issues relevant to this litigation is totally unwarranted. Mr. Angleton, as a private citizen, has a busy schedule and should not be inconvenienced by this FOIA litigation. The information relevant to the resolution of defendants' motion for summary judgment is already before the Court. To permit any further discovery by plaintiff would merely expose defendants to an unwarranted fishing expedition, a matter of no small concern given the sensitive nature of the information in dispute. See, e.g., Hayden v Central Intelligence Agency, Civil No. 76-284 (D. D.C. Sept. 29, 1976) (attached hereto as Appendix A). See, also, Baker v. Central Intelligence

Agency,, Civil No. 77-1228 (D.C. Cir. May 24, 1978) (attached to defendants' first brief as Appendix B); Goland v. Central Intelligence Agency, Civil No. 76-1800 (D.C. Cir. May 23, 1978) (attached to defendants' first brief as Appendix A); Weissman v. Central Intelligence Agency, 565 F.2d 692, 297-98 (D.C. Cir. 1977); Ray v. Turner, Civil No. 77-1401 (D.C. Cir. August 24, 1978) (attached to Notice of Filing, September 12, 1978).

Moreover, no prejudice will result to plaintiff should this motion be granted. A short postponement of discovery, pending the disposition of the defendants' dispositive motion will not injure the plaintiff in any way. In short, both legal principles and the present posture of this case confirm the conclusion that discovery should await the Court's disposition of defendants' motion for summary judgment.

II. The Freedom Of Information Act Does Not Mandate Discovery Irrelevant To The Issue Of Whether Documents Have Or Have Not Been "Improperly Withheld"

The general policy favoring broad discovery in civil litigation is, of course, conditioned on the requirement that it be relevant to the subject matter involved in the pending action. Federal Rules of Civil Procedures 26(b)(1). A Freedom of Information Act suit is, by statute, one in which the ultimate issue is disclosure of records. See Theriault v. United States, 503 F.2d 390 (9th Cir. 1974). To allow plaintiff the broad discovery he seeks here could well provide him with more relief than he could obtain from disclosure of all documents in issue.[2/] Assuming arguendo that the Court, upon review of a motion for summary judgment, were to discover any lingering questions that remain to be resolved, it would be more appropriate

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2/ Indeed, as drafted, the Freedom of Information Act originally applied to requests for "information" but was amended to apply only to suits seeking "records." Senate Report No. 813, 89th Cong., 1st Sess., p. 2.

to narrow the issues accordingly and thereupon decide what means would be best designed to resolve those issues, e.g. further affidavits or discovery Any discovery in an FOIA suit is best tailored to the nature of the litigation, so as not to compromise ultimate issues in the case, and thereby render the case moot.[3/]

The sole relief obtainable under the Freedom of Information Act, 5 U.S.C. 552, is the production of documents at issue which have been improperly withheld by a Government agency. The sole issue in an FOIA lawsuit is whether the Agency's withholding of records has been improper. The Act "only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create." NLRB v. Sears, Roebuck and Co, 421 U.S. 132, 162 (1975); Prescott v. United States, 538 F.2d 338 (9th Cir. 1976) (unreported memorandum attached hereto as Appendix B); Tuchinsky v. Selective Service Commission, 294 F. Supp. 803 (N.D. Ill. 1969), aff'd, 418 F.2d 155 (7th Cir. 1969) Diviaio v. Kelley, 571 F.2d 538, 542, 543 (9th Cir. 1978); Halperin v. CIA, 446 F. Supp. 661, 664-667 (D.D.C. 1978).

3/ The courts have recognized that the Government can show that documents are exempt by filing appropriate affidavits. See, e.g., Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974); Ray v. Turner, supra. Indeed in recent Court of Appeals decisions in this Circuit, e.g., Goland, supra, and Ray, supra, the Court has recommended that the government be given every opportunity to defend its claims by affidavit. Moreover, the legislative history of the 1974 Amendments to the FOIA makes it clear that the Government should prevail if its affidavits entitled it to judgment without the necessity of further proceedings. See, e.g., Senate Report No. 93-854, 93rd Cong., 2d Sess., p. 14; Senate Report No. 93-1200 (The Conference Report, Page 9). Now pending before this Court is a motion for summary judgment supported by 13 affidavits. As those affidavits clearly establish that defendants are entitled to judgment in their favor, discovery is totally unnecessary and inappropriate here. See Exxon Corporation v. FTC, Civil No. 78-0530 (D.D.C. November 17, 1978) (attached hereto as Appendix C.

Judge Flannery of this District thus concluded in Hayden v. CIA, supra:

> . . . plaintiff's motion to compel should be denied. Not only is the information sought of dubious relevance, given the narrow scope of this Court's permissible inquiry under the Freedom of Information Act, but also this discovery attempt appears to be an effort to obtain information outside the purview of plaintiff's original request to the agency. Plaintiff's original request sought those records in which his name appeared. The agency has proceeded throughout on the reasonable assumption that plaintiff sought only the records for which he asked. Plaintiff's contention that the public has a right to know of any CIA or other government agency wrongdoing is not apposite to the narrow confines of judicial determination of an agency's withholding of records under the Freedom of Information Act. Plaintiff has made only the most tenuous showing that the answers to his interrogatories are relevant to his lawsuit challenging the withholding of certain records by the CIA. This court should not allow plaintiff's suspicions as to ulterior agency motives to dictate a mass fishing expedition concerning the information collecting activities of the CIA and other government agencies.

Id. at 3. Judge Flannery's concerns were recently confirmed by Judge Oberdorfer in Exxon Corporation v. FTC, Civil No. 78-0530 (D.D.C. November 17, 1978, (attached hereto as Appendix C) who observed:

> Although the defendant in Goland was a security agency against which discovery might appear to be particularly inappropriate, the District Court's discretion to foreclose discovery and consider a motion for summary judgment solely on the basis of agency affidavits is not limited to cases where the defendant is a security agency.

Id. at 9 (Emphasis added).

It is evident from the record as a whole in this case that plaintiff's prime concern is likewise directed at obtaining the very information being withheld or pursuing further inquiries as to CIA operations that may not even be the subject of any document in this litigation. The use of

discovery as a substitute for disclosure under the FOIA in order to satisfy plaintiff's curiosity about national security matters is not only improper but dangerous. It is generally recognized that the Freedom of Information Act may be invoked by anyone--without a showing of need or special interest. EPA v. Mink, 410 U.S. 73, 92 (1973). Should plaintiff be permitted the discovery sought here, the end result would be that any person desiring to conduct an inquisition as to an agency's practices, procedures, and business could do so simply by filing an FOIA suit and noticing depositions, irrespective of the content of any government records. The Act does not authorize that result. Accordingly, general inquiries by way of depositions or any other discovery device is totally objectionable and unnecessary to the resolution of FOIA litigation.

III. Any Further Discovery Should Be By Interrogatores Rather Than By Deposition

The need for discovery is rare in FOIA litigation and its use should be confined to cases in which genuine material issues of fact cannot be resolved by lesser means. Not every FOIA case is susceptible to the use of discovery techniques. Grolier, Inc. v. FTC, Civil Action No. 76-1559 (D.D.C. December 13, 1976) (attached hereto as Appendix D), Slip Opinion, p. 1. Where the defendant has made a good faith showing of its attempts to comply with requirements of Vaughn v. Rosen, supra, and Ray v. Turner, supra, to index and justify any nondisclosure of documents, the courts have found that discovery is not appropriate. Goland v. CIA, supra, Hayden v. CIA, supra,; Grolier v. FTC, supra; Association of National Advertisers, Inc. v. FTC, 38 Ad.L. 2d 643 (D.D.C., 1976); Exxon Corporation v. FTC, supra, at 9.

At the very least, plaintiff should be required to demonstrate in advance some meaningful and legitimate issue of inquiry. Should the Court thereupon determine that some discovery is appropriate it should define permissible limits to

adequately protect defendants and the prospective deponents pursuant, inter alia, to Rule 26(c)(2), (3) and (4).[4/] Defendants submit that in view of plaintiff's expressed intention in prior pleadings in this action to delve deeply into the substance and merits of national security concerns rather than the basis for the specific FOIA issues in this litigation, withheld records, interrogatories would offer the only guarantee of confining plaintiff's inquiries to the "narrow scope of . . . permissible inquiry under the Freedom of Information Act." Hayden v. CIA, supra, at 3.

Interrogatories would allow plaintiff to ask whatever relevant questions he might establish while insuring an orderly process for whatever objections of irrelevance or privilege defendants may have.. Depositions, on the other hand, are simply ill-suited to FOIA cases. The procedures for depositions contemplate that "evidence objected to shall be taken subject to the objections." Federal Rules of Civil Procedure 30(c). Obviously, such a procedure is inadequate when the subject of the litigation and the subject of the deposition may be the same information. Depositions require an immediate reply to an inquiry, rather than allowing a reasoned response to be made. FOIA litigation necessarily involves the application of rules of law to specific documents. In addition, where large numbers of documents are involved, as here, the witness cannot possibly provide meaningful responses orally and from personal recollection.

4/ Even assuming deposition were ultimately permitted they should only be of individuals who have some identifiable relation to the processing of plaintiff's request and then, only, upon written questions pursuant to Rule 31 of the Federal Rules of Civil Procedure. See e.g., Colonial Capital Co. v. General Motors Corp, 29 F.R.D. 514, 518 (D.Conn. 1961). However defendants and deponents strenuously insist that all depositions are unwarranted here.

Judge Owen of the Southern District of New York crystallized the comparative advantages of interrogatories and depositions stating:

> I believe inquiry into these subjects, given the need for considered response by Government officials, is more appropriately served by proceeding with interrogatories rather than by deposition of a lay Government official.

Lord and Taylor v. Department of Labor, 75 Civ. 2839 (S.D. N.Y. January 8, 1976), attached hereto as Appendix E. Moreover, where sensitive information impacting on national security is involved the need for added precautions in preparing a response is vital. Accordingly, assuming, arguendo, that any discovery is appropriate in this case, defendants request that such discovery be limited pursuant to Rule 26(c)(3) of the Federal Rules of Civil Procedure to written interrogatories of the parties themselves as permitted by Rule 33.

CONCLUSION

Defendants firmly contend that discovery is totally unnecessary to the resolution of this litigation and the method selected by plaintiff is not only inappropriate and objectionable but hardly calculated to lead to the discovery of any information relevant to the issues in this litigation. Accordingly, defendants and prospective deponents join in urging that the depositions not be had, that the subpoenas be quashed and that further discovery be stayed pending this Court's ruling on defendant's summary judgment motion.

Alternatively, the defendants and prospective deponents urge that the notice of depositions be vacated, the subpoenas quashed and that any further discovery be by written interrogatories directed to the parties themselves and be limited in scope and in duration.

For the foregoing reasons, defendants urge that their motion for a protective order be granted.

Respectfully submitted,

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Assistant Attorney General

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United States Attorney

LYNNE K. ZUSMAN

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Telephone: (202) 633-4671

December 5, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v. Civil Action No. 77-1997

CENTRAL INTELLIGENCE AGENCY,
et al.,

Defendants.

_____/

ORDER

Upon consideration of Defendants' Motion For A Protective Order and the papers filed with respect thereto, and it appearing to the Court that the granting of the motion would be just and proper pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, it is by the Court this _____ day of December, 1978.

ORDERED that Defendants' Motion For A Protective Order be, and it hereby is, granted; and it is further

ORDERED that the subpoenas served on James J. Angleton, Charles A. Briggs, Robert W. Gambino and Gene F. Wilson be, and hereby are quashed, and it is further

ORDERED that discovery may not be had by plaintiff until such time as the Court may otherwise order.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v. Civil Action No. 77-1997

CENTRAL INTELLIGENCE AGENCY,
et al.,

Defendants.

_____/

ORDER

Upon consideration of Defendants' Motion For A Protective Order and the papers filed with respect thereto, and it appearing to the Court that the partial granting of the motion would be just and proper pursuant to Rule 26(c)(3) of the Federal Rules of Civil Procedure, it is by the Court this _____day of December, 1978,

ORDERED that Defendants' Motion For A Protective Order be, and it hereby is, granted in part; and it is further

ORDERED that the subpoenas served on James J. Angleton, Charles A. Briggs, Robert W. Gambino and Gene F. Wilson, be, and hereby are quashed; and it is further

ORDERED that plaintiff may proceed with discovery only by way interrogatories and not by depositions until such time as this Court may otherwise order.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Quash Subpoenas and to Issue a Protective Order and supporting papers have been served on plaintiff by mailing first class postage prepaid, a copy thereof to:

James H. Lesar, Esquire
910 16th Street, N.W.
Suite 600
Washington, D.C. 20006

this 5th day of December 1978.

JO ANN DOLAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

SEP 21 1977

JAMES F. DAVEY, Clerk

THOMAS C. HAYDEN,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants.

Civil Action No. 76-231

ORDER

This matter comes before the court on plaintiff's motion for an order to compel answers to certain interrogatories pursuant to Rule 37 of the Federal Rules of Civil Procedure. Plaintiff in this suit seeks records from defendant agency under the Freedom of Information Act, 5 U.S.C. §552. Plaintiff first propounded a set of interrogatories to defendant on June 15, 1976; supplemental interrogatories followed on June 25, 1976. Defendant has objected to answering certain of these interrogatories. The present dispute centers on two basic areas: whether defendant should be compelled to supply information as to whether any of the records withheld from plaintiff were acquired through information-gathering agency activity, and whether defendant should be required to supplement its affidavits detailing the exemptions claimed by itemizing by page and paragraph the claimed exemptions for each document.

The interrogatories concerning activities of the CIA and other agencies consist first of the question whether any of the records withheld was acquired through the activities of the CIA or other government agency. If the answer to that questio is in the affirmative, plaintiff asks defendant to identify the nature of the activity, identify the agency,

state whether the activities were authorized in writing by a judicial officer, and state the general nature of any foreign intelligence activity involved.

Defendant argues against the motion to compel on three basic grounds. First it argues that such information is not relevant in a Freedom of Information Act case under Rule 26 of the Federal Rules of Civil Procedure and is thus not discoverab Defendant quite properly claims that the only issue before this court in a Freedom of Information Act case is whether the agency improperly withheld the records requested. Second, defendant claims that to compel answers to the interrogatories would grant plaintiff more relief than would be obtained if plaintiff ultimately was successful in this lawsuit. Plaintiff here seeks "information", while, under the Freedom of Information Act, only "records" are available. Third, defendant claims that the source and method of obtainment of records are not valid criteria by which to determine whether disclosure is mandated under the Freedom of Information Act; the nine statutory exemptions are characterized as the exclusive method for determining disclosure.

Plaintiff argues that recent revelations disclose that the CIA has been involved in mail intercepts, phone monitoring, Operation CHAOS, and possible domestic surveillance. Plaintiff contends that the real reason certain records have been withheld from plaintiff is that the CIA wishes not to divulge government illegality: there is no mention of any such activities in any records already released to plaintiff. Plaintiff seeks information concerning agency activity directed at or likely to affect plaintiff. Plaintiff also notes that

he does not seek release of the documents at this time, only an identification of documents related to such agency activity.

The court concludes that plaintiff's motion to compel should be denied. Not only is the information sought of dubious relevance, given the narrow scope of this court's permissible inquiry under the Freedom of Information Act, but also this discovery attempt appears to be an effort to obtain information outside the purview of plaintiff's original request to the agency. Plaintiff in his original request sought only those records in which his name appeared. The agency has proceeded throughout on the reasonable assumption that plaintiff sought only the records for which he asked. Plaintiff's contention that the public has a right to know of any CIA or other government agency wrongdoing is not apposite to the narrow confines of judicial determination of an agency's withholding of records under the Freedom of Information Act. Plaintiff has made only the most tenuous showing that the answers to his interrogatories are relevant to his lawsuit challenging the withholding of certain records by the CIA. This court should not allow plaintiff's suspicions as to ulterior agency motives to dictate a vast fishing expedition concerning the information-collecting activities of the CIA and other government agencies. Even should plaintiff win his challenge to the withholding of the records in question, he presumably would obtain none or little of the vast store of information he seeks here by interrogatory.

The second issue facing the court is whether defendant should be required to supplement its affidavit detailing the exemptions claimed by itemizing by page and paragraph each exemption claimed for each document. Of the 76 documents in question, the affidavits claim more than one exemption for 68 of them. Most often, three simultaneous exemptions are claimed: (b)(1) (properly classified foreign policy or national defense secrets); (b)(3) (exempted from disclosure by statute); and (b)(6) (personnel, medical or other files, disclosure of which would unwarrantedly invade privacy).

The agency has supplied plaintiff and the court with two types of affidavits. The first type, made by the agency's Information and Privacy director, identifies each document by type, date, subject, and claimed exemption. The second type, made by the director of the CIA Office of Security and by the Chief of Services Staff, identify the source of a document, whether plaintiff's name is mentioned, whether intelligence sources, employee's names, or cryptograms are set forth, and whether parts have been released to plaintiff.

The court feels that defendant has made a good faith effort to comply with the order of May 3, 1976 requiring defendant to file detailed affidavits justifying nondisclosure. There is no indication that defendant is taking a hard-line stance on nondisclosure; it has disclosed parts of withheld documents in many instances. While undoubtedly plaintiff would

feel aided by requiring a more detailed itemization, the court, on balance, feels that defendant has sufficiently identified the documents and exemptions claimed and sees little reason to impose this additional burden on defendant.

Accordingly, it is, by this court, this 29th day of September, 1976,

ORDERED that plaintiff's motion for an order to compel answers to certain interrogatories be, and the same hereby is, denied.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

S. E. PRESCOTT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 75-1137

MEMORANDUM

Appeal from the United States District Court for the Central District of California

Before: CHAMBERS, ELY, and SNEED, Circuit Judges

The district court properly dismissed this action, brought under the Freedom of Information Act [5 U.S.C. Sec. 552(a)(3)], when appellant declined to amend his complaint. The complaint seeks to have the Department of Justice compose, then reduce to writing, and then disclose to appellant, explanations for its failure to initiate a prosecution recommended by appellant. The Act does not require the creation of such explanatory materials. See N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

Affirmed.

CIVIL NO. 77-1997

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
NOV 17 1978
JAMES E. DAVEY, Clerk

EXXON CORPORATION,

Plaintiff,

v. Civil Action No. 78-0530

FEDERAL TRADE COMMISSION, et al.,

Defendants

MEMORANDUM

This case arises under the Freedom of Information Act ("FOIA").*/ Plaintiff Exxon requested documents from the Federal Trade Commission ("FTC") relating to an ongoing FTC adjudicative proceeding in which Exxon is a defendant. Plaintiff invokes this Court's jurisdiction pursuant to 5 U.S.C. §552(a)(4)(B), challenging the thoroughness of the FTC's search for responsive documents and the FTC's refusal to disclose certain admittedly responsive material it does possess.

I. Findings of Fact

On July 18, 1973, the FTC issued a complaint against, i.a., Exxon Corporation (the "Exxon case"), alleging that anticompetitive conditions in the petroleum industry violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45 (1976).**/ The FTC has asserted without contradiction by plaintiff that the Exxon case is the largest case ever brought by the Commission. To aid the FTC in the prosecution of the Exxon case, the Commission's staff has retained a number of economic consultants to provide advice and assistance in developing litigation strategy and designing the effective

*/ 5 U.S.C. §552 (1976).

**/ In the Matter of Exxon Corporation, et al., FTC Docket No. 8934.

use of resources devoted to the case. Among the products of this collaboration is a report prepared by a panel of economists (the "Final Economic Report"), described by the FTC as containing an "in-depth evaluation of aspects of the theory of the case and the evidence supporting these aspects, discussions of possible future litigation strategies, and areas of possible inquiry for further economic analysis." Document #12, defendants' index.

The Exxon case is currently in the stage of pretrial discovery. On April 17, 1978, Exxon filed a motion with the administrative law judge in that case for issuance of a subpoena duces tecum to direct complaint counsel to produce the Final Economic Report. Administrative Law Judge Berman denied Exxon's motion on the grounds that the economic report, containing assessments of strategy, evaluations and recommendations about theory development and discovery, was clearly attorney work product and therefore privileged. */ Order of June 2, 1978, FTC Docket No. 8934, Berman, Administrative Law Judge.

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*/ Exxon also requested, by separate motion, issuance of a subpoena ad testificandum directed to Darius Gaskins, former head of the the Commission's Bureau of Economics and the Commission official responsible for employing the economists who prepared the Final Economic Report, requiring him to appear for a deposition. Exxon asserted that it sought to depose Mr. Gaskins in order to determine facts relating to the circumstances surrounding development of the Final Economic Report. Judge Berman denied Exxon's motion for the subpoena duces tecum, observing that "Respondents may not obtain by deposition what they are not entitled to through subpoena of documents." Order of June 2, 1978, p. 5, FTC Docket No. 8934, Berman, Administrative Law Judge.

Prior to the filing of its motion with the administrative law judge to obtain discovery of the Final Economic Report, Exxon, through counsel, had made a request to the FTC under FOIA for three categories of documents regarding the Exxon case or the issues of that case:

> All documents which constitute, refer or relate to any oral or written communication ... during the period January 1, 1977, to the date hereof
> (a) between any Commissioner of the Federal Trade Commission ... or any member of such Commissioner's staff, and any Federal Trade Commission employee ...
> (b) between any Commissioner of the Federal Trade Commission ... or any member of such Commissioner's staff, and any private party ...
> (c) between any employee of the Federal Trade Commission who is directly or indirectly engaged in the pending FTC Docket No. 8934 adjudicative proceeding and any private party ....*/

The FTC granted partial access to the documents responsive to Exxon's request.**/ Exxon appealed the partial denial to the General Counsel of the Federal Trade Commission. The General Counsel released additional documents (or portions thereof) and advised Exxon that the remaining documents (or portions thereof) were being withheld pursuant to exemptions 5, 7(A) and 7(D) of FOIA.***/

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*/ Letter dated October 25, 1977. This request was modified, pursuant to an understanding between the parties, to exclude communications with Environmental Impact Statement consultants, communications with Exxon case respondents and communications with a computer company with which the FTC has an ongoing contract.

**/ Letter dated November 10, 1977, from Carol Thomas, Secretary of the Commission.

***/ Letters dated January 10 and 13, 1977, from Michael Sohn, General Counsel of the Commission.

As a result of Exxon's October 25, 1977 FOIA request, the FTC located approximately 2,000 pages of responsive documents; of these, approximately 1,200 pages are on public record. Of the remaining 800 responsive pages, the FTC has released approximately 425 pages, or approximately 53% of the responsive pages located that are not on the public record.

On March 24, 1978, Exxon filed the present complaint with this Court for injunctive relief, challenging the FTC's claims to exemption for the responsive documents withheld in whole or in part, including the Final Economic Report.

Defendants have provided an index of the 64 documents withheld in whole or in part, describing the portions withheld and the exemptions claimed.

Defendants have also produced an affidavit by Carol Thomas, Secretary of the Commission, describing and attesting to the adequacy of the FTC's search for responsive documents, and an affidavit by Roger Pool, complaint counsel in the Exxon case, further explaining defendants' reasons for claiming each exemption.

The index and affidavits provided by defendants are relatively detailed and nonconclusory. For example, document #2 is described in defendants' index as follows:

> (2) Undated. From economist. To Exxon panel and FTC staff. Analysis of one aspect of theory of case and role of government agencies in relation to that aspect, including characterization of conditions in petroleum industry, and suggestions for further information to be gathered.

The index also records that both exemptions (b)(5) and (7)(A) are claimed by defendants for this document. This example is typical of the entries in defendants' index.

Plaintiff has not alleged, nor has defendants' showing exhibited to the Court, anything other than good faith compliance with FOIA by defendants.

Defendants have filed a motion for summary judgment. In the course of its consideration the Court ordered defendants to produce two disputed documents in camera. The so-called Blue Minutes of May 24 and July 29, 1977 (documents #61 and #62) and the Final Economic Report (document #12).

The Court has examined these two documents in camera and, as more fully described below, finds that the Blue Minutes contain, among other things, some facts which are already public and some account of pre-decisional deliberative communications within the Commission. The Final Economic Report contains pretrial tactical and strategic advice about a pending case to defendants' counsel from consulted specialists.

II. Conclusions of Law

This case is now before the Court on defendants' motion for summary judgment. In opposition, plaintiff raises in the first instance its need for additional discovery pursuant to Fed. R. Civ. P. 56(f). The Court has ordered that discovery be stayed pending decision on the motion for summary judgment. (Order of August 11, 1978.) The discovery issue will be considered before turning to the merits of defendants' motion for summary judgment.

A. Plaintiff's motion for additional discovery pursuant to Fed. R. Civ. P. 56(f). Plaintiff's initial response to defendants' motion for summary judgment takes the form of an affidavit of counsel, John S. Kingdon, pursuant to Fed. R. Civ. P. 56(f), explaining that plaintiff is unable to respond to factual statements in defendants' affidavits or to formulate its full opposition to defendants' motion without first obtaining certain discovery. Plaintiff states that its discovery "seeks information concerning the retention of the economists engaged in the Exxon study, the involvement of Commission employees in the preparation or supervision of the Economists' Report, and the use and distribution of documents reflecting the subject matter of the Report." Plaintiff's Opposition to Defendants' Motion for Close of Discovery, p. 2. Plaintiff also seeks discovery to respond to defendants' affidavit in support of the completeness and thoroughness of defendants' search for responsive documents. Accordingly, plaintiff outlines the following plan of discovery that it feels it must undertake in order adquately to respond to defendants' motion for summary judgment: the deposition on written questions of FTC Commissioners Pertschuk, Dole and

Clanton, the oral deposition of complaint counsel in the Exxon case, Roger Pool, the oral deposition of Kenneth Elzinga, Professor of Economics at the University of Virginia and believed by plaintiff to have been involved in the preparation of the Final Economic Report, */ and the oral deposition of Keith Golden, a paralegal in the FTC's Office of the Secretary, alleged by plaintiff to have been given responsibility for coordinating the FTC's search for documents responsive to plaintiff's October 25, 1977, FOIA request. Kingdon affidavit, ¶¶4-8.

The discovery requested by plaintiff is intended to uncover facts in support of three different legal contentions: (1) that defendants are not entitled to claim any privilege, and specifically

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*/ Defendants neither confirm nor deny that Professor Elzinga was involved in the preparation of the Final Economic Report. Defendants claim that the names of the participating economists are privileged from disclosure pursuant to exemption (b)(7)(A) of FOIA. Defendants' claim of exemption rests on the assertion that disclosure of the names of the retained economists would reveal significant aspects of the FTC's underlying economic theory of the Exxon case, since each economist is well known to advocate a particular type of economic theory or application of economic theory. Such disclosure, defendants argue, would be particularly important where, as in the Exxon case, the FTC's theory of liability is based primarily on structural economic evidence rather than on behavior.

no attorney work product privilege, for the records withheld (oral deposition of complaint counsel Pool, oral deposition of Professor Elzinga; Kingdon affidavit at ¶¶ 6-7), (2) that defendants have waived any exemption for the records withheld (deposition on written questions of Commissioners Pertschuk, Dole and Clanton, oral deposition of Professor Elzinga; Kingdon affidavit at ¶¶ 5 and 7), and (3) that defendants have failed to search adequately for documents responsive to plaintiff's October 25, 1977, FOIA request (oral deposition of Keith Golden; Kingdon affidavit at ¶ 8).

We shall examine plaintiff's need for further discovery in light of each of the legal contentions for which plaintiff would like to find further evidence.

1. Adequacy of Defendants' search.

Plaintiff seeks to discover facts relating to the adequacy of defendants' search for responsive records but does not put at issue defendants' claim, supported by the Thomas affidavit, that defendants' search was complete and thorough. Rather, plaintiff seeks to argue that, ab initio, it deserves an opportunity to discover facts that may controvert the evidence submitted by defendants.

The law does not support plaintiff's position. Our Court of Appeals has very recently reiterated its position on this matter. Goland v. CIA, No. 76-0166, slip op. (D.C. Cir. May 23, 1978). In Goland, plaintiffs also claimed the right to pursue discovery before the District Court decided defendant's motion for summary judgment on the basis of defendant's affidavits. The District Court denied plaintiffs the discovery they sought and awarded defendant summary judgment. The Court of Appeals affirmed the decision of the District Court:

> In determining whether an agency has met [its] burden of proof [on summary judgment], the trial judge may rely on affidavits . . . The agency's

> affidavits, naturally, must be 'relatively detailed' and nonconclusory and must be submitted in good faith. But if these requirements are met, the district judge has discretion to forgo discovery and award summary judgment on the basis of affidavits. Id., at 24, (footnotes omitted).

Although the defendant in Goland was a security agency against which discovery might appear to be particularly inappropriate, the District Court's discretion to forclose discovery and consider a motion for summary judgment solely on the basis of agency affidavits is not limited to cases where the defendant is a security agency. See, e.g., Nolen v. Rumsfeld, 535 F.2d 890 (5th Cir. 1976); Exxon Corp. v. FTC, 384 F.Supp. 755 (D.D.C. 1974), remanded, 527 F.2d 1386 (D.C. Cir. 1976), dismissed, No. 73-1928 (D.D.C. 28 Feb. 1977) (limiting discovery where affidavits demonstrated adequacy of search); Association of Nat'l Advertisers, Inc. v. FTC, 1976-1 Trade Cases, ¶ 60,835, (D.D.C. 1976) (where record indicates that agency search was "reasonably thorough," discovery may be limited by court). In Association of Nat'l Advertisers, plaintiff had raised detailed questions about the adequacy of the FTC's search and wished to proceed to discovery. Then Chief Judge Jones denied discovery, */ observing that:

> Discovery of facts relevant to each of these questions inevitably would lead 'down to the level of each individual participating in the search.' [Exxon Corp. v. FTC, 384 F. Supp. 755, 760 (D.D.C. 1974)]. To permit such discovery in a case such as the instant one, where the request for access is Commission-wide, and where the Secretary of the Commission has already stated under oath that the search was Commission-wide and complete, would be to permit unnecessary harassment of agency officials. 1976-1 Trade Cases at 68,644.

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*/ Judge Jones did allow limited discovery through interrogatories as to a question raised by plaintiffs to which defendants offered no explanation. 1976-1 Trade Cases at 68,644.

In the present case defendants have submitted an affidavit of the Secretary of the FTC, Carol M. Thomas, to support their assertion that their search for responsive documents was complete and thorough. The Thomas affidavit explains that upon receipt of plaintiff's request she directed the Information and Privacy Acts Branch of the Information Division of her office to commence a diligent and complete search for the documents in question. All the offices that could have been in possession of responsive documents were sent copies of the request with instructions to search for responsive documents. All records in the possession of each Commissioner were completely searched, as were all records in the possession of the Bureau of Competition, the Office of General Counsel, and the Office of Secretary.

The Court is of the opinion that the Thomas affidavit is sufficient on its face to demonstrate the adequacy of defendants' search. The affidavit explains in reasonable detail the scope and method of the search and plaintiff has alleged no failure or inconsistency of proof in the matter.

A court should not, of course, cut off discovery before a proper record has been developed; for example, where the agency's response raises serious doubts as to the completness of the agency's search, see, e.g., Association of National Advertisers v. FTC, supra at p. 68,644, where the agency's response is patently incomplete, see, e.g., Virginia Independent Schools Ass'n v. Commissioner, 1976-1 USTC, ¶ 9322 at p. 83,761 (D.D.C. 1976), or where the agency's response is for some other reason unsatisfactory, see, e.g., Weisberg v. U. S. Department of Justice, 543 F.2d 308, 310 (D.C. Cir. 1976). But here defendants have submitted a reasonably detailed, nonconclusory affidavit explaining their search and there is no question

raised as to defendants' good faith. Accordingly, the Court concludes that defendants' motion for summary judgment can and should be resolved without allowing discovery by plaintiff as to the adequacy of defendants' search. Goland v. CIA, supra, and cases cited therein.

2. Entitlement of Defendants to exemption (b)(5) because of privilege for attorney work product.

Plaintiff also seeks discovery concerning defendants' contention that a number of the withheld documents are exempt from disclosure pursuant to exemption (b)(5) because they constitute attorney work product. N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

As discussed above, the Court has discretion in a FOIA case to forego discovery and decide the case on the basis of reasonably detailed, explanatory affidavits submitted by the agency in good faith. See also Mead Data Cent., Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 262 (1977). This is no less true with respect to agency affidavits averring that identified documents are exempt than it is with respect to affidavits averring that all identifiable documents have been produced. See Goland v. CIA, No. 76-1800, Slip op. at 24, (D.C. Cir. 1978).

Here there is no serious claim that the agency affidavits and index are defective or insufficient, compare Brandon v. Eckard, 569 F.2d 683, 689 (D.C. Cir. 1977) (A conclusory affidavit does not entitle a court to ignore claims that an allegedly exempting statute does not apply because of the nature of the materials or the failure to follow proper procedures), or that there exist conflicting affidavits with respect to material issues of fact, compare Sears, Roebuck & Co. v. GSA, 553 F.2d 1378, 1382 (D.C. Cir. 1977).

Defendants have disclosed 53% of the responsive documents located that are not on public record and have provided a

relatively detailed index and accompanying affidavits, identifying and explaining the exemptions claimed for each document or portion thereof. There is no question of defendants' good faith. In light of defendants' showing and the absence of any controverting allegations by plaintiff, this Court declines to withhold its consideration of defendants' motion for summary judgment pending discovery by plaintiff. */

3. Waiver of defendants' entitlement to exemption (b)(5).

Plaintiff also seeks discovery regarding the possible "waiver" by defendants of their claim to a (b)(5) exemption. Plaintiff argues, and this Court agrees, that the attorney work product privilege can be waived as a result of the actions of the party seeking to assert it. U.S. v. Nobles, 422 U.S. 225, 239 (1975). In an appropriate case, therefore, the waiver of a work product privilege might amount to a waiver of exemption (b)(5). Plaintiff here, however, has advanced no reasons for the conclusion that defendants have, by their actions, made the application of the work product privilege inappropriate. Compare U.S. v. Nobles, id., (attorney electing to present investigator as witness waived work product privilege with respect to matters covered in his testimony).

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*/ This is not to say that defendants' submissions are sufficiently detailed and revealing to justify an award of summary judgment in defendants' favor. See p. 14 f., infra. The Court's ruling on plaintiff's 56(f) motion is without prejudice to plaintiff's seeking discovery at a later time if defendants' supplemental submissions are inadequately responsive to the Court's direction here.

Plaintiff's real argument here does not rest on a notion of "waiver" at all. Plaintiff seeks to discover whether any impermissible ex parte communications regarding the economists' study took place between a Commissioner (or his staff member) and any other party that would oblige the FTC to make the subject of such communications part of the public record pursuant to the FTC's own regulations. 16 C.F.R. §4.7 (1978). */

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*/ This regulation provides in relevant part:

> (b) Prohibited ex parte communications. While a proceeding is in adjudicative status within the Commission, except to the extent required for the disposition of ex parte matters as authorized by law, (1) no person not employed by the Commission, and no employee or agent of the Commission who performs investigative or prosecuting functions in adjudicative proceedings, shall make or knowingly cause to be made to any member of the Commission, or to the Administrative Law Judge, or to any other employee who is or who reasonably may be expected to be involved in the decisional process in the proceeding, an ex parte communication relevant to the merits of that or a factually related proceeding; and (2) no member of the Commission, the Administrative Law Judge, or any other employee who reasonably may be expected to be involved in the decisional process in the proceeding, shall make or knowingly cause to be made to any person not employed by the Commission, or to any employee or agent of the Commission who performs investigative or prosecting [sic] functions in adjudicative proceedings, an ex parte communication relevant to the merits of that or a factually related proceeding.
>
> (c) Procedures. A Commissioner, the Administrative Law Judge or any other employee who is or who may reasonably be expected to be involved in the decisional process who receives or who makes or knowingly causes to be made, a communication prohibited by paragraph (b) of this section shall promptly provide to the Secretary of the Commission: (1) All such written communications; (2) memoranda stating the substance of and circumstances of all such oral communications; and (3) all written responses, and memoranda stating the substance of all oral responses to the materials described in paragraph (c)(1) and (2) of this section. The Secretary shall make relevant portions of any such materials part of the public record of the Commission, pursuant to §4.8, and place them in the docket binder of the proceeding to which it pertains but they will not be considered by the Commission as part of the record for purposes of decision unless introduced into evidence in the proceeding. The Secretary shall also send copies of the materials to or otherwise notify all parties to the proceeding.

Documents thus required by law to be disclosed to the opposing party in litigation with the FTC, plaintiff argues, no longer fall within the scope of exemption (b)(5), since that exemption protects only records "which would not be available by law to a party other than an agency in litigation with the agency".

Plaintiff's argument is misconceived, however, in that it supposes the availability of exemption (b)(5) to turn on the particular circumstances relevant to discovery between plaintiff and defendant in the Exxon case. In Sterling Drug Inc. v. F.T.C., 450 F.2d 698 (D.C. Cir. 1971), the FOIA plaintiff advanced the same type of argument, seeking to defeat the FTC's claim to a (b)(5) exemption on the ground that it had the right to discover the documents in question in a collateral lawsuit being pursued contemporaneously with the Commission. The Court of Appeals rejected this interpretation of exemption (b)(5). Instead, the Court of Appeals observed:

> The correct test for determining which documents are not exempt under §552(b)(5) is [that] many internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public. 450 F.2d at 705.

The Court of Appeals emphasized that the question was whether a private party, not a particular litigating plaintiff, would routinely be entitled to the documents through discovery. Id., at 705. Exemption (b)(5) calls for the application of general principles of civil discovery, see EPA v. Mink, 410 U.S. 73, 86 (1973); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); see also Mead Data Cent., Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977), to determine if the documents at issue would normally be privileged.

Accordingly, the particular claims of a particular litigant related to a particular lawsuit cannot affect the application of exemption (b)(5) in an independent FOIA action. The Court concludes that plaintiff's requested discovery with respect to the "waiver" issue is unnecessary because it would be irrelevant.

If plaintiff believes that the special circumstances of its case in conjunction with FTC regulations on ex parte communications entitle it to have some or all of the affected documents placed on the public record, the proper way to pursue that claim is to follow the administrative appeal procedures laid down by Congress and the FTC. Congress did not intend FOIA to be used as an avenue for the kind of collateral attack attempted by plaintiff here.

The Court concludes that plaintiff is not, as a matter of right, entitled to discovery regarding defendants' search for responsive documents or their claim of exemption (including the alleged "waiver" thereof) for documents located. Upon the showing of defendants in this case the Court furthermore declines, as a matter of discretion, to allow such discovery. Accordingly, the Court denies plaintiff's motion under Fed. R. Civ. P. 56(f) to make discovery and turns to the merits of defendants' motion for summary judgment.

B. Defendants' motion for summary judgment.

The Court finds defendants' factual showing, as reflected in its affidavits and its in camera submission, requires partial summary judgment in defendants' favor, and requires further submissions before decision on other issues raised by defendants' motion.

1. Documents not examined in camera.

Defendants have failed in their affidavits to provide the Court with sufficiently specific explanations, for each manageable portion of each document withheld, of the grounds supporting each exemption, and each theory advanced in support of each exemption, claimed. [redacted] (5) for some documents, but the supporting affidavit, the Pool affidavit, fails

to offer any systematic, detailed explanation of which documents are supposed to fall under one theory, which are to fall under the other, and which are to fall under both. The Pool affidavit also lacks the specific, detailed explanations of legally relevant facts necessary to enable a FOIA defendant to prevail on summary judgment. See generally Mead Data Cent., Inc. v. U.S. Dept. of Air Force, 566 F.2d 242 (D.C. Cir. 1977). Specific statements about a single document or patently indistinguishable groups of documents are preferred to sweeping statements about categories of documents. In addition, little effort has gone into showing that every manageable portion of every document withheld qualifies for exemption under any or all of the theories advanced by defendants. See Ray v. Turner, No. 76-0903 (D.C. Cir. August 24, 1978) and Marks v. CIA, No. 75-1735 (D.C. Cir. August 24, 1978).

Finally, defendants' affidavit, the Thomas affidavit, in support of the claim that there are no "final opinions" within the meaning of 5 U.S.C. §552(a)(2)(A) among the documents withheld is obviously conclusory and therefore inadequate. Compare Bristol-Meyers v. FTC, No. 76-1735 (D.C. Cir. August 22, 1978). Accordingly, the Court declines to grant or deny the balance of defendants' motion for summary judgment until they have had an opportunity to submit additional affidavits pursuant to the order attached hereto.

To be most helpful to the Court, the additional affidavits might take the form of a much-expanded index, proceeding, for each document, to explain what the smallest manageable portions are, describing why each such portion is entitled to each exemption claimed, and under what theories. A separate affidavit, also in index form, could explain the extent to which any document for which an exemption is claimed:

(i) falls within the affirmative disclosure provisions of 5 U.S.C. §552 (a)(2)(A)-(C), and (ii) is (or is not) incorporated by reference into any other document either currently withheld or released pursuant to 5 U.S.C. §552 (a)(2)(A)-(C).

2. Documents examined in camera.

Pursuant to the Court's Order of September 18, 1978, defendants have submitted for in camera inspection copies of two Blue Minutes (documents #61 and #62) and the Economic Panel Report (document #12). Examination of these documents by the Court further confirms the Court's impression, noted above, that defendants have failed to fulfill their obligation to disclose segregable portions of non-exempt material. Defendants seek to withhold all three documents in full pursuant to exemption (b)(5). */ This exemption allows an agency to withhold "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." 5 U.S.C. §552(b)(5).

Exemption (b)(5) was intended, inter alia, to protect "the decision making processes of government agencies." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975). This deliberative process privilege has its core in "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Id. at 150. As a matter of logical extension of this principle courts have established the general rule that pre-decisional, deliberative memoranda are privileged, while post-decisional memoranda --

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*/ Defendants also invoke exemption (b)((7)(A) as a basis for withholding the Final Economic Report. Defendants' index at p. 4. In light of the Court's disposition of defendants' (b)((5) calim, however, the Court finds it unnecessary to rule on the (b)(7)(A) issue.

communications designed to explain a decision already made -- are not, Bristol-Meyers Company v. FTC, No. 76-1364, slip op. at 7 (D.C. Cir. August 22, 1978); Jordan v. U.S. Department of Justice, No. 76-0276, slip op. at 43-44 (D.C. Cir. October 31, 1978); nor are segregable portions of factual material which would not expose the deliberative process. Mead Data Cent., Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977); compare Mervin v. FTC, No. 76-0686, slip op. at 4 (D.C. Cir. November 2, 1978).

Applying these standards to the two Blue Minutes in the present case the Court finds that defendants are entitled to withhold one portion of document #62 (Blue Minutes of July 29, 1977) pursuant to the deliberative process privilege incorporated into exemption (b)(5), but must disclose document #61 (Blue Minutes of May 24, 1977) in its entirety.

Document #61 reflects the decision of the Commission on the request of complaint counsel, certified by the Administrative Law Judge, in the Exxon case for judicial enforcement of subpoenas issued to some of the defendants in that case. Document #61 consists of seven paragraphs, none of which is entitled to exemption from mandatory disclosure under FOIA. Paragraphs 1, 6 and 7 consist entirely of factual material whose disclosure would not in any apparent way intrude on the deliberative process of the Commission. Paragraphs 2 and 4 reflect the final decision of the Commission on the enforcement matter and therefore fail to satisfy the pre-decisional requirement of the deliberative process privilege. See Jordan, id. Paragraphs 3 and 5 indicate how the individual Commissioners voted and, in the case of one Commissioner, the reason for his vote. Paragraph 5 indicates that the votes cast by the Commissioners were to

be made part of the public record, presumably by recording the votes in the order that was the result of the Commissioners' action. The order itself represents a final opinion by the Commission and would not be entitled to an exemption under the deliberative process privilege. Because the record of votes cast has evidently been incorporated into this final order the Court finds that this record cannot qualify for a (b)(5) exemption under the deliberative process privilege. The incorporation of what might otherwise be privileged material into a final opinion causes such material to lose its privileged character. Compare Sears, supra at 161; Bristol-Meyers Company, supra, slip op. at 10 and 17. The Court also finds that the reason recorded in the Blue Minutes for the vote of one of the Commissioners is not entitled to the protection of the deliberative process privilege. If a Commissioner chooses to explain his part in a final decision of the Commission contemporaneously with the taking of such a decision this explanation is not predecisional and therefore is not covered by the privilege protecting the deliberative process. See Jordan, supra, slip op. at 41-43.

Document #62 concerns the Commission's action taken in response to a July 25, 1977 decision of the Court of Appeals for the District of Columbia Circuit requiring the Commission to sequester certain data obtained by complaint counsel in the course of the adjudication of the Exxon case. Document #62 consists of six paragraphs. The first sentence of the first paragraph identifies a D.C. Circuit opinion being referred to the Commission by the General Counsel. This sentence simply describes the subject of the Commissioners' meeting and fails to reveal the deliberative process of the

Commission.*/ In the second sentence, however, the General Counsel draws the Commission's attention to a fact that might bear on the Commission's action. The Court finds the second sentence of paragraph 1 exempt under (b)(5) in that its disclosure would reveal the Commission's consultation with the General Counsel, thereby impinging upon the process by which Commission policies are formulated. See Mervin, supra, slip op. at 4. The second sentence is furthermore not a final opinion itself nor does it appear to have been incorporated into any such opinion. Paragraph 2 recites the final disposition of the sequestration matter by the Commission and is therefore excluded from the deliberative process privilege because it is not predecisional material.**/ Paragraphs 3, 5 and 6 record the procedural mechanics attending the Commission's decision and therefore do not fall within the deliberative process privilege because they are neither predecisional nor deliberative. Paragraph 4 records the votes of the five Commissioners for the public record. The Court finds that this paragraph falls outside of the deliberative process privilege because the record of the Commissioners' votes has been incorporated into the Commission's final order directing sequestration.

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*/ The Court notes, in this respect, that the Commission's decision on the matter of sequestration here is already part of the public record in the relevant proceedings. Blue Minutes #62, ¶¶3-5. The situation might well be different if the subject of the meeting were not otherwise disclosed.

**/ The decision described in paragraph 2 is also apparently fully incorporated into the Commission's final letter of notification. Blue Minutes #62 ¶2.

In sum, the Court finds defendants have properly withheld only one sentence from documents #61 and #62: the second sentence of paragraph 1 in document #62. All other portions of these two documents have been improperly withheld by defendants and shall be disclosed to plaintiff pursuant to the Court's order accompanying this memorandum.

With respect to the Final Economic Report, the Court finds the entire document to fall within the privilege of attorney work-product and therefore entitled to exemption under (b)(5). See NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1965). The Final Economic Report was prepared by expert consultants, at the direction of and for the guidance of FTC lawyers, and discusses a large range of tactical and strategic issues and options relating to the presentation of the Exxon case. It is the essence of the "think-piece" protected as "factual information, mental impressions, conclusions, opinions, legal theories or legal strategies relevant to [a] ... prospective trial." Jordan v. U.S., supra, slip op. at 47. See Mervin v. FTC, No. 76-0686 (D.C. Cir. November 2, 1978). It is clear that the Final Economic Report was prepared after the complaint was issued in the Exxon case. It was prepared at the direction of the FTC's attorneys in aid of the FTC's prosecution of the Exxon case. The Final Economic Report is therefore privileged attorney work-product, Fed. R. Civ. P. 26(b)(3), and exempt from mandatory disclosure under (b)(5) of FOIA. See Bristol-Meyers Company, supra at 19.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

Dated: November 17, 1978

FILED

NOV 17 1978

JAMES E. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EXXON CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 78-0530
	)	
FEDERAL TRADE COMMISSION, et al.,	)	
	)	
Defendants.	)	
	)	

O R D E R

Upon consideration of the briefs, memoranda and affidavits submitted by the parties, and the points and authorities cited, and upon consideration of the recent Court of Appeals decisions in Ray v. Turner, No. 76-0903 (D.C. Cir. August 24, 1978), Marks v. CIA, No. 75-1735 (D.C. Cir. August 24, 1978), Bristol-Meyers v. FTC, No. 76-1364 (D.C. Cir. August 22, 1978), and Jordan v. Department of Justice, No. 76-0276 (D.C. Cir. October 31, 1978), it is this 17th day of November 1978, hereby

ORDERED: That plaintiff's motion for discovery pursuant to 56(f) Fed. R. Civ. P. be and is hereby DENIED, and it is

FURTHER ORDERED: That defendants' motion for summary judgment with respect to document #12 (the Final Economic Report) is GRANTED, and it is

FURTHER ORDERED: That defendants' motion for summary judgment with respect to document #62 (Blue Minutes of July 29, 1977) is GRANTED with respect to the second sentence of the first paragraph of document #62 and is otherwise DENIED, and it is

FURTHER ORDERED: That defendants' motion for summary judgment with respect to document #61 (Blue Minutes of May 24, 1977) be and is hereby DENIED, and it is

FURTHER ORDERED: That defendants shall disclose to plaintiff forthwith those portions of documents #61 and #62 with respect to which defendants' motion for summary judgment has been denied, and it is

FURTHER ORDERED: That defendants' motion for summary judgment with respect to documents other than #12, #61 and #62 will remain under advisement until the submission of supplemental affidavits on or before ~~November 27~~ December 4, 1978, by defendants in support of their motion for summary judgment. These affidavits should, for each document withheld, (1) give specific, detailed explanations for each exemption claimed and for each theory advanced in support of each claimed exemption; (2) moreover, the explanations in (1) should be addressed to each manageable portion of each document withheld, accompanied by an explanation as to why no smaller manageable portions exist; and (3) explain whether such document, or any manageable portion thereof, falls within the affirmative disclosure provisions contained in 5 U.S.C. §552(a)(2)(A)-(C). Additionally, for each document withheld, the supplemental affidavits should disclose the extent to which, if any, such document is incorporated by reference into any other document currently withheld or released pursuant to 5 U.S.C. §552(a)(2)(A)-(C), and should identify such incorporating documents, if any.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

DEC 13 1976

JAMES F. DAVEY, Clerk

GROLIER, INC., et al.,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION, et al.,

Defendants.

Civil Action No. 76-1559

ORDER

This matter came before the court on defendants' motion for a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. After consideration of the motion, memoranda submitted in support thereof, opposition thereto, and the entire record herein, the court is of the opinion that defendants have demonstrated good cause for the issuance of a protective order and that such an order should issue forthwith. Defendants have provided a detailed justification and index for documents withheld, as is required by Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), and a supporting affidavit from Charles A. Tobin, Secretary of the Federal Trade Commission, attests to the fact that the index lists all of the documents responsive to plaintiffs' request under the Freedom of Information Act. If the above materials are sufficient to show that the remaining withheld documents are exempt from disclosure under the Act, 5 U.S.C. § 522(b)(5), then the court will no longer have jurisdiction over plaintiff's complaint.

While it is true that discovery procedures are sometimes appropriate in actions under the Freedom of Information Act, every case under the Act is not susceptible to the use of discovery techniques. Specifically, interrogatories and other discovery devices should not be employed in a Freedom of Information Act suit to give the party seeking discovery more

information than that to which he is entitled under the Act. Because plaintiffs' interrogatories may intrude into areas protected from disclosure by the terms of the Act, the court will grant the motion for a protective order pending decision on defendants' motion to dismiss or, in the alternative, for a summary judgment.

Accordingly, it is, by the court, this 13th day of December, 1976,

ORDERED that defendants' motion for a protective order be, and the same hereby is, granted; and it is further

ORDERED that answers to plaintiffs' interrogatories, or to any other discovery procedure, are hereby stayed pending further order of the court.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

LORD & TAYLOR, a Division of Associated Dry Goods Corporation,

Plaintiff,

-against-

UNITED STATES DEPARTMENT OF LABOR, and JOHN T. DUNLOP, Secretary of Labor,

Defendants.

75 Civ 2839

MEMORANDUM AND ORDER

#43679

OWEN, District Judge

I have reviewed the Magistrate's Recommendation dated December 2, 1975 and the supporting papers.

I have a somewhat different view of this situation and conclude that since, as the Magistrate appropriately observes, "plaintiff seeks to learn by discovery what topics are dealt with in the Handbook and the specific grounds upon which they are being withheld," I believe inquiry into these subjects, given the need for considered response by government officials, is more appropriately served by proceeding with interrogatories rather than by deposition of a lay government official.

Therefore, to the foregoing extent, the recommendation is amended, and it is hereby ordered that notice of deposition is vacated and the subpoena duces tecum is quashed. The plaintiff is directed to serve appropriate interrogatories upon the defendants to elicit the topics dealt with in the Handbook and the specific grounds upon which the presently withheld portions are being withheld.

The foregoing is so ordered.

/s/
United States District Judge

January 7, 1976.