No. 72-49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

FRANK FRANKEL, AGNES EISENBERGER and SONYA BRODY,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The Petitioners respectfully pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals, Second Circuit reversing a decision and order of Hon. Morris E. Lasker of the United States District Court for the Southern District of New York. As we will show herein, a direct and irreconcilable conflict has developed between the Second Circuit on the one hand and the Fourth Circuit and the Court of Appeals for the District of Columbia on the other hand in their respective interpretations of the Freedom of Information Act (5 U. S. C. §552).

Opinions Below

The opinion of the United States District Court for the Southern District of New York, per Lasker, J., is reported at 336 F. Supp. 675, and is set forth herein as Appendix A. The majority and dissenting opinions of the Court of Appeals for the Second Circuit are reported at —— F. 2d ——, and are set forth herein as Appendix B.

Jurisdiction

The Jurisdiction of this Court which entitles the Petitioners to a Writ of Certiorari is based on 28 U. S. C. §1254 (1). The opinion and judgment of the Court of Appeals for the Second Circuit were entered on May 4, 1972.

Questions Presented

1. Does the "investigatory files" exemption of the Freedom of Information Act, 5 U. S. C. §552(b)(7), apply permanently after an administrative agency has terminated its investigation and its enforcement proceeding?

2. Even if the "investigatory files" exemption applies, are records which would normally be available under the rules of discovery subject to disclosure under the "except clause" of §552(b)(7)?

Statute Involved

The Freedom of Information Act (5 U. S. C. §552) provides in pertinent part:

> "(a) (3) . . . each agency on request for identifiable records . . . shall make the records promptly

> available to any person. On complaint, the district court of the United States in the district in which the complainant resides . . . or in which the agency records are situated has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. . . . Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way . . .
>
> "(b) This section does not apply to matters that are . . .
>
> (3) specifically exempted from disclosure by statute; . . .
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
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> (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; . . .
>
> "(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section . . ."

Statement

This suit, under the Freedom of Information Act, 5 U. S. C. 552 ("the Act") seeks to compel the Securities and Exchange Commission ("the SEC") to produce records, principally transcripts of testimony and related exhibits, obtained in its investigation of Occidental Petroleum Corporation ("Occidental") and its president Armand Hammer ("Hammer") for violations of the anti-fraud provisions of the federal securities laws. On March 4, 1971, the SEC filed a complaint, based upon that investigation, against Occidental and Hammer, charging that, commencing in 1966, defendants had violated the federal securities laws. In its complaint, the SEC requested an injunction against further violations. On March 5, 1971, the suit was terminated by a consent decree and the investigation ended. Petitioners are shareholders of Occidental, who have brought a class action suit against Occidental, Hammer and another, for damages arising from the said violations of the securities laws.

Petitioners commenced this suit, under the Act, on May 27, 1971, after the SEC declined to produce the requested documents.[1] On June 7, 1971, the SEC moved for summary judgment on the ground that, as a matter of law, all of the records requested are exempt from disclosure as "investigatory files". The SEC, argued that the "investigatory files" exemption applies as a "blanket" exemption, whether or not the investigation has ended. The SEC also urged that some of the records requested were "specifically exempt from disclosure by statute", pursuant to 5 U. S. C. 552(b)(3), by virtue of 18 U. S. C. 1905, which makes it a criminal offense for government employees to disclose certain types of information obtained during investigations "unless authorized by law". It claimed further that some of the records requested were exempt from disclosure under 5 U. S. C. 552(b)(4), as privileged or confidential information and, under 5 U. S. C. 552(b)(5), as intra-agency memoranda not available by law to a party.

[1] The SEC sent petitioners a list of the names and addresses of all of the witnesses who testified before the SEC and stated that these individuals had been apprised by the SEC that each could obtain a copy of the transcript of his SEC testimony.

In a decision, dated October 20, 1971 (Appendix A), Hon. Morris E. Lasker denied the SEC's motion for summary judgment, stating that the "investigatory files" exemption, 5 U. S. C. 552(b)(7), does not apply in this case since the SEC has concluded its investigation and has not established that any further investigation will occur. The Court held that the "investigatory files" exemption is available only as long as the Government "is actually or reasonably likely to be involved in an investigation for law enforcement purposes". The Court also found that the records in question were not "specifically exempted from disclosure by statute", under 5 U. S. C. 552(b)(3), by reason of 18 U. S. C. 1905. It held in abeyance its decision as to which, if any, of the files in question are not subject to disclosure under 552(b)(4) or 552(b)(5).[2]

Therefore, the only issues before the Second Circuit were: (1) whether the "investigatory files" exemption 552(b)(7) permanently bars disclosure even after the investigation and enforcement proceedings have ended, and (2)

[2] The Court ordered an in camera inspection of the documents claimed to be included with these exemptions. The examination was referred to the Magistrates of the District to hear and report as to whether and to what extent any of the materials fall within the exemptions of §552(b)(4) or (5).

whether 18 U. S. C. §1905, by means of 552(b)(3), establishes an exemption from the Act. The issues of confidentiality, privilege, and internal memoranda were not before the Court. On May 4, 1972, a divided Court of Appeals for the Second Circuit, per Hays C. J., reversed the order of Judge Lasker and directed that summary judgment be entered for the SEC. A lengthy dissent was filed by Judge James L. Oakes. In his opinion, Judge Hays stated that the issue before the Court was whether the "investigatory files" exemption applies "after the investigation and the enforcement proceeding have terminated" and held that this "exemption from disclosure applies even after an investigation and an enforcement proceeding have been terminated" (Appendix B).

Reasons for Issuance of the Writ

The decision of the Court of Appeals for the Second Circuit is in direct conflict on a key question of law with the decisions of the Court of Appeals for the District of Columbia, in *Bristol Myers Co.* v. *FTC*, 424 F. 2d 935 (1970) Cert. denied, 400 U. S. 824 (1970) and the Court of Appeals for the Fourth Circuit in *Wellford* v. *Hardin*, 444 F. 2d 21, 23 (1971). As stated by Hon. James L. Oakes in his dissenting opinion in the Court below (Appendix B):

> ". . . other respectable courts have taken a view differing from that of the majority today. In *Bristol-Meyers Co.* v. *FTC*, 424 F. 2d 935 (D. C. Cir.), cert. denied, 400 U. S. 824 (1970), the District of Columbia Court of Appeals declared that the 'investigatory files' exemption is available to the agency only '(i)f further adjudicatory proceedings are imminent.' . . . Prevention of 'premature discovery by a defendant' is the purpose of the exemption according to the Fourth Circuit. *Wellford* v. *Hardin*, 444 F. 2d 23 (4th Cir. 1974)."

The case of *Evans* v. *Department of Transportation*, 446 F. 2d 821 (C. A. 5, 1971), cert. denied, U. S. , 30 L. Ed. 2d 788 (1972), upon which the majority in the court below relies, is inapposite to the facts of this case. In *Evans* the records were furnished voluntarily by a party who, at the time they were furnished, expressly asked that they be kept confidential, and an agency official gave his assurance that the furnished records would be kept confidential. The court in *Evans*, in interpreting the "investigatory files" exemption, was concerned that "such letters" not be revealed. Undoubtedly, its interpretation would have been different if it were dealing with the instant situation where the records sought were produced to the agency pursuant to subpoena and there was no request for or assurance of confidentiality.

In opposing the Petition for Certiorari in *Evans*, the Solicitor General argued that the primary question involved was "whether the identity of an informant . . . was exempt from disclosure" under section 552(b)(3) of the Freedom of Information Act by virtue of Section 1104 of the Federal Aviation Act of 1958. In this case, the SEC has already revealed the identity of its informants. Certiorari is sought on the much broader issue, involving a direct conflict between the circuits, whether the "investigatory files" exemption of the Freedom of Information Act applies after the investigation and the enforcement proceeding have terminated.

This direct conflict is crucial in this instance, because the Act provides that suit under the Act may be brought where the complainant resides or where the agency records are situated. Since "any person" can bring suit and since

most agency records are located in the District of Columbia, a complainant will avoid bringing suits, under the Act, in the Second Circuit where the "investigatory files" exemption applies after the investigation and enforcement proceeding have ended.[3] Complainants will shop for the forum where they can expect the most favorable result. Such forum shopping can be prevented only if this Court resolves this dispute between the circuits.

The decision of the Second Circuit involves a question which is crucial to the survival of the Act as a viable means for obtaining disclosure of governmental processes. A majority of government records are obtained during the course of "investigations", and according to the decision of the Court of Appeals for the Second Circuit, such records will never be available to the public even though many years may have passed since the investigation terminated. Most governmental records will be foreclosed forever from public disclosure in spite of a clear Congressional intent to the contrary.

The Second Circuit opinion is contrary to the purpose of the Act and its mandate for broad disclosure of governmental records. It is clear from the language of the Act and its legislative history that the legislative plan of Congress was to create a liberal disclosure requirement, limited only by specific exemptions, which are to be narrowly construed.[4] The legislative history of the Act makes it clear that the predecessor statute to the Act was full of loopholes which had been used to deny access to government records, and that in enacting the Act, Congress intended to establish a general philosophy of full agency disclosure.[5]

[3] Petitioners could have brought this suit in the District of Columbia, where the law of the Circuit is that the "investigatory files" exemption does not apply, where the investigation has ended.

[4] 5 U. S. C. 552(c); *Bristol Myers Company* v. *FTC, supra,* at 938.

[5] Senate Report No. 813, 89th Cong., 1st Sess. (1965) pp. 3 and 5.

The Act's legislative history also shows clearly that the "investigatory files" exemption was not intended to apply after the underlying investigation had terminated.[6] Therefore, not only is the decision of the Court of Appeals for the Second Circuit in conflict with decisions of other circuits, but it is also contrary to the Act's legislative history and general purpose.

The decision of the Court below that the "investigatory files" exemption applies after the investigation has terminated, is based upon the fear that disclosure would hinder "future law enforcement efforts by the agency" by revealing "the agency's investigatory techniques and procedures" and "the names of people who volunteered the information that had prompted the investigation" (Appendix B). As noted by Hon. James L. Oakes, in his dissenting opinion in the Court below such fears are groundless.

> ". . . the federal courts can amply safeguard investigatory agency procedures and informants by in camera examination of the files in doubtful cases. Thus the fear of exposure underlying the majority's view is largely groundless."

Here, the district court (Appendix A) adequately protected the agency's "investigatory techniques and procedures" by reserving decision as to the agency's claims of confidentiality and privilege, under subsections 552(b)(4) and (5), and by arranging for in camera inspection of all documents claimed to fall within these exemptions. Furthermore, the SEC has made public the names of the wit-

[6] H. R. Rep. No. 1497, 89th Cong., 2nd Sess. (1966) at p. 11; Senate Report No. 813, 89th Cong. 1st Sess. (1965) at p. 9.

nesses who gave testimony to it, therefore, the government's informants' privilege does not apply in this case.[7]

In many instances, the Government has been ordered to or has consented to produce documents obtained in the course of investigations and governmental investigatory powers have not been adversely affected.[8] Even the SEC has made public the contents of its investigatory files. In the matter of *Leeds Shoes, Inc.*, SEC docket 2-26940, the SEC conducted a private investigation, and as a result of its investigation, referred the matter to the Department of Justice for criminal proceedings. This reference led to the indictment of the former president of the company. *U. S.* v. *Frank Garcia et al.* 69-77 Cr. T (Middle Dist. Fla.) While this criminal suit was still pending, plaintiffs in a shareholders suit based upon the facts uncovered by the SEC investigation, requested the transcripts and documents obtained during the SEC investigation. On March 2, 1971, during the pendency of the criminal suit, the SEC granted

[7] *Roviaro* v. *United States*, 353 U. S. 53, 59-61 (1957); the persons who furnished documents to the SEC knew that such materials would be made public by the SEC in any litigation against Occidental and Hammer, which ensued from the investigation. Petitioners' use of such information will be consistent with the purposes for which the documents and testimony were obtained. The public and Occidental shareholders should not be deprived of access to such information because the SEC chose to settle its suit against Occidental and Hammer.

[8] *United States* v. *Gates*, 35 F. R. D. 524 (D. Colo., 1964); *Timken Roller Bearing Company* v. *United States*, 38 F. R. D. 57 (N. D. Ohio, 1964); *United States* v. *San Antonio Portland Cement Company*, 33 F. R. D. 513 (N. D. Tex., 1964); *Royal Exchange Assoc.* v. *McGrath*, 13 F. R. D. 150 (S. D. N. Y., 1952); *Zimmerman* v. *Poindexter*, 74 F. Supp. 933 (D. C. Hawaii, 1947); *United States* v. *Cotton Valley Operators Committee*, 9 F. R. D. 719 (W. D. La., 1949); *State of Illinois* v. *Harper & Row Publishers, Inc.*, 50 F. R. D. 37 (N. D. Ill., 1969); *Atlantic City Electric Company* v. *A. B. Chance Company*, 313 F. 2d 431 (C. A. 2, 1963); *Consolidated Edison Co. of N. Y.* v. *Allis Chalmers Mfg. Co.*, 217 F. Supp. 36 (S. D. N. Y., 1963); *U. S.* v. *Darling-Delaware, Inc.*, 1972 Trade Cases para 73,818; *U. S.* v. *Amer. Oil Co., et al.* 1972 Trade Cases para 73,894.

the plaintiff shareholders' request and made public the testimony and exhibits obtained during the Leeds' investigation.

Shortly, thereafter the SEC refused petitioners' request for the testimony and exhibits obtained during the Occidental investigation, even though the Occidental investigation and suit had terminated. The SEC should not be permitted to operate in such an arbitrary and discriminatory manner. It will not be detrimental to the SEC, if more than one year after the investigation has ended, it produces transcripts, exhibits and documents, not confidential or privileged, to the shareholders of the company investigated, the shareholders, whom the SEC sought to protect by its investigation.

Conclusion

There is a direct and irreconcilable conflict between the decision of the Court below and the decisions of other courts of appeals with respect to whether the "investigatory files" exemption of the Freedom of Information Act permanently bars disclosure even after the investigation and enforcement proceedings have terminated. This is of vital importance since most agency records are "investigatory", and the opinion of the Court below makes the Act meaningless. The fears expressed by the Court below are unwarranted. For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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