A5,6,7;B6,8,9,10,11,12,14,16

APPENDIX A

Opinion of United States District Court Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 Civ. 2369
MEMORANDUM

FRANK FRANKEL, AGNES EISENBERGER and SONYA BRODY,
Plaintiffs,

against

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

APPEARANCES:

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LASKER, D. J.

This suit grows out of plaintiffs' efforts to secure documents and records in the possession of the Securities and Exchange Commission ("SEC") for use by plaintiffs in a pending civil action against Occidental Petroleum Corporation and its officers. The papers are in the custody of the SEC as a result of an investigation of Occidental made by it which has been settled by a consent decree enjoining violations of §10(b) of the Securities Exchange Act and Rule 10b-5 thereunder.[1]

Plaintiffs seek, under provisions of the Freedom of Information Act, 5 U. S. C. §552, to compel the SEC to disclose to them the information secured in the SEC investigation of Occidental.[2] The SEC opposes on the ground

[1] *Securities and Exchange Commission* v. *Occidental Petroleum Corp., et al.*, 71 Civ. 982 (S. D. N. Y., March 5, 1971).

[2] On March 22, 1971, plaintiff's counsel requested, by letter and on SEC form 86 (7-67), that the SEC furnish all "letters, telegrams, reports, studies, memoranda, notes, lists, tabulations, press releases, summaries, analyses and other writings, including drafts," constituting material which "supports, explains and/or discusses" all violations of 15 U. S. C. §77j(b) "during the period January 1, 1966 to March 4, 1971 referred to or alleged in the complaint filed by the Securities and Exchange Commission on March 4, 1971, in the United States District Court, Southern District of New York [Index Number 71 Civ. 982], against Occidental Petroleum Corporation and Armand Hammer," and to furnish all SEC staff discussions of "any facts which support the allegations in the SEC complaint."

Although plaintiffs' request for SEC records is broad, the SEC's objections to it clearly indicate that the SEC knows the records being sought. "[T]his is all that the identifiability requirement contemplates. The fact that to find the material would be a difficult or time-consuming task is of no importance in making this determination; an agency may make such charges for this work as permitted by the statute. *Wellford* v. *Hardin*, 315 F. Supp. 175, 177 (D. Md., 1970), aff'd (Docket No. 14,904, 4th Cir., May 25, 1971).

that the material is exempt from disclosure under three statutory exemptions discussed below.

Two motions are before the court: Plaintiffs move for an injunction under the Act compelling defendants to disclose.[3] Defendants move for summary judgment on the ground that under the seventh exemption of 5 U. S. C. §552(b) they are entitled to judgment as a matter of law. For the reasons set forth below, the motion for summary judgment is denied and decision on the motion for an injunction is deferred pending examination by a special master of the material in the SEC's files to determine whether or not any documents fall within the exemptions of §552(b)(4) or (5).

[3] Plaintiffs brought their motion on by Order to Show Cause filed June 1, 1971, "pursuant to 28 U. S. C. 1361." Clause One of the Complaint recites: "This action is brought under Title 28 U. S. C. Section 1361, Title 5 U. S. C. Section 552, 17 C. F. R. 200.80, and the general equity powers of this court." 5 U. S. C. §552(a)(3) provides, inter alia, that this court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." This authority to grant injunctions is sufficient for the relief sought here. No duty arises under the Freedom of Information Act, when the agency involved has invoked an exemption clause under §552(b), until the district court has reviewed the request for information *de novo*. Similarly, it has been held that Congress, by explicitly limiting the scope for judicial discretion in providing for injunctive relief when records are "improperly withheld," intended to curb the general equity powers of the court cited in plaintiffs' complaint. As was stated in *Soucie* v. *David* (No. 24,573, D. C. Cir. April 13, 1971), "Congress clearly has the power to eliminate ordinary discretionary barriers to injunctive relief, and we believe that Congress intended to do so here." Accordingly, plaintiffs' motion is treated here as one for injunctive relief pursuant to 5 U. S. C. §552; so much of the application as relies upon 28 U. S. C. §1361 or general equity powers is superfluous.

SUMMARY JUDGMENT AND THE EXEMPTION UNDER §552(b)(7)

Section 552(a) requires government agencies to disclose upon request broad categories of information in their files. Section 552(b) lists nine exemptions from the obligation to disclose.

Section 552(b)(7) reads as follows:

> "This section does not apply to matters that are—
>
> ". . . (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

The SEC contends that this provision exempts investigatory files "as a class" (including the Occidental documents) from the requirements of the Freedom of Information Act. The Commission also urges that the "except" clause (within the exemption) must, in the light of its legislative history, be read narrowly to apply only to parties whom a given agency is investigating, and not an outside party such as the plaintiffs here. Defendants admit that if this court finds that §552(b)(7) does not provide the blanket exemption urged, then their motion for summary judgment must be denied.

Plaintiffs contend that neither the plain meaning of the exemption's language nor its legislative history supports the SEC position. Further, they argue that, since the investigation was terminated in a consent decree on March 5, 1971, and the SEC has failed to establish that any further investigation will occur, the Commission has not met the burden of demonstrating that exemption (7) is now applicable.

The courts have divided on the question whether §552(b)(7) provides a blanket exemption for all investigatory

files. *Cowles Communications* v. *Department of Justice*, Docket No. C-70-1599-SAW (N. D. Cal. D. C. April 26, 1971), held that investigatory files "need not be produced whether [enforcement] proceedings be contemplated or not." However, where, as here, the investigation by the agency has been completed, the exemption of §552(b)(7) has been held not to apply.[4] As the court remarked in *Bristol-Myers Co.* v. *Federal Trade Commission*, 424 F. 2d 935, 939 (D. C. Cir. 1970), "the agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files with the label 'investigatory' . . . the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the complaint are nevertheless discoverable." [5]

[4] Even if we were to accept the holding of *Cowles Communications* v. *Department of Justice*, *supra* in text, defendants would not be entitled to summary judgment at this juncture since the file sought has not been submitted or offered to the court for review in connection with this motion. In *Cowles*, the court declared that, despite the blanket protection of §552(b)(7), "[t]here remains . . . the question of whether a given file is an investigatory file compiled for law enforcement purposes . . . the Government should not be allowed to file an affidavit stating that conclusion and by doing so foreclose any other determination of the fact." Furthermore, there would remain an issue of fact as to whether the government's investigation for law enforcement purposes has concluded or whether action by the Attorney General was likely or probable.

[5] The SEC's contention that if the "except" clause of §552(b)(7) applies at all, it must be limited to the actual party being investigated by the agency, is without merit. As was stated in *Wellford* v. *Hardin*, (4th Circuit), *supra* note 2,

> "We agree with the district court that the legislative history of this exemption reveals that its purpose was to prevent premature discovery by a defendant in an enforcement pro-

(footnote continued on next page)

As in *Cooney* v. *Sun Shipping & Drydock Co.*, 288 F. Supp. 708, 711 (E. D. Pa. 1968), the question is presented "whether files once classified 'investigatory files' may forever after retain that characterization so as to be immune from disclosure under the statute." Here the SEC's investigation has concluded. It is true that the possibility remains that under 15 U. S. C. §78u(e) the SEC could "transmit" the file to the Attorney General who "may, in his discretion, institute the necessary criminal proceedings." However, the SEC has expressed no intention of transmitting the file, nearly one-half year has passed since the consent decree was entered, and absent some affirmative act by the agency to maintain the file as a legitimate one "compiled for law enforcement purposes" the Commission has not demonstrated for purposes of summary judgment, that the files any longer enjoy exemption under §552(b)(7).

This construction of the "investigatory files" exemption finds support in the language of §552, which explicitly provides (§552(c)) that "[t]his section does not authorize

(footnote continued from previous page)

ceeding. . The reports of the House Government Operations Committee and the Senate Judiciary Committee define the purpose of the exemption as the protection of the government's case in court. [Here] . . . the request for records does not come from a party facing an enforcement proceeding to which the investigative material is germane."

The cause is specific and when viewed in the context of the right of "any person" under §552(a) to obtain information ought not be narrowly construed. Any person may obtain material from investigatory files to the extent that the rules of discovery would make them available. See Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 799-800 (1966); Attorney-General's Memorandum on the Public Information Section of the Administrative Procedure Act, at 38 (1967).

withholding of information or limit the availability of records to the public, except as specifically stated in this section." It protects adequately the government's interest in maintaining its files undisclosed for so long as it is actually or reasonably likely to be involved in an investigation for law enforcement purposes, and at the same time carries out the policy of the Act "to increase significantly the public availability of agency records." *LaMort* v. *Mansfield*, 438 F. 2d 448, 451 (2d Cir. 1971).

THE (b)(3), (4) AND (5) EXEMPTIONS

Having concluded that defendants cannot rely upon §552(b)(7), it remains to be determined whether or not any of the files sought are exempt under §552(b)(3), (4) or (5).

Section 552(b)(4) exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential"; section 552(b)(5) exempts "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." As the record stands, it is impossible to determine whether and to what extent the files contain material covered by either the exemptions of (b)(4) or (5). Certainly it is reasonable to assume, however, that the files contain some information which may fall within the various categories enumerated in (b)(4), and the provisions of ((b)(5) may apply to some extent as well. Such a determination must be made *in camera* in the first instance.

Section 552(a)(3) of the Act requires the court to expedite the determination of such questions. Since the files sought here are voluminous, containing 25 individual transcripts numbering 2100 pages and some 5000 pages of other documents,[6] and since important criminal cases

[6] See Affidavit of John C. Carleton, sworn to June 7, 1971

are on the court's docket which must be disposed of forthwith, the matter will be referred, pursuant to 28 U. S. C. §636 and General Rule 35 of this Court, to the Magistrates of the Southern District of New York, to hold a hearing sitting as special master, at the earliest practicable date, for review of the material in the Commission's files and to report to this court as to whether and to what extent any of the material contained in such files falls within the exemptions of §552(b)(4) and (5).

There remains for discussion the Commission's claim that the "(b)(3)" exemptions applies. That clause provides that disclosure need not be made as to materials "specifically exempted from disclosure by statute." The Commission claims that, since 18 U. S. C. §1905 provides inter alia that an officer of the United States is liable criminally if he discloses investigatory material where "not authorized by law," the material here sought is exempt under §552(b)(3).

But this circular reasoning adds nothing to the defendants' armory. 18 U. S. C. §1905 does not establish an exemption from the Freedom of Information Act, but merely penalizes a disclosure of non-exempt material. We must still determine whether the material here sought is or is not exempt.

CONCLUSION

Defendants' motion for summary judgment is denied. A decision on plaintiffs' motion for an injunction is deferred pending the receipt of the report of the special master and the court's action thereon.

Submit order, including provisions for reference to the special master.

Dated: New York, New York
October 20, 1971

MORRIS E. LASKER
U. S. D. J.

APPENDIX B

Opinions of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 533—September Term, 1971.

(Argued February 2, 1972 Decided May 4, 1972.)

Docket No. 71-2213

FRANK FRANKEL, AGNES EISENBERGER, and SONYA BRODY,

Appellees,

v.

SECURITIES AND EXCHANGE COMMISSION, WILLIAM P. CASEY, HUGH F. OWENS, A. SYDNEY HERLONG, JR., RICHARD B. SMITH, and JAMES J. NEEDHAM,

Appellants.

Before:

HAYS and OAKES, *Circuit Judges,* and
CLARIE, *District Judge of the District of Connecticut, sitting by designation.*

ROBERT N. KAPLAN, New York, New York (Dermot G. Foley, Kaplan, Kilsheimer & Foley, New York, New York, on the brief), *for Appellees.*

RICHARD E. NATHAN (G. Bradford Cook, David Ferber, Michael A. Macchiaroli on the brief), *for Appellants.*

HAYS, *Circuit Judge:*

The Securities and Exchange Commission appeals from an order of the United States District Court for the Southern District of New York enjoining the Commission from withholding certain documents that the appellees, relying on the Freedom of Information Act, 5 U. S. C. §552 (1970), sought to inspect and to copy. The district court held that the documents, which the Commission had compiled in an investigation and used in civil litigation against persons who are not parties to this action, were not exempt from disclosure under the Freedom of Information Act, 5 U. S. C. §552(b)(7) (1970) as "investigatory files," because the Commission apparently did not intend to commence further law enforcement proceedings in which the documents would be used. We reverse.

I. The Facts

In November, 1970, the Commission began a nonpublic investigation of Occidental Petroleum Corporation and some of its officers and directors. The Commission sought to determine whether certain statements of, and omissions to state, facts relating to various real estate transactions, in documents filed with the Commission and in press releases, violated §10(b) of the Securities Exchange Act of 1934, 15 U. S. C. §78j(b) (1970) and Rule 10b-5, 17 C. F. R. 240. 10b-5 (1972). During the course of this investigation the Commission heard testimony from at least 23 witnesses and obtained numerous documents from Occidental, individuals connected with that corporation, and third persons. The Commission amassed an investigatory file totaling over 7000 pages of testimony and documents relating to the affairs of Occidental and individuals connected with it, corporations with which Occidental dealt,

and third persons. On the basis of information obtained during the investigation, the Commission commenced a civil action against Occidental and its president, Armand Hammer, on March 4, 1971 in the United States District Court for the Southern District of New York. The complaint alleged that Occidental and Hammer violated §10(b) and Rule 10b-5; the Commission sought injunctive relief against further violations of the statute and the Rule. On March 5, the Commission and the defendants agreed upon a consent decree, and both the investigation and the suit were terminated when the court entered judgment on the basis of the consent decree.

Appellees in this action are shareholders of Occidental. They commenced a class action for damages against Occidental and Hammer, alleging various violations of the securities laws. The source of the facts alleged in their complaint was apparently the complaint filed by the Commission in its suit against Occidental and Hammer.

On March 22, 1971, appellees' attorney wrote the Commission "seeking documentary support for" the allegations of their complaint, and requested that appellees be permitted to inspect and to copy:

> "[a]s to each and every violation of Section 10b . . . and/or of Rule 10(b)-5 . . . , which occurred during the period January 1, 1966 to March 4, 1971 referred to or alleged in the complaint filed by the [Commission in its suit against Occidental and Hammer] . . . each and every document [defined as including "all letters, telegrams, reports, studies, memoranda, notes, lists, tabulations, press releases, summaries, analyses and other writings, including drafts"] which supports, explains and/or discusses such claimed violations.

> "... [E]ach and every document written by or to any employee of the Securities and Exchange Commission discussing any facts which supports [sic] the allegations in the SEC complaint. ..."

The Commission notified appellees' attorneys that the request was being considered by the Commission's staff. On April 22, the appellees' attorneys renewed the request for the documents. On May 27, having received no ruling on their requests, the appellees commenced this action seeking injunctive relief against continued withholding of the documents. The appellees alleged that the Commission was withholding the documents in violation of the provisions of the Freedom of Information Act. The Commission's answer set forth various affirmative defenses, including the defenses that the documents were not subject to the mandatory public disclosure requirements of the Freedom of Information Act by virtue of the "investigatory files" exemption, 5 U. S. C. §552(b)(7) (1970), the "trade secrets" exemption, 5 U. S. C. §552(b)(4) (1970), the "inter-agency or intra-agency memorandums" exemption, 5 U. S. C. §552(b)(5) (1970), and the exemption for documents "specifically exempted from disclosure by statute," 5 U. S. C. §552(b)(3) (1970). The Commission moved for summary judgment.

II. The District Court Ruling

The district court denied the Commission's motion for summary judgment and granted in part appellee's motion for an injunction against continued withholding of the documents. The district court ruled that the "investigatory files" provision of the Freedom of Information Act exempts an agency from the disclosure requirements of the Act only

"for so long as it [the agency] is actually or reasonably likely to be involved in an investigation for law enforcement purposes. ..." The court took the position that, since the original investigation of Occidental and Hammer had been concluded on the date of the entry of the consent judgment, and since the Commission has taken no affirmative action "to maintain the file as a legitimate one 'compiled for [current] law enforcement purposes,'" the exemption from disclosure provided by §552(b)(7) no longer applied to the documents requested by the appellees. The court further held that "18 U.S.C. §1905 [the Trade Secrets Act] does not establish an exemption from the Freedom of Information Act [under §552(b)(3)], but merely penalizes a disclosure of non-exempt material." The court deferred decision on appellees' motion for an injunction pending receipt of the report of a special master appointed by the court to review the voluminous file and to report whether or not any of the requested documents fell within the coverage of §552(b)(4), which exempts an agency from having to disclose "trade secrets and commercial and financial information obtained from a person and privileged or confidential," and §552(b)(5) which exempts "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." The court granted appellees' motion for an injunction requiring the Commission to allow the appellees to inspect and to copy all the records that the Commission did not claim to be exempt under §552(b)(4) or (b)(5).

III.

The question presented by this appeal is whether the exemption from disclosure to "any person" of "matter" contained in an "investigatory file" compiled and utilized by an agency in an enforcement proceeding applies after the

to give the electorate greater access to information concerning the operations of the federal government. The ultimate purpose was to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities.[6] The Senate Report said of the bill:

> ". . . [i]t eliminates the test of who shall have the right to different information. For the great majority of different records, the public as a whole has a right to know *what its Government is doing*. There is, of course, a certain need for confidentiality in some aspects of Government operations and these are protected specifically; but outside these limited areas, all citizens have a right to know."

Id. at 5-6 (emphasis added). The House Report, after citing several examples of agencies withholding information relating to their operations, House Report at 5-6, states:

> "It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests."

Id. at 6. In conclusion, the House Report observed:

> "In the time it takes for one generation to grow up and prepare to join the councils of Government—

[6] Senate Report at 2-3, 10; House Report at 2, 3, 5-6, 12.

> from 1946 to 1966—the law which was designed to provide public information about Government activities has become the Government's major shield of secrecy.
>
> S. 1160 will correct this situation. It provides the necessary machinery to assure the availability of Government information necessary to an informed electorate."

Id. at 12.

The legislative history, and, indeed, the various disclosure provisions of the Act itself, clearly indicate that the general purpose of the Act was that the public be informed about the processes of government so that the electorate would be in better position to pass upon the structure and operation of government.

B. The "Investigatory Files" Exemption

The Senate and House Reports also reveal the general legislative purpose for exempting from disclosure matter contained in investigatory files compiled for law enforcement purposes.

The Senate Report states:

> "Exemption No. 7 deals with 'investigatory files compiled for law enforcement purposes.' These are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court."

Senate Report at 9. An earlier portion of the same report, discussing the general purpose of the Act, said of the need for balancing the interests of disclosure and confidentiality:

> "It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation."

Senate Report at 3.

The House Report, in discussing the "investigatory files" exemption, states:

> "This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings."

House Report at 11.

These Reports indicate that Congress had a two-fold purpose in enacting the exemption for investigatory files: to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information. Both these forms of confidentiality are necessary for effective law enforcement.

The conclusion that the §552(b)(7) exemption from disclosure applies even after an investigation and an enforcement proceedings have been terminated is supported both by the authority of the cases decided under the Act and by consideration of the policies underlying the Act in general

and the investigatory files exemption in particular. In *Evans* v. *Department of Transportation*, 446 F. 2d 821, 824 (5th Cir.), petition for cert. filed, 40 U. S. L. W. 3325 (U. S. Nov. 24, 1971) (No. 71-698), the court said:

> "We are of the further opinion that Congress could not possibly have intended that such [matter] should be disclosed once an investigation is completed. If this were so, and disclosure were made, it would soon become common knowledge with the result that few individuals, if any, would come forth to embroil themselves in controversy or possible recrimination by notifying the [agency] of something which might justify investigation."

See also *NLRB* v. *Clement Bros. Co.*, 407 F. 2d 1027 (5th Cir. 1969).

If an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered. The agency's investigatory techniques and procedures would be revealed. The names of people who volunteered the information that had prompted the investigation initially or who contributed information during the course of the investigation would be disclosed. The possibility of such disclosure would tend severely to limit the agencies' possibilities for investigation and enforcement of the law since these agencies rely, to a large extent, on voluntary cooperation and on information from informants.

In the present case disclosure would have but small effect with respect to the general purposes of the Act, the better informing of the electorate as to the operations of government. On the contrary it would defeat important purposes of the exemption for investigatory files. We therefore reverse.

Of course our decision does not mean that appellees are completely barred from obtaining information contained in the requested documents. In their suit against Occidental and Hammer appellees are entitled to the usual remedy of discovery under the discovery provisions of the Federal Rules of Civil Procedure. In the discovery procedure a district judge will be able to balance the need for the documents with the need for confidentiality.

The order of the district court is reversed, and remanded with directions to enter summary judgment for appellants.

OAKES, *Circuit Judge* (dissenting):

Legislative history can often be a helpful device for judges in the dark seeking light, as we are here.[1] But the legislative history of the Freedom of Information Act is so extensive and so full of internal inconsistencies that Professor Davis has said of it:

> Even though the records of the various hearings over a ten year period are voluminous, probably more than ninety-five per cent of the useful legislative history is found in a ten page Senate Committee report and in a fourteen page House Committee report. . . . Committee reports not addressed to the enacted version of the bill do not show the intent of Congress in enacting the statute. They show what the intent of Congress would have been if it had enacted the bill it did not enact.

Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 762, 791 (1967). Unfortunately, nothing

[1] Perhaps legislative history should be utilized only when it is subordinated, like the words of the act, to the "principal task of deriving the specific intent of Congress from a full and sympathetic understanding of its purpose." Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370, 381-82 (1947).

in the two reports Professor Davis mentions sheds any light on the specific question before us.[2] That question is whether, once an investigation has been terminated, and utilization of the files for law enforcement purposes is not reasonably likely, "investigatory files compiled for law enforcement purposes" [5 U. S. C. §552(b)(7)] are exempt from the disclosure requirements of 5 U. S. C. §552(a)(3). Indeed, our question is narrower still, for a careful district judge specifically framed his order and accompanying memorandum to preserve to the SEC, through in camera production, its exemptions under 5 U. S. C. §552(b)(4), "commercial or financial information obtained from a person and privileged or confidential," and (b)(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."[3]

[2] An early Senate report does indicate that the Act "is not a withholding statute but a disclosure statute. . . ." Senate Rep. No. 813, 89th Cong., 1st Sess. 5 (1965).

[3] *Frankel* v. *SEC*, Civil Docket No. 71-2369 (S. D. N. Y., Oct. 20, 1971 [mem.]; Nov. 5, 1971 [order]). By thus narrowing his decree, Judge Lasker takes away the force of the majority's argument that future law enforcement efforts could be hindered by revealing the agency's investigatory techniques and procedures or the names of informants. It seems to me that under subsections (b)(4) and (b)(5) adequate protection of these legitimate agency objectives is assured. Moreover, while the government may have a privilege not to disclose the *identity* of informers, *Roviaro* v. *United States*, 353 U. S. 53, 59-61 (1957), *here the SEC has already disclosed the names of the witnesses who gave testimony to it.* The SEC concedes that the subsection (b)(4) and (b)(5) exemptions would cover much of the material in their investigative files but worries lest *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 425 F. 2d 578 (D. C. Cir. 1970), will cause it some work by its requirement of "suitable deletions" by the agency from each document to make the protection of the exemption available. 425 F. 2d at 581. *See also Getman* v. *NLRB*, 450 F. 2d 670, 673 (D. C. Cir. 1971); *Soucie* v. *David*, 448 F. 2d 1067, 1078 (D. C. Cir. 1971). This is a typical agency argument and it really doesn't rise to a level warranting judicial reply.

On the narrow question before us reasonable judges may readily differ. I dissent from the views of my brethren because I think the Act contains an underlying recognition that disclosure of the workings of a government bureaucracy, which long since has suffered the "curse of bigness," can benefit the agency by increasing its sense of responsibility to the public. The Freedom of Information Act has as its aim, in other words, a delegation by Congress to the federal courts of the power to subject agency operations to public perusal. Behind this policy are some of the same considerations which underpin freedom of the press; at the very least the Act was intended to expand the possibility of "participation in decision making by all members of society." T. Emerson, The System of Freedom of Expression 7 (1970).

It is, therefore, not surprising that other respectable courts have taken a view differing from that of the majority today and of the Fifth Circuit in *Evans* v. *Department of Transportation*, 446 F. 2d 821 (5th Cir. 1971), *cert. denied*, 40 U. S. L. W. 3399 (U. S. Feb. 22, 1972), upon which the majority relies.[4] 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." 429 F. 2d at 939. Prevention of "premature discovery by a defendant" is the purpose of the exemption according to the Fourth Circuit. *Wellford* v. *Hardin*, 444 F. 2d 21, 23 (4th Cir. 1971). Judge Higginbotham has put it that the purpose is "to avoid a *premature* disclosure of an agency's case when engaged in law enforcement activities." *Cooney* v. *Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 711-12 (E. D. Pa. 1968) (emphasis original). He looks at the exemptions, quite practically, as a codification of existing judicially and congressionally created exceptions. *Id.* at 712.[5]

[4] Our own case, *LaMorte* v. *Mansfield*, 438 F. 2d 448, 451 (2d Cir. 1971), doesn't go to the specific question here.

An analysis of the prior case law discloses a number of times when government agencies have been required, on a showing of good cause, to produce documentary material

[5] The commentaries in point shed no more light than the legislative history. One, less a carefully reasoned legal analysis that it is a polemic, as its name implies, is Katz, *The Games Bureaucrats Play: Hide and Seek under the Freedom of Information Act*, 38 Texas L. Rev. 1261 (1970). Ms. Katz does make the point that the exceptions—including the "investigatory files" exception—are "administrative loopholes through which federal officials escape with records intact." *Id.* at 1262, and see 1277-84. She goes on to say that "[o]nce litigation is concluded, disclosure is impliedly required." *Id.* at 1279. And she adds:

> Admittedly it may sometimes be difficult for the agency itself to know whether an enforcement action will be brought in the near future. As long as there is a realistic prospect that such an action will be instituted, and as long as administrators endeavor to make the enforcement decision as quickly as possible, the exemption should apply. But the exemption should not avail an agency that claims only that its investigatory files are "open" and therefore always subject to use in hypothetical future enforcement proceedings.

Id. at 1280 n. 100.

Another Naderite, Peter H. Schuck, Esq., has recently told a congressional committee that the Act "has foundered on the rocks of bureaucratic self-interest and secrecy." N. Y. Times, Mar. 15, 1972, at 19, col. 1 (city ed.). I would suggest that it has foundered on the rocks of equivocal draftsmanship. One of its pertinent critical failings has been pinpointed by Professor Davis:

> The Act is faulty in its use of the unsatisfactory term "files." Much of the contents of investigatory files compiled for purposes that may include law enforcement should not be exempt from required disclosure.

Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 800 (1967).

obtained in the course of an investigation. Disclosure of grand jury minutes, for example, has been ordered in private antitrust cases involving electric companies. *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F. 2d 431 (2d Cir. 1963) (*per curiam*) (minutes turned over to antitrust plaintiff); *accord, Consolidated Edison Co.* v. *Allis-Chalmers Manufacturing Co.*, 217 F. Supp. 36 (S. D. N. Y. 1963). *See also Illinois* v. *Harper & Row Publishers, Inc.*, 50 F. R. D. 37 (N. D. Ill. 1969) (children's books antitrust suit). Documents possessed by the Internal Revenue Service that bear directly upon disputed tax calculations have also been disclosed by court order. *Timken Roller Bearing Co.* v. *United States*, 38 F. R. D. 57 (N. D. Ohio 1964); *accord, United States* v. *Gates*, 35 F. R. D. 524 (D. Colo. 1964); *United States* v. *San Antonio Portland Cement Co.*, 33 F. R. D. 513 (W. D. Tex. 1963). The United States Justice Department itself has been the subject of disclosure orders. *Royal Exchange Assurance* v. *McGrath*, 13 F. R. D. 150 (S. D. N. Y. 1952) (Attorney General ordered to produce for trustee investigative reports regarding conduct and control of foreign corporation); *Zimmerman* v. *Poindexter*, 74 F. Supp. 933 (D. Hawaii 1947) (FBI ordered to produce investigative reports pertaining to plaintiff's alleged wrongful imprisonment).

I am of the view that 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. The argument to which the SEC is ultimately reduced is that it should not be required to disclose its files to just "any person." The fact is that plaintiffs here are or were in litigation with Occidental Petroleum. Thus, if the words "any person" mean any person with standing, plaintiffs here surely have it.

I would affirm the opinion and judgment below.