UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 75-1868

ROBERT C. ANTON and LAMBERT HIRSHEIMER,

Plaintiffs-Appellants,

v.

SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Colorado

ANSWERING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

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INDEX

Citations

Citations (continued) — Page

Statutes and Rules:

Statutes and Rules (continued): Page

Miscellaneous:

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COUNTERSTATEMENT OF ISSUE

Where, after the institution by the Commission of administrative proceedings against them to determine whether they have violated the federal securities laws, and, if so, whether remedial action is appropriate in the public interest, plaintiffs request access under the Freedom of Information Act to all Commission records relating to such proceeding, did the district court err in holding that an exemption under that Act permitted the Commission to refuse to make available to them investigatory records relevant to the proceeding which could not be obtained by discovery?

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the District Court for the District of Colorado dismissing the complaint and the action filed by Robert C. Anton and Lambert Hirsheimer ("plaintiffs"). The complaint sought production under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, of investigatory records of the Commission that are relevant to a pending public administrative proceeding commenced by the Commission to determine whether plaintiffs and others violated the federal securities laws, and, if so, whether remedial action is appropriate in the public interest. 1/ The proceeding is still pending with respect to plaintiffs. 2/

1/ The complaint also sought access to records relating to then pending criminal enforcement actions arising from other Commission investigations not involving plaintiffs. It was explained to the district court that copies of certain of those records -- those in which the Commission's staff was "interested" in connection with the pending administrative proceeding -- had already been made available to plaintiffs (Record, Vol. II, pp. 13-16). Because the criminal actions to which the remainder of these voluminous records relate have now been concluded, the Commission will undertake promptly to make all such records available to plaintiffs to the extent they are not otherwise exempt under the FOIA.

2/ The proceeding, In the Matter of Financial Programs, Inc., et al., Admin. Proc. File No. 3-4610, was ordered instituted on March 24, 1975, pursuant to Section 9(b) of the Investment Company Act of 1940, Section 203 of the Investment Advisers Act of 1940 and Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. 80a-9(b), 80b-3 and 78o(b). The Order of the Commission, which is attached to plaintiffs' complaint as Exhibit D, recites at page 8 that the Commission determined the proceeding was "necessary and appropriate in the public interest and for the protection of investors" to determine whether specified antifraud and other provisions of certain of the federal securities laws had been violated by Financial Programs, Inc. and others, including the plaintiffs in the action below. The respondents named in the Commission's Order, except plaintiffs, have consented to remedial sanctions.

The district court dismissed the complaint and action upon the Commission's motion, after receiving briefs, hearing argument and conducting an on-the-record inquiry of counsel for the Commission.

Plaintiffs submitted an FOIA request, dated March 31, 1975, 3/ which refers to the administrative proceeding and to prior attempts on behalf of plaintiffs to obtain access to the Commission's evidence of plaintiffs' alleged violations of the federal securities laws. 4/ It seeks access generally to all records relating to the allegations set forth in the Commission's order of March 24, 1975, instituting the administrative proceeding, and states that "these materials are essential . . . in order . . . to respond in any meaningful way" to those allegations. 5/ The request was denied by the Director of the Commission's Office of Public Information by letter dated April 16, 1975. 6/

Plaintiffs filed this action on June 4, 1975, prior to consideration by the Commission of an administrative appeal from the Commission staff's denial of access to the records. In order to allow time for consideration by the Commission of that appeal, all parties to this

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3/ A copy of the request is attached to the complaint as Exhibit E.

4/ See paragraphs 8-10 of the complaint and Exhibits A-C thereto.

5/ Exhibit E to the complaint, p. 3.

6/ See paragraph 13 of the complaint and Exhibit F thereto.

action stipulated to an extension of time for the Commission to file its answer or otherwise to plead in this action (Record, Vol. I, p. 12).

On July 22, 1975, the Commission considered plaintiffs' appeal from the staff's denial and the four Commissioners present unanimously voted to affirm the staff's action for the reasons set forth in the Commission's Freedom of Information Act Release No. 20. 7/ As set forth in that Release, the Commission's staff had made available a considerable number of records requested by plaintiffs. These included not only the Commission's public files relating to numerous corporate entities involved in the Commission's investigation, but also the following materials:

(1) records obtained from Financial Programs, Inc., relating to certain corporations involved in the investigation;

(2) stock transfer records of two companies involved in the investigation, Richard Packing Company and Acrite Industries, Inc.;

(3) all documents received from plaintiffs in the course of the investigation;

7/ Following the February, 1975, amendments to the FOIA, the Commission instituted the practice of issuing a release in a series designated "Freedom of Information Act Release" on most occasions when it decides an administrative appeal from a staff denial of a request made pursuant to the Act.

A copy of Release No. 20 is attached as Exhibit A to the affidavit of George A. Fitzsimmons, Secretary of the Commission, in support of the Commission's motion to dismiss or, in the alternative, for summary judgment, and is included in the appendix to this brief.

(4) transcripts of all testimony given by plaintiffs in the course of the investigation;

(5) letters to Commission staff members from Lambert Hirsheimer; and

(6) brokerage records of Witlow & Co., a Denver, Colorado, broker-dealer, relevant to the investigation.

As set forth by the Commission in FOIA Release No. 20 at p. 2, the records requested by plaintiffs which have not been made available fall into five categories:

"(1) statements and testimony of witnesses other than . . . [plaintiffs]; 8/

(2) charts and summaries prepared by staff accountants and securities compliance examiners in preparation of anticipated litigation and under the direction of Commission attorneys;

(3) Wells Committee submissions . . . 9/ and other correspondence from attorneys for other respondents and proposed respondents to the proceeding;

8/ These were statements obtained in the Commission's investigation and the testimony of witnesses taken in that investigation who were expected to be called in the administrative proceeding, either directly or in rebuttal (Record, Vol. II, p. 11).

9/ In response to the Report of the Advisory Committee on Enforcement Proceedings and Practices (June 1, 1972), often referred to as the "Wells Committee Report," the Commission has directed its staff that, where practicable and appropriate, it allow persons under investigation to submit a statement setting forth their views at the time the Commission is asked to consider the institution of enforcement action. For further information on this procedure, see Securities Act of 1933, Release No. 5310 (September 27, 1972).

(4) internal memoranda and various notes of attorneys, accountants and securities compliance examiners and investigators working on the case; and

(5) records related to pending criminal enforcement actions arising from other Commission investigations not involving . . . [plaintiffs]. 10/" (Footnotes added.)

On July 28, 1975, the Commission moved the district court to dismiss plaintiffs' complaint against it or, in the alternative, for summary judgment. On August 19, 1975, plaintiffs noticed the taking of depositions of two members of the Commission's staff in this matter, and on August 22, 1975, the Commission moved the district court for a protective order on the grounds that the depositions were not necessary to determine the Commission's pending motion and were an attempt to obtain access to the records which had been denied to them under the FOIA. After a hearing on August 26, 1975, the district court issued the protective order sought by the Commission.

The Commission's motion to dismiss or, in the alternative, for summary judgment was heard on September 18, 1975. In addition to hearing argument, the court inquired of Commission counsel on the record as to the nature of the categories of records withheld, which the Commission had enumerated in FOIA Release No. 20 and which are set forth at pp. 5-6, supra. In response to the court's questions, Commission

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10/ See n. 1, supra.

counsel described the documents in the various categories in somewhat more specific terms (Record, Vol. II, pp. 10-16). The Commission, both in its memoranda before the hearing and at the hearing itself, tendered the records in question to the court for its in camera inspection (Record, Vol. II, pp. 21-22).

In its Memorandum and Order (Record, Vol. I, pp. 15-16), the district court found:

> "The character of the information sought and the context in which it is sought is apparent from the pleadings. There is no necessity to convene a trial, take evidence or make an in camera inspection of this material.
>
> It is clear that the Securities and Exchange Commission has conducted an investigation into matters which involve the two plaintiffs in this action. It is also clear from the statements of counsel made at the hearing of this matter that an administrative enforcement proceeding has been initiated and is now pending. The documents and records sought all relate to that proceeding."

Accordingly, it dismissed the complaint and the plaintiffs' action on the ground that the records sought therein were exempt from disclosure under the FOIA as investigatory records compiled for law enforcement purposes, the production of which would interfere with pending enforcement proceedings, 5 U.S.C. 552(b)(7)(A). 11/

11/ The court also based its order on the ground, not asserted by the Commission, that all of the records were exempt within the meaning of 5 U.S.C. 552(b)(5) as "predecisional material . . . gathered and created for the purpose of presenting the case for administrative enforcement which will result in agency action." Cf. generally Brockway v. Department of the Air Force, 518 F. 2d 1184 (C.A. 8, 1975). Of course, if the district court was correct that the records are exempt under 5 U.S.C. 552(b)(7)(A), this second ground need not be reached by this Court.

ARGUMENT

WHERE, AFTER THE INSTITUTION BY THE COMMISSION OF AN ADMINISTRATIVE PROCEEDING AGAINST THEM TO DETERMINE WHETHER THEY HAVE VIOLATED THE FEDERAL SECURITIES LAWS, AND, IF SO, WHETHER REMEDIAL ACTION IS APPROPRIATE IN THE PUBLIC INTEREST, PLAINTIFFS REQUEST ACCESS UNDER THE FREEDOM OF INFORMATION ACT TO ALL COMMISSION RECORDS RELATING TO SUCH PROCEEDING, THE SEVENTH EXEMPTION UNDER THAT ACT PERMITS THE COMMISSION TO REFUSE TO MAKE AVAILABLE TO THEM INVESTIGATORY RECORDS WHICH ARE RELEVANT TO THE PROCEEDING AND WHICH COULD NOT OTHERWISE BE OBTAINED BY DISCOVERY

Plaintiffs contend on this appeal essentially that the district court could not properly conclude, on the basis of the record, that the records sought by them were exempt from the disclosure requirements of the FOIA as "investigatory records compiled for law enforcement purposes" the production of which would "interfere with enforcement proceedings" within the meaning of 5 U.S.C. 552(b)(7)(A). 12/ Before demonstrating the propriety of the district court's determination, it is important to consider the circumstances in which the Congress intended this exemption to apply.

12/ The complaint also sought to enjoin the Commission from conducting the administrative proceeding in which plaintiffs are respondents until they had been permitted to examine the records sought. It alleged that otherwise plaintiffs would be irreparably harmed because they cannot prepare an adequate defense to the allegations against them. (Record, Vol. I, pp. 7-9.) In its Memorandum and Order (Record, Vol. I, p. 16), the district court held that in this respect the complaint "does not state a claim for relief within the jurisdiction of this court." Cf. Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1 (1974). Plaintiffs have not raised this issue on appeal.

A. The 1975 Amendment to the Seventh Exemption Was Not Intended To Force an Agency To Turn Over Records That Could Not Have Been Obtained by Discovery Prior to Completion of a Proposed Enforcement Proceeding

As this Court is, no doubt, aware, the seventh exemption from the FOIA, the provision which originally exempted "investigatory files compiled for law enforcement purposes . . ." [emphasis supplied], was amended as of February 19, 1975, to apply more narrowly to "investigatory records" [emphasis supplied]. Production is not required to the extent that it would "(A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy" or cause some other harm specifically described in the Act.

By reason of the amendment there is a substantial difference under the FOIA between the status of investigatory records after enforcement action has been concluded, and the status of such records when, as here, the enforcement action to which they are relevant is still pending. As shown below, concern that the FOIA not be interpreted to require premature disclosure of investigatory records to adversaries in enforcement proceedings was a principal focus when the FOIA was originally enacted in 1966, 13/ and there is nothing in the legislative history of the 1975 amendments to indicate an abandonment of this concern.

13/ See also Renegotiation Board v. Bannercraft Clothing Co., Inc., supra, in which the Supreme Court refused to enjoin an administrative proceeding where it was alleged that the agency had

(footnote continued)

The legislative history of the original Act emphasized the risk of an adverse effect upon prospective adjudicatory proceedings as the principal reason for the seventh exemption. In the 89th Congress, which passed the Freedom of Information Act, the House Report, referring to the exemptive language that was originally enacted, stated that the bill was "not intended to give a private party any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." 14/ The Senate Report explained that disclosure of such files, "prepared by Government agencies to prosecute law violators," ". . . could harm the Government's case in court." 15/

Based on this history, while there was no question that "active" enforcement files were exempt, some commentators on the Act had expressed the view that disclosure was required after litigation was concluded and there was no prospect of further litigation. 16/ Indeed, this was

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13/ (footnote continued)

failed to comply with the requirements of the FOIA. Noting that the "FOIA's stress was on disclosure," the Court observed that "it was on disclosure for the public, . . . and not for the negotiating self-interested" person. 415 U.S. at 22. The Court concluded: "Nothing new by way of due process emerged with the FOIA." Id. at 22.

14/ H.R. Rep. No. 1497, 89th Cong., 24 Sess., p. 11 (1966).

15/ S. Rep. No. 813, 89th Cong., 1st Sess., p. 9 (1965).

16/ See, e.g., Davis, "The Information Act: A Preliminary Analysis," 34 U. Chi. L. Rev. 761, 914 (1967); Katz, "The Games Bureaucrats Play: Hide and Seek under the Freedom of Information Act," 48 Tex. L. Rev. 1261, 1279 (1970).

the initial reaction of some courts, see e.g., Bristol-Meyers Co. v. Federal Trade Commission, 424 F.2d 935 (C.A.D.C.), certiorari denied, 400 U.S. 824 (1970). But see Frankel v. Securities and Exchange Commission, 460 F.2d 813 (C.A. 2, 1972). After the Court of Appeals for the District of Columbia Circuit in Weisberg v. United States Department of Justice, 489 F.2d 1195 (C.A.D.C., 1973)(en banc), certiorari denied, 416 U.S. 993 (1974), overruled the view it had earlier articulated in Bristol-Meyers and agreed that the exemption would apply indefinitely to investigatory files as a whole, the Congressional decision to amend the exemption was made. 17/ But the recent legislative amendment casts no doubt upon the propriety of protecting investigatory records prior to the completion of enforcement activities.

The amendment was not intended to introduce an era of "open" investigations in which, prior to the completion of enforcement proceedings, persons suspected of violations of law have the right to know the nature and extent of the information which enforcement authorities have obtained regarding their activities. The legislative history of the amendments demonstrates that the purpose of the drafters of the amendment to the seventh exemption was to reassert, as one of the concepts underlying the original enactment of that exemption, that investigatory records need not be disclosed where to do so might harm the government's case in enforcement proceedings by the premature release of evidence.

17/ See 120 Cong. Rec. S. 9336 (May 30, 1974, colloquy between Sen. Hart and Kennedy).

In introducing the amendment on the Senate floor, 18/ Senator Hart made his purpose clear:

> "My reading of the legislative history suggests that Congress intended that this seventh exemption was to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have.
>
> "Recently, the courts have interpreted the seventh exemption to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes -- a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made.
>
> "That, we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966. Then as now, we recognized the need for law enforcement agencies to be able to keep their records and files confidential where a disclosure would interfere with any one of a number of specific interests, each of which is set forth in the amendment that a number of us are offering." (Emphasis added.)

120 Cong. Rec. S9329-S9330.

18/ The amendment to the seventh exemption was introduced by Senator Hart during the floor debate in the Senate on May 30, 1974. Neither the bill initially passed by the House (H.R. 12471) nor the bill considered and reported on by the Senate Committee on the Judiciary (S. 2543) would have amended this exemption. Accordingly, the legislative history of the amendment consists of the Senate floor debate on S. 2543 and H.R. 12471, 120 Cong. Rec. S9310-S9342 (May 30, 1974), the Conference Report, H.R. Rep. No. 93-1380, 93rd Cong., 2d Sess. (1974), the Senate and House debate thereon, 120 Cong. Rec. S17828-S17830 and S17971-S17972 (October 1, 1974), H10001-H10009 (October 7, 1974), and the Senate and House debate on the President's veto, 120 Cong. Rec. H10705-H10706 (November 18, 1974), H10864-H10875 (November 20, 1974) and S19806-S19823 (November 12, 1974).

Senator Hart continued:

> "Our concern is that, under the interpretation by the courts in recent cases, the seventh exemption will deny public access to information even previously available. For example, we fear that such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption.
>
> "Our amendment is broadly written, and when any one of the reasons for nondisclosure is met, the material will be unavailable. But the material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes.
>
> "Let me clarify the instances in which nondisclosure would obtain: First, where the production of a record would interfere with enforcement procedures. This would apply whenever the Government's case in court -- a concrete prospective law enforcement proceeding -- would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. In determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding.
>
> * * *
>
> "This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information." (Emphasis added.)

120 Cong. Rec. S9330.

To make it clear which court decisions he thought improperly interpreted the seventh exemption, Senator Hart introduced into the record a brief excerpt from the Report of the Committee on Federal Legislation of the Association of the Bar of the City of New York entitled "Amendments to the Freedom of Information Act," which states, id.:

> "The courts have agreed that Exemption 7 applies to investigations by regulatory agencies as well as criminal investigations. But there is dramatic disagreement over the question of continued non-disclosure after the specific investigation is completed. The Second Circuit, in Frankel v. SEC, 460 F.2d 813 (1972), held that investigatory files are exempt from disclosure forever, on the theory that disclosure of investigatory techniques would undermine the agency's effectiveness and would choke off the supply of information received from persons who abhor, for whatever reason, public knowledge of their participation in the investigation."
>
> * * *
>
> "Other jurists, however, have reached the conclusion that Exemption 7 was intended only to protect against premature disclosure in a pending investigation, and that once the investigation is completed and all reasonably foreseeable administrative and judicial proceedings concluded, the files must be disclosed. We agree with this view."

The views which Senator Kennedy expressed on the floor of the Senate are in accord with those of Senator Hart. Explaining to his colleagues why the bill his subcommittee reported out did not contain an amendment to the seventh exemption, Senator Kennedy noted:

> "Last October, when I introduced S. 2543, the case law on the subject of investigatory files was substantially different than it is today.
>
> * * *

> "Unfortunately, Mr. President, I must agree with the Senator from Michigan that our initial appraisal of the development of the law in the area affected by his amendment has turned out to be short lived. A series of recent cases in the District of Columbia has applied the seventh exemption of the act woodenly and mechanically and, I believe, in direct contravention of congressional intent when we passed that law in 1966."

120 Cong. Rec. S9330-S9331.

The following colloquy between Senators Hart and Kennedy further emphasizes that the purpose of the amendment to the seventh exemption was to reassert the original meaning of the exemption.

> "[Sen. Kennedy]. [L]ooking back over the development of legislation under the 1966 act and looking at the Senate report language from that legislation, it was clearly the interpretation in the Senate's development of that legislation that the 'investigatory file' exemption would be extremely narrowly defined. It was so until recent times -- really, until about the past few months. It is to remedy that different interpretation that the amendment of the Senator from Michigan which we are now considering was proposed.
>
> "I should like to ask the Senator from Michigan a couple of questions.
>
> "Does the Senator's amendment in effect override the court decisions in the court of appeals on the Weisberg against United States; Aspin against Department of Defense; Ditlow against Brinegar; and National Center against Weinberger?
>
> "As I understand it, the holdings in those particular cases are of the greatest concern to the Senator from Michigan. As I interpret it, the impact and effect of his amendment would be to override those particular decisions. Is that not correct?
>
> "Mr. HART. The Senator from Michigan [sic] is correct. <u>That is its purpose</u>. That was the purpose of Congress

> in 1966, we thought, when we enacted this. Until about 9 or 12 months ago, the courts consistently had approached it on a balancing basis, which is exactly what this amendment seeks to do."

120 Cong. Rec. S9336 (emphasis added).

The pertinent portion of the Conference Report on the amendment states:

> "The Senate amendment contained an amendment to subsection (b)(7) of the Freedom of Information law, not included in the House bill, that would clarify Congressional intent disapproving certain court interpretations which have tended to expand the scope of agency authority to withhold certain 'investigatory files compiled for law enforcement purposes.'" 19/

An examination of the "recent cases" referred to by Senators Hart and Kennedy further clarifies the legislative intent underlying the amendment. As indicated at p. 11, supra, in Weisberg v. United States Department of Justice, 489 F.2d 1195 (1973), the holding of which was to be overturned by the amendment, the Court of Appeals for the District of Columbia Circuit disagreed with an earlier decision of that same Court of Appeals 20/ and held that investigatory materials re-

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19/ H.R. Rep. No. 93-1380, 93rd Cong., 2d Sess. (1974), p. 12.

20/ In 1970 that Court had stated in Bristol-Meyers Co. v. Federal Trade Commission, supra, 424 F.2d 935, 939 (C.A.D.C., 1970),

> "Congress intended to limit persons charged with violations of the federal regulatory statutes to the discovery available to persons charged with violations of federal criminal law. The exemption prevents a litigant from using the statute to achieve indirectly 'any earlier or greater access to investigatory files than he would have directly. * * *' But the agency cannot, consistent

(footnote continued)

lating to the assassination of President Kennedy were exempt although the files were almost ten years old and no further enforcement action was contemplated, stating at 1202-1203:

> "Here the record overwhelmingly demonstrates how and under what circumstances the files were compiled and that indeed they were 'investigatory files compiled for law enforcement purposes.' When the District Judge made that determination, he correctly perceived that his duty in achieving the will of Congress under the Freedom of Information Act was at an end."

In Aspin v. Department of Defense, 491 F.2d 24, 30 (C.A.D.C., 1973), the holding of which was also to be overturned by the amendment, the Court had held

> ". . . that an exemption under §552(b)(7), as investigatory files compiled for law enforcement purposes, remains available after the termination of investigation and enforcement proceedings."

In Ditlow v. Brinegar, 494 F.2d 1073, 1074 (C.A.D.C., 1974), also criticized by Senator Kennedy, the Court stated:

> "The court en banc in Weisberg held that, if the documents in issue are clearly to be classified as 'investigatory files compiled for law enforcement purposes,' the exemption attaches, and it is not in the province of the courts to second-guess the Congress by relying upon considerations which argue that the Government will not actually be injured by revelation in the particular case."

20/ (footnote continued)

> with the broad disclosure mandate of the Act, protect all its files with the label 'investigatory' and a suggestion that enforcement proceedings may be launched at some unspecified future date. Thus the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files . . . ."

And in Center for National Policy Review on Race and Urban Issues v. Weinberger, 502 F. 2d 370, 372 (C.A.D.C., 1974) [referred to by Senator Kennedy as National Center v. Weinberger], the Court, citing Weisberg, supra, stated:

> "The sole question before us is whether the materials in question are 'investigatory files compiled for law enforcement purposes.' Should we answer that question in the affirmative, our role is 'at an end.'"

The foregoing quotations also describe the holding in Frankel v. Securities and Exchange Commission, supra, criticized by the Report of the Committee on Federal Legislation of the Association of the Bar of the City of New York (p. 14, supra).

In light of the foregoing, it seems clear that in amending the seventh exemption Congress meant to override the decisions holding that records properly classified as "investigatory" are exempt forever, but to continue to protect bona fide investigatory records from disclosure until the completion of law enforcement proceedings, except to the extent they might otherwise be available through discovery procedures.

B. The District Court Correctly Concluded that the Documents Here Involved Came within the Seventh Exemption

Plaintiffs' assert in their brief (Br. 15) that the district court could not properly conclude that disclosure of the documents sought would "interfere with enforcement proceedings." As discussed at p. 3, supra,

the complaint and exhibits thereto make clear that the Commission's administrative proceeding is pending against plaintiffs, who seek records relevant to that proceeding in order to prepare their defense. In fact, the complaint sought to enjoin the administrative proceeding until plaintiffs' examination of the records. See n. 12, supra.

Plaintiffs assert (Br. 10-11) that the Commission "cannot meet its burden of proof merely by stating to the court that the records fall within one of the statutory exemptions." The nature of the records withheld, however, was described by the Commission in FOIA Release No. 20 and by Commission counsel in the course of an on-the-record inquiry conducted by the district court. The official statement of a respected government agency, supplemented by representations in open court by an official of that agency who is an officer of the court, are comparable to affidavits which might have been submitted. 21/ Moreover, even in Vaughn v. Rosen, 484 F. 2d 820, 824 (C.A.D.C., 1973), relied upon by plaintiffs (Br. 12), the court recognized that where there is no factual dispute as to the

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21/ While such statement and representations were not technically part of the pleadings in this action, the decision of the district court should be sustained if summary judgment would lie. See, Clark v. Volpe, 481 F. 2d 634 (C.A. 4, 1973).

nature of documents, 22/ the scope of the judicial inquiry might appropriately be limited. 23/ Thus, plaintiffs' claim (Br. 10) that the district court was required to resolve this matter upon "affidavits" and "sworn testimony and documents properly admitted" is without merit.

As stated at p. 7, supra, the Commission, both in its memoranda before the hearing and at the hearing itself, tendered the records to the district court for in camera inspection. The court also specifically considered whether the circumstances warranted the submission of detailed affidavits of the type discussed by the court in Vaughn v. Rosen, supra (Record, Vol. II, pp. 17-19), and properly concluded that neither such submission nor in camera inspection were necessary (Record, Vol. I, p. 15).

22/ The language quoted by plaintiffs (Br. 11-12) from Rabbitt v. Department of the Air Force, 383 F. Supp. 1065 (S.D.N.Y., 1974), is inapposite. The question in that case was whether all non-deliberative portions of an intra-agency memorandum had been made available. Thus, there was a factual dispute as to nature of the information being withheld. The same was true in Moore-McCormack Lines, Inc. v. I.T.O. Corp., 508 F. 2d 945 (C.A. 4, 1974), also cited by plaintiffs (Br. 12).

23/ The FOIA makes clear that whether to examine records in camera is within the discretion of the district court. 5 U.S.C. 552(a)(4)(B). See S. Rep. No. 93-1200, 93rd Cong., 2d Sess., p. 9.

To the extent that plaintiffs imply that Congress indicated that an agency must prove that plaintiffs would in fact utilize access to its investigatory records to "construct" 24/ a defense in a proceeding to be brought against them, the legislative history of the amendments is to the contrary. The President in his veto message and certain opponents of the 1975 amendments had pointed out that there could be no such degree of certainty in most cases. 25/ The responses of the proponents of the bill to the President's concerns indicate that no impossible standards were intended to be imposed. For example, Senator Hart stated:

> ". . . I suggest that the burden is substantially less than we would be led to believe by the President's message . . . .
>
> * * *
>
> "The clauses providing for 'segregation of records' and 'search fees' are ambiguous and doubtlessly will be subject to litigation. If the requests prove unnecessarily burdensome, I suspect that the agencies will find a sympathetic ear in the courts when the time comes for interpreting those sections." 26/

24/ See p. 22, infra.

25/ See Weekly Compilation of Presidential Documents 1318 (1974); 120 Cong. Rec. S19314 (November 21, 1974)(Sen. Hruska); 120 Cong. Rec. S19818 (November 21, 1974)(Sen. Thurmond).

26/ 120 Cong. Rec. S19812 (November 21, 1974).

And Congressman Moorehead stated:

> "Similarly ludicrous legal arguments are made later in the veto message with respect to investigatory law enforcement files . . . ." 27/

Significantly, the Report of the Committee of Federal Legislation of the Association of the Bar of the City of New York, presented to the Senate by both Senator Hart and Senator Kennedy when the amendment to the seventh exemption was introduced, 28/ states:

> "The realistic problems are those we have already met -- the need to preserve the identity of sources of information in particular cases, the need to assure an impartial trial and to protect reasonable personal privacy. In the context of Exemption 7, there is the additional consideration that premature disclosure of the Government's case will allow the civil or criminal defendant to 'construct' his defense." (Emphasis in original.)

The fact is that the disclosure of any relevant investigatory records not obtainable by discovery prior to the completion of enforcement proceedings will, at a minimum, give some indication to the subjects of the proceedings as to the nature and scope of the information which has been obtained by the agency, which was not intended by Congress. 29/

27/ 120 Cong. Rec. H10865 (November 20, 1974).

28/ 120 Cong. Rec. S9330-S9332 (May 30, 1974).

29/ We do not contend, as plaintiffs suggest (Br. 16), that whether or not the materials sought are discoverable is determinative of the question whether the seventh exemption is available. As made clear in the case he cites, Deering Milliken, Inc. v. Nash, 44 U.S. Law Week 2252 (D. S.C., Nov. 12, 1975), the test

(footnote continued)

We submit that a reasonable and logical interpretation of the seventh exemption must recognize that in general (i) prior to an enforcement proceeding, until all the records thought relevant have been obtained and analyzed by the agency, the disclosure of any bona fide investigatory record could well significantly prejudice the investigation or the enforcement proceeding by permitting the "construction" of defenses, (ii) once it has been determined whether and what type of enforcement action is warranted, the records which are irrelevant to that action may be disclosed generally without serious risk to the enforcement proceeding, and (iii) until the parties have submitted their evidence to the court or tribunal in the enforcement proceeding, disclosure of the agency's relevant investigatory records could well result in substantial prejudice to it.

29/ (footnote continued)

is whether production of the documents involved would, in the statutory language, "interfere with enforcement proceedings" or would fall within one of the other clauses of the exemption. The fact that the documents involved might also not be obtainable by discovery because they would interfere with the enforcement proceeding does not, of course, make the exemption unavailable. Moreover, the records involved in that case related to a proceeding to determine the amount of back pay owed to former employees of the company. The records involved in the instant case are relevant to a proceeding which will determine whether plaintiffs have committed violations of the federal securities laws and, if so, whether remedial sanctions, possibly barring them from future employment by an investment adviser or registered investment company, 15 U.S.C. 80a-9(b) and 80b-3(f), should be imposed in the public interest. Failure to recognize this type of distinction would be applying the act "woodenly and mechanically" in the manner criticized by Senator Kennedy. See p. 15, supra.

CONCLUSION

For the foregoing reasons, the order of the district court dismissing the complaint and this civil action should be affirmed.

Respectfully submitted,

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April, 1976

A P P E N D I X

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

FREEDOM OF INFORMATION ACT
Release No. 20/July 22, 1975

In the Matter of Request of	:	
ROBERT C. ANTON and LAMBERT HIRSHEIMER	:	ORDER DENYING REQUEST
for access to investigatory records relating to Financial Programs, Inc.	:	

This administrative appeal has been taken from the denial of the request of Messrs. Robert C. Anton and Lambert Hirsheimer for access to, in effect, all of the materials contained in or related to the investigatory file with respect to Financial Programs, Inc. which was compiled by the Commission in connection with a public administrative proceeding, In the Matter of Financial Programs, Inc., et al., Administrative Proceeding No. 3-4610. 1/ In addition, access was requested to certain records pertaining to various persons and entities involved in the Financial Programs investigation which were not compiled in the course of this particular investigation. In the proceeding instituted by the Commission against Financial Programs 2/ and others, Messrs. Anton and Hirsheimer are both named as Respondents. In support of their request, they claim that access to these materials is essential in order for them to respond in a meaningful way to the allegations set forth in the Commission's order instituting the proceedings against them.

In response to their request, the staff has examined the material contained in its investigatory files and the other materials requested and has made available to counsel for Messrs. Anton and Hirsheimer a large quantity of materials from its public and non-public files, including certain materials related to the Financial Programs investigation. In

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1/ Contemporaneous with the entry of the order instituting these proceedings, Financial Programs, Inc. and two individual Respondents consented to the imposition of remedial sanctions and the publication of findings by the Commission. See Securities Exchange Act of 1934 Release No. 11312, 6 SEC Docket 503 (March 24, 1975).

2/ Financial Programs, Inc. a mutual fund manager registered with the Commission as both a broker-dealer and an investment adviser, is investment adviser to and principal underwriter for four mutual funds.

addition, pursuant to Rule 6 of the Commission's Rules Relating to Investigations, 17 CFR 203.6, and Section 6 of the Administrative Procedure Act, 5 U.S.C. §555, documents supplied by Messrs. Anton and Hirsheimer, as well as transcripts of their testimony, have been made available. The staff has, however, declined to produce the following records:

(1) statements and testimony of witnesses other than Messrs. Anton and Hirsheimer;

(2) charts and summaries prepared by staff accountants and securities compliance examiners in preparation of anticipated litigation and under the direction of Commission attorneys;

(3) Wells Committee submissions 3/ and other correspondence from attorneys for other respondents and proposed respondents to the proceeding;

(4) internal memoranda and various notes of attorneys, accountants and securities compliance examiners and investigators working on the case; and

(5) records related to pending criminal enforcement actions arising from other Commission investigations and not involving Messrs. Anton and Hirsheimer in any way.

The Commission, having given consideration to the matter, is of the view that all of the records enumerated above are at this time exempt from compelled disclosure pursuant to a request made under the Freedom of Information Act because they are investigatory records compiled for law enforcement purposes, the disclosure of which would interfere with enforcement proceedings and thus come within the seventh exemption set forth in the Act. 5 U.S.C. §552(b)(7)(A). In addition, certain of the records enumerated above are independently exempt from compelled disclosure by virtue of the exemption for inter- or intra-agency memoranda, 5 U.S.C. §552(b)(5), or because disclosure would tend to deny a person his right to a fair trial or impartial adjudication or would constitute an unwarranted invasion of personal privacy, 5 U.S.C. §552(b)(7)(B) and (C).

We would point out, in addition, that the Commission's Rules of Practice provide that Respondents named in administrative proceedings may subpoena documents and other tangible evidence, 4/ and obtain the prior statements of a witness after he has been called by the interested Division or Office of the Commission and has completed his direct testimony. 5/ While consideration of a request pursuant to the FOIA is not precluded simply because the person making that request is engaged in litigation with the Commission, we must start with the principle that the FOIA was "not intended to give a private party earlier or greater access to investigatory files than he would have had directly in . . .

3/ See Securities Act Release No. 5310 (September 27, 1972).

4/ 17 CFR 201.14(b).

5/ 17 CFR 201.11.1.

litigation or [administrative] proceedings" 6/ under existing laws and rules of procedure. We have previously noted on several occasions that premature disclosure of the records contained in investigatory files was a principal focus when the FOIA was initially enacted, and continued to be a primary concern when the FOIA was recently amended. 7/ Thus, while the Commission will give full consideration to any FOIA request made by a person who is a respondent in an administrative proceeding or a defendant in a civil injunctive action, the Commission does not believe that the FOIA does, or should, provide a substitute for, or a shortcut around, the established rules and procedures for discovery by the parties to civil litigation or administrative proceedings commenced by the Commission.

This policy is consistent with the recent holding of the United States Supreme Court in Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1 (1974), in which the Court refused to enjoin an administrative proceeding where it was alleged that the agency had failed to comply with the requirements of the FOIA. Noting that the "FOIA's stress was on disclosure," the Court further observed that "it was on disclosure for the public, . . . and not for the negotiating self-interested" person, 415 U.S. at 22. The Court, therefore, refused to countenance interference with the agency proceeding or to permit "the use of the FOIA as a tool of discovery . . . over and beyond that provided by the regulations issued by the [agency] for its proceedings." Id. at 24. The Court concluded: "Nothing new by way of due process emerged with the FOIA." Id. at 22.

In view of such considerations, and of the fact that an enforcement proceeding could be impeded and the Commission's case harmed by premature release of evidentiary materials to the subject of the proceeding or to other parties, the Commission has stated as its general policy that so long as enforcement proceedings to which the records are relevant are pending, the records will not generally be made public. 8/ In this case, the Commission is satisfied that there has been the fullest production of records which is consistent with the above-stated principles, and that any further production which may be made ought to occur only in response to requests made pursuant to the rules of procedure applicable to the pending administrative proceeding. The Supreme Court has observed that "controlled access to information concerning the Government's position plays a significant role in the administrative process." 9/

6/ H.R. Rep. No. 1497, 89th Cong. 2d Sess., page 11 (1966).

7/ See, e.g., In the Matter of Request of American Institute Counselors, Inc., FOIA Release No. 3, 6 SEC Docket 718 (April 24, 1975).

8/ Securities Act Release No. 5571, 6 SEC Docket 286 (February 21, 1971).

9/ Renegotiation Board v. Bannercraft Clothing Co., Inc., supra, 415 U.S. at 11 (emphasis supplied).

In the context of the administrative proceeding in which Messrs. Anton and Hirsheimer are named Respondents, those controls are supplied by the Commission's Rules of Practice.

Accordingly, IT IS ORDERED that the request of Robert C. Anton and Lambert Hirsheimer for access to investigatory records relating to Financial Programs, Inc. be, and it hereby is, denied.

By the Commission.

GEORGE A. FITZSIMMONS
Secretary