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FCC v. Schreiber: In Camera and the Administrative Agency

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Obtaining protection for business secrets in an agency proceeding is at best an imperfect art. The lack of any uniform rule and the confusion and delay which result from an ad hoc approach are highlighted by FCC v. Schreiber. The authors examine the current state of the law in light of the Schreiber decision and point up the present inequities. Their conclusion is that the situation can only be remedied by enactment of regulatory in camera procedures for all federal agencies. A model for such a regulation is appended to the article.

Nearly every successful business possesses information as to its operations which, in a desire to protect its position, it safeguards from disclosure. This information may be as diverse as the formula for a product, a marketing agreement with distributors, a list of customers, or a production cost figure. Disclosure of such information could jeopardize an industrial empire.

Trade and business secrets, like wives and children, become “hostages to fortune”\(^1\) when involved in public proceedings such as civil litigation or administrative investigations. No better example of this can be found than Coca-Cola Co. v. Joseph C. Wirthman Drug Co.,\(^2\) in which the Coca-Cola Company sued a purchaser of its syrup for diluting the company’s product. The Eighth Circuit affirmed a district court dismissal of the action on the ground that Coca-Cola had intentionally omitted proof of the exact formula of its own product, an element deemed essential to establishing that the defendant had sold an adulterated product. Coca-Cola undoubtedly considered the loss to be the lesser of two evils. But this was not a necessary result. As Dean Wigmore pointed out in commenting on this case, a judicial device was available to permit the necessary comparison without requiring the soft drink maker to disclose on the public record the secret of its success.\(^3\) Coca-Cola could have requested, and the court could have ordered, pro-

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\(^{1}\) F. BACON, Of Marriage and the Single Life, in COLLECTED ESSAYS (1533).
\(^{2}\) 48 F.2d 743 (8th Cir. 1931).
\(^{3}\) Wigmore, Note, 26 ILL. L. REV. 564, 565 (1932).
cures in camera.4 The valuable formula would have been shielded from public view while still permitting the company to prove its case.

Fortunately, the result of the Coca-Cola case is not invariable. Generally, counsel are alert to the possibilities afforded by in camera proceedings and courts are not loath to conceal trade secrets from public view when the interests of justice dictate.5 It has become generally recognized that the use of in camera procedures is essential in civil litigation if litigants with important secrets to safeguard are not to be placed beyond the protection of the law.6

But when similar attempts are made to obtain confidential treatment in the context of federal and state administrative or legislative proceedings, the matter becomes more complex. While civil litigation usually concerns only the just resolution of a private dispute, administrative and legislative proceedings may involve a significant additional factor: an intensified public interest in the disclosure of all that transpires.7 Since many businessmen are intimately involved with administrative agencies, any difficulty in obtaining confidential treatment can pose a serious problem.

The difficulties confronting the businessman desiring confidentiality for matters he deems essential to be kept secret were highlighted by the case of FCC v. Schreiber.8 In the course of a public investigation of television network programming, the Federal Communications Commission subpoenaed Taft B. Schreiber, an officer of Music Corporation of America (MCA), to appear and testify concerning his company's role in producing, packaging, and owning television network programs. The subpoena requested a list of all programs appearing on the three

4 “Let the court hear in camera the testimony showing the ingredients' proportions, let these details not be mentioned in the opinion, and let the judge’s note of them be preserved for confidential transmission to the court of appeal.” Id. at 565-66.


8 381 U.S. 279 (1965).
major networks in which MCA packaged or had a percentage interest. Schreiber agreed to testify concerning these matters and to produce the list only if the Commission would accept this information in confidence. It was the corporation’s position that the information sought might disclose trade secrets which would cause it grave injury. The hearing examiner denied the claim and the Commission upheld him. In its opinion the Commission stated its resolve to permit in camera acceptance of evidence only in the extraordinary situation where (1) public disclosure would irreparably damage the private business interest and (2) the private business interest could be said to outweigh the public interest in full disclosure.\footnote{Id. at 285.}

However, when the Commission sought to enforce the subpoena, the district court qualified enforcement by ordering that all evidence received by the Commission be taken and held in confidence unless and until the Commission could show good cause for the public release of the evidence.\footnote{Id. at 287.} A divided Ninth Circuit affirmed the district court’s action in this regard, holding that the district court had not abused its discretion in conditioning the enforcement order.\footnote{FCC v. Schreiber, 329 F.2d 517 (9th Cir. 1964).}

In reversing the court of appeals, the Supreme Court\footnote{See 381 U.S. at 288.} agreed with the dissenting view taken by Circuit Judge Browning.\footnote{329 F.2d at 528 (Browning, J., dissenting).} Chief Justice Warren, writing for a unanimous Court, reasoned that, as a result of congressional delegation,\footnote{Communications Act of 1934, \$ 4(j), 48 Stat. 1068, as amended, 47 U.S.C. \$ 154(j) (1964) provides in part: “The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”} it is the Commission which has the discretion to accord or deny in camera treatment of evidence and all subsequent judicial review is limited to determining whether the Commission’s exercise of that discretion was reasonable.\footnote{See 381 U.S. at 291.} The Court was of the opinion that it was well within the Commission’s authority to place the burden of justifying confidential treatment of evidence on MCA as the moving party.\footnote{Id. at 294.}

By ordering enforcement of the administrative subpoena without qualification,\footnote{Id. at 294.} the Court must have viewed the record made before the Commission as providing no basis for confidential treatment regardless of the standard of proof laid down by the administrative agency.\footnote{Id. at 300.} Thus,
the Court never questioned the standard imposed by the Commission. All that the Court said in this regard was that MCA had not presented any evidence from which the hearing examiner could "ascertain the likelihood of irreparable damage to private competitive interests, nor could he discern whether the private interest outweighed the public interest in disclosure."\(^1^9\) If and when information was demanded which might in fact injure MCA competitively, the Court noted that there would be ample opportunity to request that it be received in confidence and to seek judicial protection if the request was denied.\(^2^0\)

This view raises a serious question for the businessman or anyone else seeking confidential treatment from an administrative agency. How is the private party to meet the agency's standard of proof, whatever that standard may be, without disclosing in the process that which he wishes to conceal from public view? Unless the agency provides some limited preliminary in camera procedure for the showing of need for confidentiality, the subpoenaed party may be placed on the horns of a dilemma: either make a showing which reveals in whole or part that which he wishes to conceal from public view or reveal his business or trade secret directly. Confronted with this Hobson's choice, he may wish to stand mute. If he does, the district court will be unable to aid him even in the instance where he has a legitimate claim to in camera treatment, for the district court can hardly deem an agency's denial of confidentiality an abuse of discretion when there has been no showing of need before the agency.

This practical problem is just one of several confronting the businessman in this developing area of administrative law. This article will attempt to explore some of these problems in the hope of indicating an approach to their solution that will provide protection for legitimate claims to confidentiality while permitting maximum public disclosure of information. Situations will arise, of course, in which both interests cannot be served. But even in these instances, counsel should be familiar with the problems and how they may best be approached before the major federal administrative agencies.

**WHAT INFORMATION MAY BE ACCORDED CONFIDENTIAL TREATMENT**

Any examination of the area of confidential treatment must first determine what asserted secrets should even be considered for protection

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\(^1^9\) 381 U.S. at 296.

\(^2^0\) Id.
from disclosure. There is no disagreement that a secret formula or process which is the essence of a company's success deserves protection from unnecessary disclosure.21 Courts appear hopelessly split, however, as to whether customer lists, advertising budgets, cost figures, sales figures, and other similar types of information are eligible for protection.22 According to the Restatement of Torts, "a trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."23 Thus, a trade secret may range from a chemical compound24 to a pricing code.25 Almost any information possessed by one person or a restricted group in a form not generally available can be considered a trade secret.26 Such information, however, may not always be protected.27

The dilemma facing the businessman seeking trade secret status can best be seen in the courts' treatment of customer lists. Rather than ascertaining the status of this information in the general industry or its importance to the operation of the particular firm, the courts have relied instead on arbitrary standards. As a result, different courts and commentators have urged protection of all lists,28 written lists,29 or only retail route lists.30 This uncertain status of the trade secret explains the

21 See notes 5 & 6 supra and accompanying text.
23 RESTATEMENT OF TORTS, Explanatory Notes § 757, comment b at 3 (1939).
25 See Simmons Hardware Co. v. Waibel, 1 S.D. 488, 494-95, 47 N.W. 814, 816 (1891).
reluctance of business firms to subject their basic formulae and modes of operation to the whim of the courts.

The authors believe, however, that efforts to classify business information and then base confidential treatment on that classification is ill-advised; it begs the important question of the impact of the individual disclosure on the particular business. A pragmatic approach ought to be required of the agency's hearing examiners. No claim for confidential treatment of business information should be rejected unless the examiner has first provided to the proponent of confidentiality an opportunity to demonstrate the nature and degree of the damage which would result from disclosure. Any administrative imposition of a priori limitations on the type of business information which will be accorded protection would be ill-advised and might well amount to an abuse of discretion.

**PROCEEDINGS IN WHICH THE REQUEST FOR CONFIDENTIALITY SHOULD BE MADE**

Absent express statutory limitations, there is no doubt that an agency has the power to determine whether a particular proceeding is to be public or private, or partially both. This power includes the authority

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31 The Federal Trade Commission gave such an opportunity in *Graber Mfg. Co. v. Dixon* by means of a preliminary in camera hearing. 223 F. Supp. 1020 (D.D.C. 1963). Following the temporary in camera proceedings, however, the hearing examiner, relying on the Commission's opinion in *H.P. Hood & Sons*, 58 F.T.C. 1184 (1961), denied Graber's request for permanent confidential treatment, and the Commission refused to entertain an interlocutory appeal. The district court held, *inter alia*, that Graber had demonstrated that a clearly defined and serious injury to its business could result from public disclosure of the exhibit and that, accordingly, the denial of permanent in camera status to the exhibit in question was an abuse of the Commission's discretion. 223 F. Supp. at 1023. Unfortunately, the district court abandoned its pragmatism by ordering that other exhibits be held confidential even though no showing to warrant such treatment was ever made to the hearing examiner. *Id.* In this respect *Graber* has been implicitly overruled by *FCC v. Schreiber*. See notes 16-20 supra and accompanying text. For an excellent study of the FTC's treatment of confidential information at the hearing stage, see *Gellhorn, The Treatment of Confidential Information by the Federal Trade Commission: The Hearing, 116 U. Pa. L. Rev. 401* (1968).

A preliminary procedure similar to that used in *Graber* was attempted in *Will Weiss* where the Secretary of the Army was denied the right to withhold documents under an executive privilege. 155 Ct. Cl. 825 (1961). The Commissioner requested the Government to list and describe the withheld documents to see if the claim of privilege could be determined without their production or examination. The Government refused to surrender all the documents in spite of the Commissioner's offer to return them upon an adverse finding, thereby preserving confidentiality. In light of the protections offered, the refusal was deemed bad faith and the Government was then ordered either to turn the documents over to the plaintiff for discovery purposes or to deliver them to the Commissioner for his determination as to the allowance or rejection of the claim of privilege. *Id.* at 899; see *Evans, Current Procedures in the Court of Claims, 55 Geo. L.J. 422, 433-34* (1966).

32 Federal agencies typically have broad power to determine their own proceedings. The Federal Communications Commission, for example, has been empowered to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j) (1964); see 47 C.F.R. § 1.1 (1963). The Supreme Court has held that such a provision confers power upon the agency to establish its own pro-
to establish standards for a ruling by a hearing examiner permitting a party to obtain *in camera* status for certain testimony or other evidence, and under such a standard the hearing examiner may commit the agency to a pledge of confidential treatment. While it is obvious that the businessman should always seek *in camera* treatment of business secrets in a public proceeding, there will be times when the request should be made in a closed proceeding as well. The mere fact that a proceeding, particularly an investigatory one, is nonpublic does not necessarily mean that information presented therein may not subsequently be disclosed. Unless the private party seeks a commitment not to make the information available to the public, the agency is generally free to publish the information or place it in the public record of a subsequent related adjudicatory proceeding.

A party to such a subsequent adjudicatory proceeding would, at that time, have the absolute right to request that the material furnished by it in a prior nonpublic investigation be continued in an *in camera* status. A nonparty to the subsequent proceeding would have to seek leave from the agency to intervene in the proceeding before any such request for confidentiality could be made, and the obtaining of such leave is no certainty. It is essential for the protection of his client, therefore, that counsel make formal request for permanent confidential treatment in the nonpublic proceeding itself.

But even a commitment of confidentiality is not absolute protection against disclosure. While it is true that Congress has made it a crime for a government officer or employee to divulge "any information" con-

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34 Most agency investigatory proceedings are of this type. See, e.g., 30 C.F.R. § 222.24 (Department of Interior); 16 C.F.R. § 1.41 (Federal Trade Commission); 17 C.F.R. § 203.5 (Securities & Exchange Commission); 46 C.F.R. § 502.291 (Federal Maritime Commission). See also Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 321-22 (1933); 5 U.S.C. § 555(c) (Supp. II, 1965-1966).

35 See, e.g., 47 U.S.C. § 154(f) (1964). While a Federal Trade Commission investigation may be nonpublic, the Commission has the authority to order public disclosure of all information obtained by it in the investigation except trade secrets and customer lists. 15 U.S.C. § 46(f) (1964); see 16 C.F.R. §§ 1.133-34 (1967). All such information, without exception, may be utilized in a related public adjudicatory proceeding. Id.; see FTC v. Tuttle, 244 F.2d 605, 616 (2d Cir. 1957), *cert. denied*, 354 U.S. 925 (1958); cf. 8 J. WIGMORE, EVIDENCE § 2212(3) (McNaughton ed. 1961).

36 It has been indicated to the authors that the practice of the Federal Trade Commission, at least, is to permit third parties who have furnished confidential business information in a closed investigation (whether voluntary or under the Act) to appear at subsequent public adjudicatory proceedings and request confidentiality for the material furnished by them. Interview with Assistant General Counsel Fletcher Cohn, in Washington, D.C., Jan. 27, 1967; see 15 U.S.C. § 46(f) (1964).
ing to him in his capacity as an officer or employee relating to "trade secrets, processes, operations, style of work, or apparatus, . . ." the statute contains the large loophole permitting such disclosures where "authorized by law." Thus, trade secrets or similar information received in confidence could be disclosed in a later public proceeding or to Congress without the federal officer or employee having to fear criminal prosecution.

Judicial injunctive protection is a theoretical possibility. Such an instrument could only be used where the person desiring court protection knew of a threatened disclosure prior to its being made. Where disclosure is to be made in a report to or by Congress or in a subsequent agency proceeding to which the person was not a party, such knowledge would be clearly fortuitous. As a practical matter, therefore, the normal lack of foreknowledge precludes effective use of the judicial injunction. Nevertheless, the existence of these problems should never deter counsel from requesting confidential treatment whenever it would be in his client's best interests not to have the information disclosed to the general public. The agreement to hold information nonpublic may and probably will operate as a moral restraint on the government employee or agency otherwise tempted to publicly disclose. Government officers are generally honorable men and it is fair to presume that a prior agreement to keep information in confidence will be honored except in the most compelling situation. Furthermore, the failure to have requested confidential status when the information was given in

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39 E.g., id. §§ 80a-45(a), 80b-10(b)(2).
40 41 Op. ATTY GEN. 221 (1955). In the Schreiber case the Supreme Court specifically noted that the Commission, in denying confidential treatment, relied in part upon its duty to make annual reports to Congress. 381 U.S. at 294, citing 47 U.S.C. § 154(k) (1964). The Court also noted that funds were authorized by Congress for the specific investigation that formed the basis of the Schreiber case because of the congressional desire to "draw upon the facts which are obtained" by the Commission. 381 U.S. at 294, citing 101 CONG. REC. 7629 (1955).
41 Relief in tort appears to be unlikely since the federal government is immune from such liability. 28 U.S.C. § 2680(h) (1964). Similarly, a broad immunity doctrine protects the government officer or employee from any fear of tort liability. Howard v. Lyons, 360 U.S. 593 (1959); Barr v. Matteo, 360 U.S. 564 (1959); see Norton v. McShain, 332 F.2d 855 (5th Cir. 1964), cert. denied, 330 U.S. 981 (1965); Gregoire v. Biddle, 177 F.2d 579 (2d Cir.), cert. denied, 330 U.S. 949 (1949). Contra, Kelley v. Dunne, 344 F.2d 129 (1st Cir. 1965); Hughes v. Johnson, 305 F.2d 67 (9th Cir. 1962). It should be noted that Barr was decided by a 5-4 vote and that the Government did not seek certiorari in either of the circuit cases that went against it on this point. Any implication that the denial of certiorari in Norton might constitute a ratification of Barr is weakened by the civil rights overtones in the Norton case. Whatever may occur on further Supreme Court review of the question, the fact remains that the broad immunity doctrine of Barr is now the law.
PRERULING PROTECTION FOR ALLEGED BUSINESS SECRETS

A proponent of confidentiality is initially faced with the problem of maintaining the secrecy of his information while he tries to demonstrate a need for *in camera* treatment. A "naked assertion" avails him little, and any submission of the information exposes it to possible public disclosure. Moreover, a refusal to submit the information, as demonstrated by *Schreiber*, will not sustain an appeal. The reason for this confusing state of affairs is the almost total absence of any preruling protection for a party seeking *in camera* treatment. Only two agencies, the Civil Aeronautics Board and the Securities and Exchange Commis-

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42 381 U.S. at 298-99. The validity of the FCC's procedures concerning the establishment of a case for confidentiality was not at issue in *Schreiber*. In the status in which that case reached the Supreme Court, the only question was whether the Commission could place the burden on the witness to establish a proper case for *in camera* proceedings and whether Schreiber's mere demand for such proceedings and naked assertions of injury satisfied that burden.


Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, the disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law. Provided, That nothing in this Section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress.

Under the CAB's regulations, any person who objects to the public disclosure of information contained in documents filed with the Board or included within any testimony is entitled to have the relevant information taken *in camera* and then placed in a sealed envelope bearing the notation "Classified or Confidential Treatment Requested Under § 302.39." The objecting party is then given five days to file a formal motion requesting confidentiality and including a statement describing the material and demonstrating the need for confidentiality. 14 C.F.R. § 302.39(e) (1967). While the regulation does not require the motion itself to be taken *in camera*, the practice of the Board is to extend confidential treatment to the motion, upon the request of counsel. If the Board denies the motion, the moving party is given five days from the date of entry of the Board's adverse order to file a written statement with the Board indicating the moving party's good faith intention to seek judicial review of the Board's order. 14 C.F.R. § 302.39(e) (1967). The Board is generally very lenient in granting requests for confidentiality, and once a request is granted, the Board will go to great lengths to protect business secrets. The Board may order such a degree of confidentiality that only enforcement counsel may see the material. Or the Board may require the coding of customer or travel agent lists so that while financial and economic data of a carrier is placed on the record, no one but the cryptographer will know the precise sources of a carrier's operating revenue. In addition, when confidential material is included in the record, the hearing examiner may be required to prepare both a public initial decision and a private or confidential decision. Telephone conversation with Francis W. Brown, CAB Chief Hearing Examiner,
sion, provide any rules guaranteeing the secrecy of information during the agency’s deliberations on whether to accord permanent confidential status. Since the burden of sustaining such a request is clearly on the businessman, protection for him in the form of a preliminary in camera procedure ought to prevent publication of disclosures made when the required showing is attempted.

Such a procedure has much to recommend it. First of all, the agency will get possession of the information and the hearing will be able to proceed while the issue of confidentiality is being resolved. One need only examine the results of the Schreiber case to realize the value of this: MCA, by withholding information deemed crucial by the FCC, managed to delay the hearing’s progress for almost 5 years! This is not to say that providing such protection will assure willing submission of evidence, but it will certainly substantially diminish both the frequency and success of refusals to obey agency subpoenas.

Admittedly, this preruling protection creates certain difficulties. Most important is the frustration, though temporary, of the overriding agency concern with full public disclosure. On closer examination, this

Apr. 4, 1967. The filing of this statement precludes public disclosure of the relevant information until completion of judicial review. 14 C.F.R. § 302.39(c) (1967).

SEC Rules of Practice, 17 C.F.R. § 201.26(b)(1) (1967). The SEC’s rules are the most explicit in this regard:

All papers containing data as to which confidential treatment is sought, together with any application making objection to the disclosure thereof, or other papers relating in any way to such application, shall be made available to the public only in accordance with orders of the Commission and/or the applicable provisions . . . of this chapter . . . .

Id.

At least two other agencies claim, as a matter of practice, to follow preliminary in camera procedures similar to those of the Civil Aeronautics Board in adjudicatory proceedings. Interview with members of FTC Staff, in Washington, D.C., Jan. 27, 1967; Memorandum from FCC General Counsel Henry Geller to the authors, Dec. 6, 1966; Interview with FCC General Counsel, Henry Geller in Washington, D.C., Nov. 3, 1966; see Graber Mfg. Co. v. Dixon, 223 F. Supp. 1020, 1021 (D.D.C. 1963). This informal manner of approaching the problem is quite unsatisfactory since it permits wide variations in practice, depending upon the identity of the hearing examiner. Of course, this objection can be obviated by providing hearing examiners with a manual of practice similar to that published by the CAB.


In the Schreiber case, MCA was the largest member of the industry under study and a failure to obtain information from it successfully rendered all other data meaningless. 381 U.S. at 283.

Id. at 297.

Under a preruling protection arrangement, there could be little justification for nonproduction and the “naked assertions” doctrine of Schreiber would bar any successful refusals. Id. at 298-99. The validity of the FCC procedure concerning the establishment of need for confidentiality was not at issue in Schreiber. When that case reached the Supreme Court, the only issue was whether the Commission could place the burden of establishing need for in camera proceedings on the witness and whether Schreiber’s mere demand for such proceedings satisfied that burden.
objection loses much of its force. Public disclosure usually occurs at the conclusion of a proceeding when the entire hearing becomes a public record. Almost any issue of permanent confidential status will be settled before the hearing terminates. In those instances where the issue of confidentiality survives the hearing, due to judicial review, delay of public disclosure, as is demonstrated by Schreiber, will be no different than under existing law.

Nor will such a preruling protection affect the burden of proof in the determination of in camera status. While it is true that the information will be temporarily retained in camera, the proponent will still have to demonstrate satisfactorily the need for preserving that status. Since application of the protection would be automatic, it would in no way reflect on the merits of any individual request.

Perhaps the most compelling argument for preruling protection is the effect of the alternatives which might be employed by a businessman in its absence. If safeguards are not afforded by the agency, the businessman with a substantial claim to confidential treatment may wish to pursue one of two courses, depending upon whether the agency is in possession of the information sought to be protected. If the agency is not in possession of the information, upon the advice of counsel, the businessman may wish to appear before the agency and respectfully decline to testify or produce the necessary papers. This will require the agency to seek enforcement of its subpoenas ad testificandum and duces tecum in the district court, at which time the allegedly inadequate agency procedural safeguards against disclosure may be challenged by way of defense to the enforcement action. If, on the other hand, the agency is already in possession of the information, the businessman will be obliged, if judicial review is available, to bring an action for injunctive relief to prevent the agency from making disclosure prior to the final determination of the request for confidentiality.

Neither of these alternatives is satisfactory. The first denies the material to the agency and thereby delays the hearing for the length of

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60 It now seems clear that a respectful refusal to obey an agency subpoena in good faith will not subject the subpoenaed party to immediate criminal sanctions. See Reisman v. Caplin, 375 U.S. 440, 447 (1964); Anheuser-Busch, Inc. v. FTC, 359 F.2d 487 (8th Cir. 1966). Only after the judiciary has ruled adversely to the proponent of confidentiality and enforced the subpoena would criminal sanctions be available to the Government to punish continued refusal to obey the subpoenas. Anheuser-Busch, Inc. v. FTC, supra at 489. Of course, if the district court were to find that the original claim to confidentiality was frivolous and the refusal to obey the administrative subpoenas not to have been in good faith, the criminal sanctions of such statutes as Federal Trade Commission Act § 16 could be imposed for the original disobedience of the agency's subpoenas. 15 U.S.C. § 50 (1964).

61 The problem of the availability and scope of judicial review of an agency's interlocutory ruling denying confidential treatment is discussed infra, pp. 464-67.
time necessary to obtain enforcement of the subpoena. The second achieves the same result as preruling protection, but involves far more delay: once the issue of injunctive relief is settled and the question of temporary in camera status decided, additional judicial review might lie on the question of permanent in camera status. In light of these possibilities, preruling protection would seem to be both logical and just.

THE STANDARD OF PROOF

Having received some degree of assurance that his asserted business secrets will not be prematurely disclosed, the businessman must now prove his case on the merits. His first impediment is the statement of the standard of proof in very general terms: he must show that the private interest in nondisclosure outweighs the public interest in full disclosure of administrative proceedings. Any expression which contrasts private interests with public ones places the businessman at a decided psychological disadvantage. It should, instead, be applied in terms of weighing the public interest in protecting the businessman's enterprise from serious damage or destruction against the public interest in full disclosure.

Any expression of the standard, however, is too general to be of much assistance in deciding specific cases. As the FTC has recognized, "a definitive answer [as to what constitutes a showing of good cause for confidential treatment] responsive to all factual situations cannot be given and indeed none should be attempted since this is an area which quite obviously falls peculiarly within the scope of the hearing examiner's discretion." 54

53 The idea of offering two points of judicial challenge to an in camera ruling is its own best refutation. By making permanent status the only question for review, the continuity of the hearing process is preserved while the only real objection to a denial of in camera treatment, disclosure to others, is still susceptible to judicial evaluation.


55 H.P. Hood & Sons, 58 F.T.C. 1184, 1188 (1961). As far as the authors are aware, Hood is the only reported case in which any body, administrative or judicial, has attempted to come to grips with the standard of proof necessary to justify confidentiality. While disclaiming any attempt to bind its hearing examiners to a hard and fast rule covering every case, the Commission stated that as a matter of general policy, "the correct rule requires a showing that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. The showing may consist of extrinsic evidence or, in certain instances, may be inferred from the nature of the documents themselves." Id. The last sentence has reference to the Commission's novel distinction between "trade secrets," e.g., the secret formula for Coca-Cola, which may be accorded confidential status simply because serious harm from disclosure is clearly inferable, and "business secrets," e.g., cost data relative to the production of the same soft drink, the disclosure of which does not necessarily require the inference of serious competitive harm.
It is precisely this area of the hearing examiner's discretion which provides the most flexible alternative to an uncompromising standard of proof. By emphasizing this stage of the consideration for confidential treatment, agencies will be able to afford meaningful protection to business secrets without surrendering their regulatory control over the disposition of in camera treatment. The hearing examiner should not only be able to entertain a broad spectrum of considerations, but should also be able to assign varying weight to the evidence offered.

In exercising his discretion, there are several factors which the hearing examiner should be permitted to consider. The first is the specific reasons, in the case before him, for public disclosure of the information. Is disclosure necessary to draw supplemental information or even refutation from other interested persons or businesses? Is disclosure desired to make the public aware of possible wrongdoing in the sector of the economy and to allow the public to protect itself?

Is it desired to inform the public and interested members of the affected industry of the reasons for the agency's promulgation of new rules or regulations or its request to Congress for new legislation? Or is public disclosure desired simply because it accords with the public policy of a democratic society favoring such course?

The first two reasons, responsive to needs rather than policies, are clearly the most compelling. The requisite showing in such instances
should therefore be greater than that necessary to overcome a general policy favoring disclosure. The authority to determine the exact quantum of showing in a particular case should rest with the hearing examiner. This is the only way to achieve a workable balancing process.

Another factor is the nature of the information itself. Is it really secret? If so, is it merely internal financial or economic information or is it a customer list, a secret formula, or a new process which has given the businessman a strong competitive advantage? A hearing examiner would probably require a stronger showing of need for confidentiality when the information involves simply internal financial or economic data, since the need for protecting this type of information is much less clear.

Finally, the hearing examiner must consider both the likelihood of harm to the businessman and the precise nature and severity of that harm. It will be necessary for counsel to demonstrate that the harm is certain to result and readily ascertainable. In addition, he must demonstrate that the harm to his client's business will be substantial. While no quantitative standard would completely serve here, evidence that disclosure will cause the loss of one important customer while ninety-nine others remain will certainly not suffice. On the other hand, should disclosure cause the loss of the one customer who is essential to the continuance of the business, more serious consideration should be given to the businessman's request for confidentiality.

The examiner's decision to grant or deny confidential treatment requires a balancing of interests. Although a business may be severely damaged or even destroyed because of public disclosure, the public interest in the information may be so compelling as to require just that result. The authors doubt, however, that a business should be sacrificed simply to vindicate the general public policy favoring disclosure of the reasons underlying new agency rules, regulations, or requests for additional legislation.

### AVAILABILITY AND SCOPE OF JUDICIAL REVIEW OF THE ADMINISTRATIVE DENIAL OF CONFIDENTIAL TREATMENT

Should counsel for the businessman be unable to persuade the hear-

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59 A suspicion exists that the "confidential" list of MCA-packaged network television programs which was at the heart of the Schreiber litigation was not secret since Fortuna magazine published a chart purporting to show the prime time network programs for the week of April 3-9, 1960, with which MCA was associated. Fortuna, July 1960, at 116-17. Moreover, MCA's competitors furnished the same type of information without objection. 381 U.S. at 298. If the businessman does not guard his assertedly confidential information, there is no reason why the administrative agencies should.

ing examiner and the agency that his client's asserted business secrets should be received in camera, he must then decide whether judicial review of the adverse ruling is appropriate. Before determining whether to indulge in costly litigation, counsel must consider whether judicial review of the interlocutory decision is available and, if it is, whether the scope of that review is broad enough to permit a meaningful challenge of the adverse ruling.

If the information is still solely within the knowledge of his client, judicial review may be obtained by alleging incorrect denial of confidential treatment as a defense to judicial enforcement of the agency's subpoena. It is less clear, however, whether judicial review would be available to the businessman in an action against the agency for injunctive and declaratory relief, where the agency has not affirmatively sought judicial enforcement.

Congress has provided a general scheme for exclusive judicial review of agency actions by a court of appeals subsequent to the entry of final administrative orders. Pursuant to such statutory review, the court of appeals may consider all constitutional, jurisdictional, substantive, and procedural questions arising out of the agency's proceedings. In light of these circumstances, federal district courts have usually been obliged to dismiss equitable actions challenging interlocutory administrative actions because of the failure of the complainant to first exhaust his statutory remedy.

Recently, in those cases where the statutory remedy has been plainly inadequate to prevent irreparable injury, the federal courts have carved out an exception to the requirement that the statutory remedy must be exhausted before judicial review will be granted. While none of these cases presents a factual situation involving threatened disclosure of confidential business information, it would appear that district court jurisdiction exists to entertain actions for injunctive and declaratory relief challenging agency interlocutory orders which deny confidential status.

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61 Cf. 381 U.S. at 297-98.
to alleged business secrets. Any other conclusion would require a party to wait until entry of the agency's final order before challenging the interlocutory denial of confidentiality; and public disclosure, with its irreparable results, will most likely occur prior to the statutory review. This should certainly represent sufficiently compelling circumstances to warrant equitable jurisdiction in the district court.

The traditional bar to such an appeal, failure to exhaust administrative remedies, should not pose an insurmountable hurdle. In similar cases, courts have recognized the unalterable injury of delayed review, and have granted jurisdiction where the agency's action might cause "great and obvious damage." If it is remembered that such injurious finality in the context of business secrets occurs when the information is revealed, then an appeal should lie immediately upon a refusal of confidentiality.

Once in court, the businessman's opportunity to obtain injunctive and declaratory relief is further limited by the narrow scope of judicial review defined by the Supreme Court in *Schreiber*. There review was limited to determining whether, in denying confidentiality, the hearing examiner or the agency had abused its discretion.

Remaining for determination is whether the Commission's application of its disclosure rule and the consequent rejection of respondents'
requests for confidential treatment were so arbitrary or unreasonable as to warrant the imposition by the District Court of conditions upon enforcement of the Commission’s subpoena and orders.\textsuperscript{71}

Thus, unless an agency’s refusal to grant confidential treatment is shown to be plainly unreasonable, the district court is obliged to uphold the ruling and to refrain from substituting its own judgment for that of the agency.

Delay and disruption of the administrative process may be occasioned by counsel’s resort to litigation.\textsuperscript{72} The Schreiber case is a good example of the enormous time which can be consumed by appellate review. Schreiber appeared before the hearing examiner on October 21, 1960.\textsuperscript{74} By the time the Supreme Court upheld the FCC’s order and remanded to the district court for enforcement—May 24, 1965—the information sought by the Commission was of so little relevance that the Commission made no attempt to enforce the subpoena. To obviate this problem, several agencies have established, or are considering, a system of parallel public and private dockets to permit public proceedings to continue while the questions of confidentiality are litigated before the agency or in the courts.\textsuperscript{74} Under such a system, only in the relatively rare case in which the agency is not in possession of the allegedly secret information and the public proceedings cannot continue without the agency’s possession of such information will delay be possible.

**THE EFFICACY OF OBTAINING ADMINISTRATIVE CONFIDENTIALITY**

Should an agency agree with the businessman that there is a legitimate purpose in keeping his business secrets confidential, there is no certainty that the information will remain shielded from public disclosure—some agency guarantees of confidentiality are far from absolute. A pronounced example of this is the Federal Maritime Commission’s new rule regarding confidentiality which contains the proviso that “any information given pursuant thereto, may be used by the presiding officer or the Commission if they deem it necessary to a correct decision in the proceeding.”\textsuperscript{75} Obviously, the businessman subject to the jurisdiction of this

\textsuperscript{71} 381 U.S. at 295.

\textsuperscript{72} See Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 323-24 (1933).

\textsuperscript{73} 381 U.S. at 297.

\textsuperscript{74} Interview with Francis W. Brown, CAB Chief Hearing Examiner, in Washington, D.C., Nov. 10, 1966; Interview with Henry Geller, FCC General Counsel, in Washington, D.C., Nov. 3, 1966; Interview with members of the FTC Staff, in Washington, D.C., Jan. 27, 1967.

\textsuperscript{75} Federal Maritime Commission Rules of Practice & Procedure 10(aa), 46 C.F.R. § 502.167 (1967). Another give-and-take-away agency regulation is the Federal Trade Commission Rules of Practice for Adjudicative Proceedings 3.16(g) which provides, inter alia: “The right of the hearing examiner, the Commission, and reviewing courts to disclose in camera
agency can never be certain that his business secrets taken in camera will not be taken out of camera under this somewhat illusory rule. Some agencies reserve the right to order disclosure to interested federal or state agencies and individuals or to the public upon a showing of good cause.

Another potential loop-hole through which confidential information may slip into the public domain is provided by the widespread statutory requirement that the federal regulatory agencies make annual reports to the Congress and its committees. That Congress may demand special reports and information obtained by the agencies in confidence is provided in Section 1104 of the Federal Aviation Act: "nothing in this section shall authorize the withholding of information by the [Civil Aeronautics] Board or [Federal Aviation Agency] Administrator from the duly authorized committees of the Congress." The statute is silent as to any responsibility on the part of congressional committees to respect the confidentiality accorded by the Board or the Administrator.

Whenever a member of the air transportation industry receives a grant of confidentiality for information provided the Board, it knows that it is subject to the proviso of section 1104; hence, it can hardly be heard to complain of congressional leaks. But there is more room for

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16 C.F.R. § 3.16(g) (1967).

For example, in one agency investigation certain stevedoring contracts were accorded confidential treatment. Trust & Lighter Loading & Unloading Practices at New York Harbor, FMC Doc. No. 1153. Nonetheless, provisions of these same contracts were discussed in some detail in a later related report. See Supplemental Report to FMC Doc. No. 1153, Dec. 19, 1966.

See, e.g., FCC Reg. § 0.457, which reads in part:

[T]he Commission will entertain requests from members of the public . . . for permission to inspect particular records withheld from inspection under the provisions of this section, and will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in the light of the facts of the particular case.

32 Fed. Reg. 10575 (1967). See also § 0.457(d)(1) of the same regulations which reads in part:

Materials submitted to the Commission which contain trade secrets, or which contain commercial, financial or technical data which would customarily be guarded from competitors by the person submitting it, will not ordinarily be made available for inspection. A persuasive showing as to the reasons for inspection of such materials . . . will be required in requests for inspection . . . .

Id. at 10576.


The CAB's practice is to refuse disclosure of confidential information to individual senators and congressmen by pointing to the precise language of the proviso: "authorized committees of Congress." Telephone conversation with Joseph B. Goldman, CAB General Counsel, in Washington, D.C., Nov. 10, 1966.

However, the Board transmits confidential information to the appropriate committees with the request that confidentiality be safeguarded. Id.
complaint in other regulated areas of the economy where legislation comparable to section 1104 does not exist. The regulatory agencies in those areas have discretion to furnish the Congress with information obtained by them in confidence. Thus, what the agencies give, the agencies may take away, and, because subsequent breach of confidentiality is within the discretion of the agencies, resort to the courts for injunctive relief (in the unlikely event that the businessman has prior notice of the breach) will almost certainly prove futile.

CONCLUSION

The problem of confidential status of information made known to government is, as is much of the law, a necessary compromise of competing values. On the one hand there is the value to a person, whether or not a businessman, in maintaining privacy, and this is particularly so where public disclosure will cause him incalculable harm. On the other hand there is the value to another litigant, an administrative agency, or a congressional committee in obtaining information on the basis of which they may prepare or decide a case, promulgate a regulation, or enact legislation. The compromise achieved at this juncture is the receipt of information in confidence whenever it can be shown that the harm done to the individual outweighs the possible good to society by disclosure. This is not a perfect compromise, and it begs many questions—but this is true of most compromises.

The authors, having examined the practices, both formal and informal, of the principal federal government agencies, propose the following model regulation which provides answers to many of the problems posed. Again, no perfect adjustment of competing interests can be made therein—for there is no regulation which will entirely satisfy a need for both disclosure and confidentiality. But it provides a procedural mechanism for arriving at solutions which we contend are better than that now achieved by most federal agencies.

82 This discretion is limited only by § 4 of the Federal Reports Act which prohibits the disclosure of confidential information except as is authorized by law. 44 U.S.C. § 423(b) (Supp. II, 1963-1966). Fines up to $1000 or imprisonment for one year or both and mandatory removal from office are provided for violation of the Act. 18 U.S.C. § 1905 (1964). Federal statutes, however, generally confer upon the agencies, as opposed to their individual personnel, discretion to release confidential information. Hence, the agencies may make such information available to Congress upon proper requests. 41 Op. Atty Gen. 221, 228 (1955). But since agency discretion is involved, the agencies are not compelled to honor these requests. Id. at 228-29; cf. Boske v. Comingo, 177 U.S. 459 (1900).

83 The "Freedom of Information Act" expressly states that its requirements "shall not be applicable to matters that are . . . (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential . . .". Administrative Procedure Act § 3, 5 U.S.C.A. § 552(b) (1967). Since such confidential information is not dealt with by the act, it appears that the agencies' discretion to withhold or release it remains intact.
APPENDIX

MODEL REGULATION ON PROCEDURES GOVERNING
CONFIDENTIAL TREATMENT OF
BUSINESS INFORMATION
BY GOVERNMENTAL AGENCIES

SECTION I  OBJECTION TO DISCLOSURE OF ALLEGED BUSINESS PROCEDURES TO BE FOLLOWED.

(a) Any interested person who objects to the public disclosure of any business information contained in any paper filed in any proceeding or in any oral testimony given in connection therewith shall request the separation of such information into separate papers or transcripts and shall request its separate filing in a sealed envelope bearing the notation "Classified or Confidential Treatment Requested."

(b) In the case of oral testimony, the witness or deponent shall be compelled to disclose the objected to information only in the presence of the hearing examiner or the person before whom the deposition is taken, the official stenographer and such representatives of each party as the hearing examiner or the person before whom the deposition is taken shall designate, and only after all persons present have been sworn to secrecy.

(c) Within five (5) days after the making of the objection, the objecting person shall file a formal written application for confidential treatment of the objected to information. The application shall be signed by the objecting person or by his authorized representative and shall contain a general description of the information sought to be withheld and a detailed statement of the reasons for the request for confidentiality. This application shall be filed with the person conducting the hearing or proceeding. Written notice of the application shall be served on all persons interested in the proceedings or their authorized representatives, but the application itself need not be served. The person with whom the application is filed shall maintain the application in confidence until such time as the objected to information is itself publicly disclosed.

(d) Within five (5) days of service of the notice of the filing of the application, any interested party may request a hearing on the application or the person conducting the proceeding may order such hearing sua sponte. This hearing shall be held in camera with all persons present sworn to secrecy.
Section II Determination of Application to Obtain Confidential Treatment; Standard of Proof to Be Employed; Burden of Proof; Receipt of Other Evidence Pending Determination of Request for Confidential Treatment.

(a) The person conducting the hearing or proceeding shall decide the application for confidentiality with due regard to the public's interest in full disclosure of the Agency's proceedings and the interests of the applicant in maintaining secrecy of the information sought to be kept confidential. The burden of proof shall be on the applicant to establish the need for confidential treatment.

(b) The person conducting the hearing or proceeding may determine that, during a contest before the agency or in court over whether certain evidence shall be received publicly or in camera, the administrative hearing or proceeding shall proceed for the reception of other evidence.

Section III Procedures Following the Grant of an Application for Confidential Treatment.

(a) An order granting an application for confidential treatment shall specify the date on which such treatment will expire and shall include a statement of the reasons for granting the application and a general description of the material to be held in confidence.

(b) Documents and transcripts of testimony subject to such order shall be placed in a parallel nonpublic docket and filed in a sealed envelope bearing the notation “Classified or Confidential Treatment Granted” and the date on which in camera treatment expires and the documents and testimony are to be placed in the public docket.

(c) For good cause found, the person conducting the hearing or proceeding may permit a party thereto to disclose in camera documents or testimony to experts, consultants, or witnesses to be utilized in the hearing or proceedings, but an order shall be entered protecting the rights of the affected parties and preventing unnecessary disclosure.

(d) In the submittal of proposed findings, briefs or other papers, counsel for all parties should make a good faith attempt to refrain from disclosing the specific details of in camera documents and testimony, but generalized references thereto and general statements concerning them is permissible. Proposed findings, briefs or other papers containing detailed confidential information shall be marked “confidential” and made part of the parallel nonpublic docket.
SECTION IV  PROCEDURES FOLLOWING THE DENIAL OF AN APPLICATION FOR CONFIDENTIAL TREATMENT.

(a) An order denying an application for confidential treatment shall state the reasons for the denial and shall stay public disclosure five (5) days in order to permit the applicant to file an interlocutory appeal from the adverse order with the agency's final decisional body. If such appeal is filed within that time, public disclosure shall be stayed until the final decisional body disposes of the appeal.

(b) If that body refuses to consider the interlocutory appeal or affirms the order of the hearing examiner, it shall stay public disclosure for five (5) days from the date of its order to permit judicial review. If an action is filed in the appropriate United States district court within that time, public disclosure shall be stayed until completion of judicial review.

SECTION V  RELEASE OF CONFIDENTIAL BUSINESS INFORMATION BY THE AGENCY.

(a) The Agency shall not disclose publicly any information ordered held in confidence until the expiration of the period during which the information is to be so held.

(b) However, the Agency, on its own motion and without notice to any affected party, may make in camera documents and testimony available for inspection, copying or use on a confidential basis by agencies of the federal or state governments. In making such material available to other agencies, the Agency shall request that the confidentiality of the material be respected.

(c) Upon the request of any duly authorized committee of the Congress, the Agency shall make available to the committee confidential documents and transcripts of testimony without regard to the use to which the material may be put by the committee. But in making such material available to committees of the Congress, the Agency shall inform the committee that the material furnished is confidential and shall request that the committee not reveal the contents of the material publicly.