IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 9130. Interlocutory Order, Aug. 6, 1981

ORDER

The Administrative Law Judge, pursuant to Section 3.23(b) of the Rules of Practice, has certified to the Commission complaint counsel's application for review of the ALJ's prehearing order of March 2, 1981, directing them to "exclude resort" to special reports under Section 6(b) of the FTC Act. The ALJ, in authorizing the appeal, stated that his ruling "involves in part Section 6 issues which lie without the Part 3 Rules of the Commission."

I. BACKGROUND

The adjudication in this case began on August 10, 1979, when the Commission issued a complaint charging that the proposed acquisition by respondent Exxon Corporation ("Exxon" or "respondent") of Reliance Electric Company would violate Section 7 of the Clayton Act, as well as Section 5 of the FTC Act. The Commission entered an order on that date directing that the case be tried on an expedited basis. On October 26, 1979, the United States District Court for the District of Columbia entered a hold-separate order pending the administrative proceeding. The first prehearing conference was held before the ALJ on October 24, 1979, and several conferences were subsequently held to map out a proper route for discovery.

During a prehearing conference on February 27, 1981, the ALJ requested counsel to describe the progress of their respective discovery efforts. This review led to a discussion of complaint counsel's plan to use Section 6(b) as a means of discovery. The ALJ then stated his intent to disallow the use of Section 6(b) and on March 2, 1981, he issued a pretrial order directing complaint counsel "to proceed forthwith by way of Part 3 discovery rules and exclude the Section 6 method."

In his March 18, 1981, order authorizing complaint counsel to file an application for review pursuant to Rule 3.23(b), the ALJ justified his decision to preclude the use of Section 6(b) as a means of discovery on two grounds: (1) the injection of Section 6 issues into the proceeding might result in needless and undue delay, in contravention of the Commission's order dated August 10, 1979; and (2) complaint counsel's use of Section 6(b), "a device not available to respondents, would be fundamentally unfair."

Complaint counsel, on appeal, assert, among other things, that pretrial discovery under Section 6(b) is lawful and that it is the only satisfactory and workable method of discovery for this particular case. In this connection, they claim that their proposed Section 6(b) questionnaire is designed to gather information related to (1) the identification of economically significant markets and submarkets; (2) the determination of universe and individual firm market share data within those markets and submarkets; and (3) the identification and description of barriers to entry into those markets and submarkets or to "significant" competition by "minor" firms already in those markets or submarkets. They also assert that *subpoenas duces tecum* would be an inadequate substitute for 6(b)'s because, *inter alia,* the returns would include highly technical engineering documents, the interpretation of which would be "time-consuming, in some instances impossible, and, because it would require technical consultants, extremely expensive given projected budget constraints"; their draft questionnaire "covers the breadth of a company's involvement in the relevant market [and] *** [c]omplaint counsel would be required to spend untold hours studying the company and the interrelationships between its sets of records in order to determine the answers to the survey questions"; and responsive documents may not be available.

Complaint counsel also assert that the ALJ had no authority to deny the use of Section 6(b) reports because "only the Commission has the power to issue orders for special reports under Section 6(b) of the FTC Act; the Commission has not delegated that authority to the Administrative Law Judges." Finally, they argue that the judge "clearly abused" his discretion by providing, at the prehearing conference, inadequate reasons for his decision, and that he failed to afford them an adequate opportunity to be heard on the validity of their request.

Like the ALJ, respondent contends that unfairness would result if complaint counsel were allowed to use a method of discovery unavailable to respondent. Moreover, respondent maintains that the use of Section 6(b) reports would (1) impose an undue burden on third parties because they would be subjected to overlapping and multiple demands and (2) result in delays in the proceedings because of likely resistance by third parties. Finally, respondent argues that the use of Section 6(b) would be improper because it is not provided as a discovery device in Part 3 of the Commission's Rules of Practice.

II. COMPLAINT COUNSEL'S APPLICATION FOR REVIEW

Interlocutory appeals are generally disfavored because they may interfere with the orderly and expeditious conduct of the adjudicative process. In particular, applications for interlocutory review of discovery rulings will rarely be granted because such review could undermine the responsibility that our administrative law judges have to manage carefully the discovery process. *Bristol-Myers Co.,* 90 F.T.C. 273 (1977). We reaffirmed this principle recently in adopting revisions to our discovery rules. 43 FR 56862 (1978). Today we again reaffirm the crucial responsibility of the law judges to keep a firm hand and careful eye on the discovery process toward fair and expeditious conduct of the adjudicatory process.

Complaint counsel's application, however, raises issues that go beyond the proper exercise of an ALJ's discretion in ruling upon discovery requests; it also presents the questions of whether Section 6(b) should be available as a discovery device in adjudicatory proceedings and, if so, how the exercise of Section 6(b) authority should be used. Because of the importance of this issue not only for this matter, but for discovery requests in future cases, we grant complaint counsel's application for review and confine our review to these two questions.

III. THE USE OF SECTION 6(B) IN ADJUDICATIVE PROCEEDINGS

Over the past 25 years, the Commission has issued Section 6(b) special reports in several adjudicatory proceedings, *e.g., Campbell Taggart Associated Bakeries, Inc.,* 71 F.T.C. 509, 521-22 (1967); *Scott Paper Co.,* 63 F.T.C. 2240, 2243 (1963); *Crown Zellerbach Corp.,* 51 F.T.C. 1105 (1955); see *In re Subpoena Duces Tecum Addressed to Atlantic Richfield Co.,* File No. 741-0019, at 36 n.45 ("ARCO Statement"), and has allowed the parties to use evidence compiled through the use of Section 6(b) orders issued prior to the initiation of adjudicatory proceedings, *e.g., Jim Walter Corp.,* 90 F.T.C. 671, 700 (1977), *vacated and remanded on other grounds,* 625 F.2d 676 (5th Cir. 1980); *Dean Foods Co.,* 70 F.T.C. 1146, 1267 n.73 (1966). Although these opinions did not discuss the general question of the propriety of issuing Section 6(b) orders during the course of an adjudication, decisions by the Commission to issue pretrial Section 6(b) orders necessarily reflected a judgment that Section 6(b) can be an appropriate tool of discovery. We are not persuaded that their use should be abandoned where a party can make a real showing of need.

Respondent has not challenged the Commission's statutory authority to issue special report orders for the purpose of pretrial

discovery and we are satisfied that Sections 6(a), 6(b), and 6(g) of the FTC Act authorize their use. The Supreme Court, in rejecting a claim that Section 6(b) could not be used in aid of a Section 5 proceeding (in that case, a compliance proceeding), stated that it found "nothing that would deny its use for any purpose within the duties of the Commission, including a Section 5 proceeding. A construction of such an Act that would allow information to be obtained for only a part of a Commission's functions and would require the Commission to pursue the rest of its duties as if the information did not exist would be unusual, to say the least." *United States* v. *Morton Salt Co.,* 338 U.S. 632, 649–50 (1950).

Respondent does argue, however, that the Commission's own Rules of Practice preclude the issuance of Section 6(b) orders during the course of an adjudicative proceeding.

Section 6(b) orders to file special reports are not expressly included among the discovery devices described in the Commission's rules governing adjudicatory matters. Nevertheless, the Commission has stated that "[t]he discovery rules do not provide the exclusive means by which parties may obtain information, and are not intended to limit such ability as a party otherwise may have to obtain information through voluntary means or that may otherwise be available" to it. 43 FR 56862 (1978). In an earlier statement concerning an investigatory subpoena, the Commission indicated that its existing discovery rules do not limit complaint counsel's access to information properly obtained by the Commission for other purposes and, citing adjudicative cases in which Section 6(b) orders had issued, stated that "the Part 3 discovery rules do not provide the exclusive means by which the Commission's powers of compulsory process may be invoked in aid of a pending adjudicative proceeding." ARCO Statement at 36.

Likewise, two decisions, which preceded the promulgation of the new discovery rules, have held that the administrative law judges are empowered by Rule 3.42(c) to employ discovery procedures which are not specifically authorized by the Rules of Practice. In *Exxon Corp.,* 90 F.T.C. 450, 452 (1977), the Commission held that ALJ's are authorized to impose "production procedures designed to assure orderly compliance with subpoenas," even though such procedures were not mentioned in the Rules of Practice. See also *Century 21 Commodore Plaza, Inc.,* 89 F.T.C. 108 (1977) (authorizing issuance of access order). The Commission in *Exxon,* however, stated that

> [d]iscovery should ordinarily be by the methods described in the Rules of Practice. Only where necessary to the conduct of "fair and impartial hearings * * * [and] to avoid delay in the disposition of proceedings," Rule 3.42(c), may the law judges resort

to discovery methods not explicitly sanctioned by the Rules. Moreover, the Administrative Law Judges may not depart from the specific requirements of applicable rules and any orders they issue must, of course, be authorized by the F.T.C. Act. [90 F.T.C. at 453.]

We therefore see no reason why the rules should be construed to preclude the issuance of Section 6(b) orders in adjudications and to require that adjudications be conducted "as if the information did not exist * * * ." *Morton Salt, supra,* 338 U.S. at 649-50.[1] Nonetheless, we believe the Commission, in adopting the current discovery rules, contemplated that the devices specifically authorized would be adequate to meet the needs of the typical case and we see no reason to depart from our holding in *Exxon* that "[d]iscovery should ordinarily be by the methods described in the Rules of Practice" and that other discovery procedures should be used "[o]nly where necessary to the conduct of 'fair and impartial hearings * * * and to avoid delay * * * .'"[2]

Respondent also asserts that resort to the Commission's Section 6(b) authority during an adjudication would "strip" the ALJ's of their authority to control discovery, and thus run counter to the Commission's conclusion that the "complexity of many Commission proceedings and the potential for delay inherent in discovery require careful supervision by the Administrative Law Judge at every stage of the proceedings." 43 FR 56863 (1978).

Although we are not prepared to construe Section 3.42(c) of the Rules of Practice, see p. 5, *supra,* to authorize the administrative law judges to issue Section 6(b) orders, we do not intend to permit ourselves to interfere with the ALJ's ability to maintain proper control of the pretrial proceedings. Thus, when a party files a petition for issuance of a special report order, we would hope that the ALJ's will accompany their certifications of these motions to the

[1] Respondent argues that Rule 2.12(a) provides that the Commission's Section 6 report powers may be used only for purposes of conducting investigations, not adjudications. That rule states in part:

> In investigations other than those covered by Section 20 * * * the Commission may issue an order * * * to file a report or answers in writing to specific questions * * * .

We do not understand this language, in Part 2 of the Rules, to do anything more than describe the Commission's powers to issue Section 6(b) orders in its nonadjudicative proceedings. An inference cannot permissibly be drawn that a Part 2 rule would purport to describe all the purposes for which a statutory procedure might be used to collect information.

[2] "Necessary" should not be understood to suggest some standard of absolute need, that without a special report order, a party could not possibly prove its case or rebut evidence offered by its opponent. A discovery procedure may fairly be said to be "necessary to the conduct of fair and impartial hearings and to avoid delay in the disposition of proceedings" if, taking account of such relevant considerations as costs (both to the subject of the proposed discovery and to the discovering party), the speed with which discovery might be completed, and the likelihood that the proposed discovery would produce accurate, useable information, it clearly appears that the procedure is substantially superior to any of the discovery techniques specifically authorized by the rules. In the case of Section 6(b) orders, we expect that such a showing could be made only in the extraordinary case.

Commission with a recommendation whether an adequate case has been made for this remedy.[3] In view of the responsibility of the ALJ's to maintain control of pretrial proceedings and the especially broad discretion they have in deciding matters of discovery, the Commission intends to attach great weight to these recommendations.[4]

Finally, respondent has argued that "[n]either party in * * * adjudicatory proceedings should be entitled to utilize compulsory discovery devices unavailable to the other, and yet that is exactly what complaint counsel propose to do." The ALJ, in recommending that we deny complaint counsel's appeal, contended that "[c]omplaint counsel's proposed resort to a Section 6 survey, a device not available to respondents, for complaint counsel's discovery needs and for reasons of alleged inadequacies of Part 3 discovery devices for the purposes of this case, is fundamentally unfair." However, although it would not be unfair in any particular case to allow only one party—the party that was able to make the required showing of need—to use a Section 6(b) order as a discovery device, we believe that special report orders may issue at the request of *any* party[5] who can make the difficult showing that such an order is necessary to its preparation for trial.[6]

IV. CONCLUSION

The ALJ has already ruled that the discovery procedures expressly authorized by the Part 3 rules are adequate for purposes of this case. If complaint counsel choose to file a motion for the issuance of a Section 6(b) order, the Commission, in acting on the motion, will

[3] The ALJ's are required by Section 3.22(a) of the Rules of Practice to certify to the Commission any motions upon which they lack authority to rule together with any recommendations they believe it appropriate to make as to the appropriate disposition of such motions.

[4] In this case, the ALJ properly stayed further discovery pending the Commission's disposition of complaint counsel's appeal. However, proceedings need not normally be stayed pending the Commission's disposition of a motion or an interlocutory appeal, see Rules of Practice, Section 3.23(b), and we expect that there would be few cases in which a stay pending Commission action on a motion for a Section 6(b) order would be warranted. Where the ALJ recommended that a Section 6(b) not issue, in view of the deference the Commission will accord this recommendation, the judge might reasonably require the parties to proceed with their pretrial discovery even if the discovery covered much the same ground as the requested Section 6(b) order. Nevertheless, where the ALJ has recommended that a Section 6(b) order issue, a stay of any discovery that was contingent on the Commission's decision to override the judge's recommendation, and not permit discovery by means of Section 6(b), might well be warranted.

[5] In the unusual case where a party can show that Section 6(b) orders are needed, it may be that all parties can make an adequate showing of need. In such cases, we would hope that, with the ALJ's encouragement, the parties could agree on a single special report form. We will be unwilling to burden third parties with multiple report forms each designed to meet the discovery needs of a different party.

[6] Respondent has argued that the use of Section 6(b) would result in delay because of likely resistance by third parties. However, we are unprepared on this basis to foreclose its use where a party has made a strong showing of need.

accord great deference to the ALJ's assessment of the need for complaint counsel's proposed order.

It is so ordered.

IN THE MATTER OF

INTERNATIONAL HARVESTER COMPANY

Docket 9147. Interlocutory Order, Aug. 12, 1981

ORDER GRANTING MOTIONS FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE ON THE ISSUE OF PUBLIC INTEREST

By motions dated July 14 and 15, 1981, complaint counsel have asked the Commission to receive and consider new evidence of fuel fires involving respondent International Harvester's (IH) gas-powered tractors. In its opposing memorandum, IH also provides additional evidence of recent fuel fires involving these tractors.

The "Gary Killingbeck" incident and other alleged fuel fires recounted for the first time by complaint counsel and IH possibly raise questions both about the appropriate scope of relief in this case and the adequacy of IH's past disclosure of alleged safety hazards to affected tractor owners. Thus, this evidence may be relevant to the public interest question certified to the Commission by Judge Mathias. IH does not deny that this evidence may be relevant to the public interest question. Instead, it claims the evidence of the Killingbeck fire is tainted by the way in which it was collected by complaint counsel and thus should not be considered by the Commission. In the absence of a trial record, the Commission will not attempt to evaluate IH's allegations, or determine the ultimate weight that should be accorded the new evidence of fuel fires in any findings of fact. However, the existence of such evidence, and the dispute between the parties over its significance, may be relevant to an assessment of the need for further litigation concerning the sufficiency of IH's notification efforts and the appropriateness of prospective relief.

Accordingly, *it is ordered,* That complaint counsel's motion and supplemental motion for leave to submit additional evidence on the issue of public interest are hereby granted.

IN THE MATTER OF

GROLIER, INCORPORATED, ET AL.

Docket 8879. Interlocutory Order, Aug. 13, 1981

ORDER DENYING MOTION TO DISQUALIFY JUDGE VON BRAND

This matter is before us once again on Respondent's Motion for Disqualification and Removal of the Administrative Law Judge ("Renewed Motion"). Grolier was given the opportunity to raise this issue a second time when the United States Court of Appeals for the Ninth Circuit remanded the case because it believed that there was an erroneous "flat refusal" by the Commission to disclose to Grolier anything at all about Administrative Law Judge von Brand's prior participation in the Grolier case while he served as an attorney-advisor to former Commissioner MacIntyre. *Grolier, Inc.* v. *FTC,* 615 F.2d 1215, 1222 (9th Cir. 1980).

The Commission denied Grolier's discovery request when it held that, as a matter of law, attorney-advisors were not engaged in investigating or prosecuting matters so as to bring them within the proscription of Section 554(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. 554(d). See *Grolier, Inc.,* 87 F.T.C. 179, 181 (1976). The Ninth Circuit held however that Section 554(d) precluded attorney-advisors to the Commissioners "from [subsequently] participating in the adjudication of cases [as administrative law judges] in which they have actually performed * * * ['investigative and prosecuting'] functions, and in 'factually related cases,'" and stated that "[o]nce an attorney-advisor is shown to have been 'engaged in the performance of investigative or prosecuting functions,' through prior acquaintance with *ex parte* information, 554(d) says he 'may not * * * participate or advise in the decision * * * .'" *Id.,* 615 F.2d 1221. The Ninth Circuit therefore held that Judge von Brand's "actual involvement" with "information received outside of the controlled adjudicative setting" (615 F.2d 1220, 1221) was the critical determination to be made on disqualification. The court remanded the case for us to reconsider the denial of discovery and thereafter the disqualification motion.

Since the case was remanded, Grolier has made extensive submissions, mostly consisting of documents from the Commission's files, which it had prior to the Ninth Circuit's decision. Despite directions to Grolier to state the impact these documents might have on the disqualification issue,[1] Grolier has presented only a recast version of

[1] Order Reopening Proceeding and Directing Submission of Further Information, September 12, 1980.

an argument previously rejected by both the Commission and the court of appeals. Although advanced at length, the argument is simply that because Judge von Brand served as an attorney-advisor he is presumed to have a close relationship with his Commissioner and further presumed to be aware of everything circulated among the Commissioners[2] and, because the Commission considered several matters involving Grolier while he was an attorney-advisor, Judge von Brand must be presumed to have been exposed to information outside of the controlled adjudicative setting and, hence, disqualified. See Renewed Motion. Grolier also argues that, although the Commission has searched its files thoroughly and repeatedly for relevant material, Grolier is entitled to further discovery because it is still unable to connect Judge von Brand with any prior Grolier matter. We shall address these issues after a brief review of the history of this matter to put Grolier's present arguments in perspective.

History of the Disqualification Motion

Judge von Brand served as an attorney-advisor to Commissioner MacIntyre from 1963 to 1970. The Commission issued its complaint against Grolier on March 8, 1972.[3] Hearings on the complaint extended from 1973 to 1976 and were conducted before two Administrative Law Judges.[4] Judge von Brand's prior role at the Commission was related in a Commission press release announcing his appointment as a judge on March 18, 1975, and reported in the Antitrust and Trade Regulation Reporter on March 25, 1975 (706 ATRR 32, 33) (R. 3301–02). The first prehearing conference before Judge von Brand was held on March 19, 1975. *Id.* Judge von Brand reheard much of the testimony at Grolier's insistence (R. 1804–29, 1967–81). Almost a year later, just five days before the end of hearings before Judge von Brand, Grolier's president testified that Commissioner MacIntyre may have met with him in 1966 or that he may have met Commissioner MacIntyre.[5] Judge von Brand immedi-

[2] The argument has apparently escalated because now Grolier would charge Judge von Brand with knowledge of every document possessed by the staff even though there is no indication it was previously seen by the Commissioners. *E.g.*, Renewed Motion, 7, 8; Johns Affidavit, Exhibits D-F, I; Righthand Affidavit, Exhibits I and M; see footnotes 12 and 13, *infra*.

[3] The original record revealed, in affidavit form, the undisputed fact that the recommendation to issue a complaint, based on the results of the staff's investigation, was not forwarded to the Commission until *after* Judge von Brand left Commissioner MacIntyre's office. R. 4663–64. Exhibit BB to the Righthand Affidavit indicates that the Commission was advised that the investigation was progressing while Judge von Brand was an attorney-advisor. Nothing in the record or in Commission practice indicates that the Commission knew the substance of the information Grolier provided at that time to the investigatory staff.

[4] The first judge assigned to hear the case retired after a year of hearings had been held (R. 1793).

[5] The actual testimony was: "I only recall having met Mr. MacIntyre and I don't remember, or I think, I am quite sure at one of the earlier discussions with the Chairman he was there, but it was a very informal discussion just trying to say who I was and where I hoped to be able to take the company in the following 20 years." (Tr. 16115).

ately disclosed that he had worked for Commissioner MacIntyre but stated that he had no recollection of any events involving Grolier.

Armed with this bit of testimony Grolier filed a motion to disqualify Judge von Brand along with a discovery request for all documents relating to Grolier which were before the Commission during the period from 1963 to 1971. Judge von Brand entered a statement in the record pointing out that his former position had been a matter of public (and published) record since he presided over the case; that he had no recollection of working on Grolier matters; that he had asked a former secretary to search Commissioner MacIntyre's former suite of offices for any records relating to Grolier; that no such records were located nor were there any logs that would show who worked on any particular matter, and that he has searched his own files and could find nothing related to Grolier in them. Statement of Administrative Law Judge Concerning Motion for Disqualification, January 30, 1976. On February 10, 1976, the Commission declined to disqualify Judge von Brand and denied discovery. *Grolier, Inc.*, 87 F.T.C. 179 (1976).

On April 30, 1976, Grolier replicated its discovery motion for documents in a Freedom of Information Act ("FOIA") request. On May 17, 1976, the Secretary of the Commission granted the request in part and denied it in part. Grolier appealed this determination to the Commission. On June 28, 1976, the Commission granted Grolier access to most of the documents but withheld, in whole or in part, 41 documents. Submission of Documents in Response to the Commission's Order of September 12, 1980 ("Submission"), Exhibit A, paras. 26–29; Exhibit C. On August 20, 1976, Grolier filed a lawsuit under FOIA to obtain the 41 documents withheld. *Grolier, Inc.* v. *FTC,* Civil Action No. 76–1559 (D.D.C.). On November 1, 1976, an affidavit and an index of the 41 documents withheld were filed by the Commission. Submission, Exhibits B and C. On May 6, 1977, the Commission responded to interrogatories propounded by Grolier about the nature of the Commission's search for documents and about how Commission records are maintained. Submission, Exhibit D. On July 22, 1977, the district court ordered an additional search for documents which was conducted with negative results. Submission, Exhibit E. On March 10, 1978, the district court granted summary judgment for the Commission, holding that the documents withheld were exempt from production under FOIA. Submission, Exhibit F. Grolier appealed. Then, because the District of Columbia Circuit had changed its interpretation of the status of Commission "blue minutes,"[6] the

[6] *Bristol-Myers Co.* v. *FTC,* 194 U.S. App. D.C. 285, 598 F.2d 18 (1978).

Commission sought a remand. On remand the Commission, on March 13, 1979, voluntarily released 11 of the 14 blue minutes in their entirety. Minor deletions were made in the three remaining minutes. Submission, Exhibit G. The district court subsequently ordered the release of all the blue minutes. Submission, Exhibit H. Grolier again appealed.[7]

Meanwhile, in the adjudicative proceeding, Judge von Brand issued his initial decision on October 12, 1976. *Grolier, Inc.*, 91 F.T.C. 331 (1978). Grolier appealed this decision to the Commission which issued a Final Order and Opinion on March 13, 1978. *Grolier, Inc.*, 91 F.T.C. 476 (1978). Grolier did not attempt to use the documents it obtained in June 1976, or the Index describing the withheld documents it obtained in November 1976, when it made its disqualification and discovery arguments to the Commission and the court of appeals.

On remand from the Ninth Circuit Judge von Brand has executed an affidavit reaffirming that he has no recollection of working on Grolier matters as an attorney-advisor. In view of the time period involved and the volume of documents that passed through Commissioner MacIntyre's office, he cannot positively say he never saw a circulation relating to Grolier. Judge von Brand also relates conversations he had with a former secretary to Commissioner MacIntyre and the Commissioner himself and states that both recall that another attorney-advisor, Mr. Powers (now deceased), worked on Grolier matters. Judge von Brand also describes searches he made for records that might show his involvement with Grolier matters. First, he searched his personal files and found nothing related to Grolier. Second, he had another former secretary search Commissioner MacIntyre's former suite of offices for Grolier related documents or anything that would show which attorney-advisor worked on Grolier matters. The results were negative. Finally, he directed the Secretary of the Commission to search the Grolier files for anything that would show whether he had prepared documents related to Grolier. Again, nothing was found. Affidavit of Theodor P. von Brand.

Commissioner MacIntyre has also filed an affidavit stating that he compartmentalized work assignments in his office. He assigned investigational matters to Mr. Powers and, after his departure, to Mr. Volhard. Motions were assigned to Mr. Michaels and adjudicatory matters were assigned to Judge von Brand. To the best of his recollection, Commissioner MacIntyre did not discuss matters relat-

[7] The appeal was dismissed after the Commission released all the documents in this proceeding. See Order, March 10, 1981.

ing to Grolier with Judge von Brand and he was not aware that Judge von Brand had contact with any Grolier matters as an attorney-advisor. Finally, Commissioner MacIntyre states that all his official files remained in his office when he left the Commission, that the personal files he removed have since been destroyed and that he has no documents related to Grolier now. Affidavit of Everette MacIntyre.

Finally, although none of the 28 documents withheld in the FOIA case shed any light on Judge von Brand's involvement with Grolier matters, we provided them to Grolier as a matter of discretion. Order, March 10, 1981.

Further Discovery Is Unnecessary

Grolier again contends it is entitled to discovery beyond its original request for documents and that if this discovery is denied an adverse inference must be drawn against Complaint Counsel. Renewed Motion, 18–27. No further discovery is necessary. Our March 10, 1981, Order in essence granted Grolier's original request for documents but rejected additional requests Grolier made.[8] We are satisfied, both independently and in light of the court of appeals decision, that there is sufficient information available in the record to make an accurate determination under Section 554(d) of the Administrative Procedure Act (5 U.S.C. 554(d)) that there is no basis to disqualify Judge von Brand.

The affidavits of the two principals, Commissioner MacIntyre and Judge von Brand, demonstrate that neither recalls discussing any Grolier matters with the other. Furthermore, both state that Judge von Brand handled only adjudicatory matters for Commissioner MacIntyre. More importantly, our files have been searched several times for any document that Judge von Brand might have seen, and a district court has approved the adequacy of some of those searches. Grolier has been given every document relating to Grolier that circulated among the Commissioners while Judge von Brand served as an attorney-advisor as well as many documents that were not. Not a single document connects Judge von Brand with a single Grolier circulation.

Grolier has substantially more information than was available in other cases where courts have upheld an agency decision to deny discovery on the possible disqualification of a decisionmaker. For example, in *San Francisco Mining Exch.* v. *SEC,* 378 F.2d 162, 168,

[8] Grolier sought ten categories of documents and to depose Commissioner MacIntyre, Judge von Brand and three other individuals formerly employed in Commissioner MacIntyre's office.