



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 25, 2003

Advanced Research, Inc.

through its counsel

Dennis M. Hart

Butera & Andrews

1301 Pennsylvania Avenue, N.W.

Suite 500

Washington, D.C. 20004

Re: Petition to Quash or Limit of Advanced Research, Inc. - File No. P014806

Dear Mr. Hart:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Quash or Limit ("Petition"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. See 16 C.F.R. § 2.7(d)(4) (2002).

The Petition is **denied** for the reasons stated below. The new deadline for Advanced Research, Inc. ("Advanced" or "Petitioner") to respond to, and otherwise comply with, the Civil Investigative Demand is **Friday, March 7, 2003**.

Advanced has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter ruling. The filing of a request for review by the full Commission does not stay or otherwise affect the new return date – March 7, 2003 – unless the Commission rules otherwise. See 16 C.F.R. § 2.7(f) (2002).

I. BACKGROUND

Advanced Research, Inc. is an information service provider. More specifically, it is in the business of providing information to its clients such as the location of assets or persons, telephone records, background checks, and research relating to divorce or child support proceedings. Some businesses of this type have been known on occasion to utilize unfair or deceptive practices to obtain such information, and to solicit others to obtain such information knowing that such practices will be employed to obtain the information. These practices are often referred to collectively, as "pretexting," *i.e.*, the use of fraudulent, fictitious, or false statements or fraudulent or stolen documents to obtain customer information from entities such

as financial institutions, communications services providers, or even directly from consumers themselves. Advanced is a small company, with two principals, R. Michael Martin and Bruce Martin, and one part-time employee. Advanced represents that it employs independent contractors to conduct the research and provide the information requested by its clients.

On November 26, 2002, the Commission issued a civil investigative demand to Advanced (the "CID") pursuant to two compulsory process resolutions, one authorizing investigations of those "obtaining, directly or indirectly, personal information contained in telephone or cellular call records through 'pretexting,'" and the other authorizing investigations of those "engaged in acts or practices in violation of Title V of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809, 6821-6827 and/or Section 5 of the FTC Act, 15 U.S.C. § 45" (*i.e.*, pretexting in connection with financial records). The CID both requested several categories of documents and propounded several interrogatories.

On December 30, 2002, Advanced filed its Petition seeking to quash or limit the CID along with a supporting affidavit of Michael Martin, Advanced's president. Advanced presents three main arguments in support of its request: (1) the CID is unduly burdensome; (2) responding to the CID directed to Advanced will violate the Fifth Amendment privilege against self-incrimination of the company's two principals; and (3) the FTC lacks jurisdiction to investigate telephone records activity.

Commissioner Anthony carefully reviewed the Petition and determined that it should be denied for the reasons set forth below.

II. ANALYSIS

A. Fifth Amendment

The CID here is directed *only* to Advanced, the corporation. Nonetheless, Petitioner argues that the corporation's two principals cannot participate in the production process required by the CID because to do so would violate their Fifth Amendment right against self incrimination. Petitioner's specific concern seems to be that if these officers assist in gathering responsive corporate records documents, participate in drafting interrogatory answers, and certify those responses, they will be deemed to have waived their Fifth Amendment rights in any subsequent action that might be brought under the criminal provisions of the Gramm Leach Bliley Act.

This argument is completely at odds with well established case law and is, therefore, rejected. Although the Fifth Amendment protects individuals from compelled, incriminating testimony, it does not provide the same protection for corporations. It is settled law that the custodians of corporate records, including corporate officers, may not refuse to produce those documents based upon the assertion of a personal privilege. *Braswell v. United States*, 487 U.S. 99, 102 (1988). The custodian of corporate records has no Fifth Amendment privilege to refuse

to produce records, as Advanced argues here, on the ground that the act of production itself would tend to incriminate him personally, because “the custodian’s act of production is not deemed a personal act, but rather the act of the corporation.” *Matter of Grand Jury Proceedings*, 959 F.2d 981, 1163 (2nd Cir. 1992). In *Braswell*, the Court held that a custodian of corporate records must comply with a subpoena ordering the production of those records even when the act of production constitutes testimonial self-incrimination. 487 U.S. at 121.

The fact that the corporation has only two officers does not change the analysis. The courts have explained that “no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be.” *In re Grand Jury Subpoena*, 973 F.2d 45, 47 (1st Cir. 1992) (noting that *Braswell* applied the rule to a one-person corporation); *see also In re Custodian of Records of Variety Distributing, Inc.*, 927 F.2d 244, 247 (6th Cir. 1991) (explaining that corporate entity doctrine applies regardless of the corporation’s size) (citing *Braswell*).

For these reasons, the Commission rejects Advanced Research’s Fifth Amendment argument.¹

B. Burden

Petitioner presents several arguments relating to its assertion that the CID is unreasonably burdensome. Each point will be addressed in turn.

First, Petitioner argues that production within 30 days is far beyond the available resources of the company, and that compliance would likely put the company out of business. Petitioner explains that it has only one part time employee and only a facsimile machine to make copies of documents. It estimates that it has 25,000 responsive documents and that it would take more than twenty weeks for the employee to reproduce all of these documents if she did nothing else. This is a false dilemma based upon what appears to be a willful ignorance of the many other options available to the company. For example, the FTC staff conducting this investigation have: offered to travel to Advanced’s offices to assist in identifying relevant documents for production; and explained that documents can be shipped to the FTC to be copied. Further, many commercial establishments exist that will perform copying services or rent state-of-the-art photocopying equipment to small businesses. In sum, Advanced has many options for avoiding any burdens the requests might otherwise place upon its business.

Next, Petitioner asserts that the CID should be limited to address three perceived issues. First, some of the requests might be read as seeking records of information obtained from

¹ Advanced also suggests that upon review, it may find that some of the documents in its files can legitimately be characterized as personal, but that additional time for review is needed in order to make such determinations “intelligently.” Petition at 9. This argument is rejected as well. Every CID production process requires the recipient to review its records to cull out both those that are responsive and those that are responsive but may nevertheless be subject to a claim of privilege.

international sources, like foreign banks. Second, some of the requests might be read to call for the production of “such confidential customer information as invoices and payment information.” And finally, Petitioner argues that it understands some requests to require Advanced to produce all of its computer equipment, a requirement that would shut down the business. Petition at 6-7.

The Commission staff has already addressed two of these three points during its discussions with Advanced’s counsel. Staff clarified that it only seeks documents related to financial information obtained from United States institutions. Staff also clarified that it was only seeking *copies of the data* on the computer hard drives and other electronic data storage devices used in the company’s operations and was not seeking to remove the actual computer equipment from Advanced’s premises. The Commission hereby adopts these two specific limitations, to which the Commission staff has already agreed.

With respect to confidential customer information, such as invoices and payment information, petitioner offers nothing to support any inference that production of such documents is uniquely burdensome or that such documents are privileged, irrelevant, or in any other way not subject to being produced.²

Finally, Petitioner suggests that the Commission limit the scope of the CID “in time or subject” or permit Advanced to provide only a relevant sample of documents. The Commission rejects both of these proposals. The time limitation for the vast majority of the requests contained in the CID (November 12, 1999, the effective date of Subtitle B of the Gramm Leach Bliley Act) is reasonable and the subjects of those requests are both relevant the Commission’s inquiry and narrowly tailored to stay within the scope of the FTC’s authority on these issues. While a sampling procedure might be appropriate in certain circumstances, such as where an automated process or uniform practice is being investigated, a pretexting investigation does not lend itself to such an approach.

² The Commission is free to seek confidential information through compulsory process in the course of its non-public investigations. Its handling of such information is controlled by a set of detailed statutes and regulations. See 15 U.S.C. § 57b-2. Further, as the court in *FTC v. Invention Submission Corp.*, explained:

Congress, in authorizing the Commission’s investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought. So long as the subpoena meets the requirements of the FTC Act, is properly authorized, and within the bounds of relevance and reasonableness, the confidential information is properly requested and must be complied with.

1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,353 (D.D.C. 1991), aff’d, 965 F.2d 1086 (D.C. Cir. 1992), cert. denied 507 U.S. 910 (1993).

Petitioner has failed to carry its heavy burden to show that the CID is unreasonably burdensome such that it should be quashed or significantly modified.

C. FTC Jurisdiction to Investigate Telephone Records Pretexting

Petitioner argues that because the Telecommunications Act of 1996 directed the Federal Communications Commission ("FCC") to promulgate regulations governing how communications carriers under its jurisdiction must treat certain types of private telephone record information, see 47 U.S.C. 222, the FCC must be considered to have exclusive jurisdiction over matters relating to such information. This argument is baseless.

The FCC rules, which are not yet final,³ will be aimed at the conduct of telecommunications carriers within the FCC's jurisdiction (*e.g.*, the steps carriers must take to protect such information). *See Third Report and Order and Third Further Notice of Proposed Rulemaking*, Docket Nos. 96-115, 96-149, 00-257 (Adopted July 16, 2002, Released July 25, 2002). The rules will not relate to the use of telephone records information in the hands of third-parties like Advanced Research, which may have acquired such information unfairly or through deception. The FTC has full jurisdictional authority under the FTC Act to investigate those who may be engaged in, or soliciting others to engage in, pretexting to obtain personal and confidential telephone records information.⁴

III. CONCLUSION

For all of the foregoing reasons, the Petition is **denied**, and, pursuant to Rule 2.7(e), 16 C.F.R. § 2.7(e), Petitioners are directed to comply with the Civil Investigative Demand on or before **Friday, March 7, 2003**.

By direction of the Commission.



Donald S. Clark
Secretary

³ The FCC proposal is known as the "CPNI rule" (Customer Proprietary Network Information). CPNI includes personal information such as the telephone numbers called by a consumer, the length of calls, and services purchased by the consumer, such as caller identification, *i.e.*, information similar to that often obtained from carriers through deception by third parties.

⁴ Petitioner suggests that pretexting telephone record information is not illegal under the laws of the state where it is headquartered [Pennsylvania]. Of course, such pretexting may well violate the Federal Trade Commission Act, a federal law.