

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
GENERAL NUTRITION, INC.,
a corporation.

DOCKET NO. 9175

ORDER GRANTING MOTION TO LIMIT DISCOVERY SUBPOENA

The National Academy of Sciences ("Academy") has moved to limit the third-party subpoena duces tecum served upon it in this proceeding at the behest of respondent. Respondent has filed an opposition, and oral argument on the motion has been heard.¹ Having fully considered the matter, I have determined that the relief requested by the Academy should be granted.

The question presented involves a report entitled "Diet, Nutrition and Cancer" ("Report"), prepared by the Academy's National Research Council pursuant to a contract awarded in June 1980 by the National Cancer Institute of the National Institutes of Health, requesting a comprehensive study of the scientific literature dealing with diet, nutrition and cancer.

Respondent's subpoena seeks to discover the following from the Academy:

1. All drafts of the National Research Council's publication entitled Diet, Nutrition, and Cancer and the individual chapters contained therein; and
2. All memoranda, notes, minutes of meetings, correspondence, and other documents by, between and among the Committee on Diet, Nutrition and Cancer, its individual members and any and all persons who participated in the review and preparation of said publication, pertaining to the contents thereof in its final form and in any preliminary drafts or other versions thereof; and

¹ The Academy has also moved for leave to file a reply. This motion is granted, pursuant to my discretion under Rule 3.22(c).

3. All studies, tests, reports, memoranda, correspondence and other documents submitted to and/or considered by the Committee on Diet, Nutrition, and Cancer, its individual members and any and all persons who participated in the review and preparation of said publication.

The violations alleged in the Complaint are that respondent:

- a. Falsely represented that the findings of the National Research Council's Diet, Nutrition, and Cancer Report support the claim that use of Healthy Greens, or food supplements of dehydrated vegetables such as Healthy Greens, is associated with a reduction in the incidence of certain cancers in humans;
- b. Falsely represented that research indicates that Vitamin E plays an important role in reducing the risk of cancer;
- c. Failed to possess a reasonable basis for the claim that the use of Healthy Greens is associated with a reduction in the incidence of certain cancers in humans;
- d. Failed to possess a reasonable basis for the claim that Vitamin E plays an important role in reducing the risk of cancer.

Issuance of the discovery subpoena in question has been requested by respondent on two occasions. The original request was denied on the following grounds:

- * As to the "reasonable basis" allegations, points "c" and "d", supra, I ruled that since Paragraph Ten of the Complaint confines these charges to information "possessed and relied upon by respondent at the time of the dissemination of the representations, the material sought would be plainly "after the fact" and thus irrelevant.
- * As to allegation "a", charging misrepresentation of the findings of the Report, I held that the issue here concerned what the findings themselves say -- not how they were arrived at. I observed that respondent had not demonstrated threshold relevance on this point.

The above ruling, however, accorded respondent leave to reapply for a subpoena based upon a "satisfactory showing" pursuant to the Commission's Rules.²

Thereafter, respondent filed a renewed application for subpoena, in which it elaborated at some length upon its earlier bare assertion that "serious questions involving the interpretation, application and preparation of the report" are "an integral part" of the issues raised in the Complaint.

In its reapplication respondent contended, as to the "reasonable basis" allegations ("c" and "d"), that it had the right to claim that its reliance upon the Report itself constituted such reasonable basis. In this connection, respondent stated that "[u]ndoubtedly, complaint counsel will rely upon their interpretation of that Report, as well as on the interpretation which may be proposed by various witnesses called by complaint counsel." (Emphasis added.) Respondent identified the latter as including "participants in the preparation of the Report," and contended that the "underlying documents" sought in its application "may shed a different light on the interpretation of the report" than the interpretation proffered by complaint counsel or their witnesses. Respondent described its request as being, at the very least, one "reasonably calculated to lead to the discovery of admissible evidence," and as one which "may be the only basis" for proper cross-examination of complaint counsel's witnesses respecting the interpretation of the Report.

Respondent's contention concerning allegation "a" -- misrepresentation of the Report's findings -- relied on similar grounds: "Here again the interpretation to be made of the Report will be most critical to the determination of this issue." (Emphasis added.) Respondent explained that complaint counsel had identified five witnesses designated to testify concerning the Report and its findings. It reasoned that these witnesses would not be called merely to read from the Report, but obviously "to provide background and interpretation information" concerning it.

The renewed application thereafter identified two of these expected witnesses as being actually involved in the preparation of the Report. It asserted that "these witnesses may be expected to render opinions regarding the work of the Committee that put

² As to allegation "b", concerning "research" and Vitamin D, it is my understanding, based upon the statements of Academy counsel at page 121 of the hearing on November 20, 1984, that such research material has already been made available to respondent by the Academy.

together the Report in terms of the Committee's intent * * *.³ Accordingly, respondent urged that the documents sought in its renewed application "are clearly within the scope of proper discovery for purposes of developing respondent's defense and for purposes of possible cross-examination of these witnesses."

Finally, respondent pointed to certain language in the Report itself which, in its view, "emphasizes the importance of the matter of interpretation." Accordingly, the information sought by the subpoena "may shed light upon the inevitable controversies, the criteria to be selected or which were selected in making interpretations and the influence of individual or collective judgments in making interpretations," which "is precisely the function of discovery" sought in the renewed application.

Based upon the expanded reasoning and arguments set forth in respondent's second application, I authorized the requested subpoena, which was thereafter duly served upon the Academy, and which is the object of the present motion to limit.

Because the Academy's motion raises a serious concern, it merits detailed consideration. Basically, the Academy is seeking an order prohibiting the discovery of any drafts of the Report and any related underlying materials, and of all documents having to do with the Report's internal review process. The Academy argues that these documents are not relevant to the issues raised in this case and, in addition, that they constitute confidential materials which deserve protection from the discovery process.

The Academy has made a strong showing in support of its motion. While it is not a government "agency", the Academy was originally chartered by Congress, which directed that it "shall, whenever called upon by any department of the Government, investigate, examine, experiment, and report upon any subject of science or art * * *" 36 U.S.C. § 253 (1982). Thus, over the years the Academy has been routinely called upon to conduct studies and investigations by various government agencies, and even at times by the Congress.

The Academy customarily conducts its studies pursuant to a contract with a requesting agency. In this regard, the Report involved in the instant case was the result of a contractual arrangement between the Academy and the National Cancer Institute of the National Institutes of Health.

³ On this point, respondent referred in particular to declarations of these witnesses previously submitted to the federal district court in the Commission's Pharmtech injunction matter.

In compiling the Report, the Academy employed the same standard procedures used with respect to the other projects which it has undertaken. According to the Declaration of Mr. Smith, the Academy's Executive Officer, these procedures are as follows: A committee is convened by the Academy to conduct the study and prepare the report. The members of this committee are appointed by the Academy, and are selected from the ranks of some of the nation's most competent scientists and engineers in the particular field under scrutiny. These individuals serve on the project without compensation, other than for reimbursement of travel expenses. The committee thus formed then proceeds to review the relevant scientific literature, following which various drafts of a report are prepared for purposes of discussion. The committee deliberations involve a continuing review of data and revisions of drafts, until a consensus is reached and a final draft report is prepared. Thereafter, the final draft undergoes a rigorous internal review within the Academy until the completion of a final report and its delivery to the interested government agency.

The latter internal review process normally involves a certain give-and-take between the original study committee and an independent group of reviewers selected by the Academy. The review comments are furnished to the committee for consideration, and further deliberations and drafting may follow as circumstances require. Academy final reports (other than reports which are classified for reasons of national security or subject to export controls) are made public after delivery to the Government. However, drafts, reviews of reports, reviewer correspondence and similar internal materials are not released either to the Government or to the public at large.

I am informed that the records of the Academy's study in this case include committee correspondence, minutes of meetings, scientific reports and papers, drafts, and various documents relating to the review process. In accordance with the Academy's policy, none of these papers have been released. Only the Report is publicly available.

According to the Academy, its "confidential" policy regarding such materials is required for the performance of its essential functions. Were it not for the shielding of its deliberative and review process, participants in the Academy's studies would be inhibited in the candid exchange of views concerning often controversial scientific subjects. Such disclosures would have a chilling effect upon the conduct of vigorous internal debate and seriously impair the Academy's ability to produce reports of the best possible quality for the Government. Moreover, the revealing of unfinished or working drafts could result in the dissemination of incomplete or even misleading information.

The Academy contends that "the principle of confidential peer review in advance of publication is a quality-control

feature of the scientific profession and scientific research in the United States." Absent such a policy, according to the Academy's Mr. Smith, the recruitment of "volunteer" scientists to carry on the Academy's important work "may become seriously impaired."

Thus, a situation is presented in which the discovery interests of a litigant must be balanced against the important interests of a third party in maintaining confidentiality. In my view, I must here resolve this dispute in favor of the Academy, based upon the reasoning which follows:

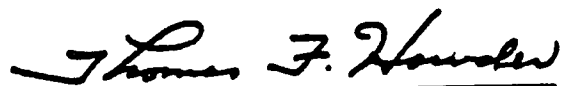
As earlier set forth, respondent's basic contention is that the requested materials are needed to address the question of how the Report should be interpreted. Respondent also argues that these underlying documents are needed for possible use in the cross-examination of certain individuals allegedly involved in the Report's preparation.

However, it has not been established at this point that the Report requires any such interpreting. In fact, complaint counsel have been contending to the contrary throughout the discovery process, viz., that the Report is unambiguous on its face, at least as to those portions which they intend to rely upon to prove the complaint's charges. And it is complaint counsel's further position that none of the witnesses they intend to summon will require cross-examination involving the materials and information sought to be discovered.

Thus, in the present posture of this proceeding, it is not known whether respondent's asserted needs are real or lacking in substance. This, it appears, will probably not become clear until the evidence and testimony are presented. Such being the case, the considerations raised by respondent must yield to the demonstrated needs of the Academy in maintaining its "confidentiality" policy.

The relief requested by the Academy is hereby granted.

So Ordered.



Thomas F. Howder
Administrative Law Judge

DATE: March 19, 1985