ORAL ARGUMENT NOT YET SCHEDULED

No. 06-5361

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VENETIAN CASINO RESORT, LLC,

Plaintiff-Appellant,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendant-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLANT AND IN SUPPORT OF REVERSAL

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August 14, 2007

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Amici curiae Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit this Certificate pursuant to Rule 28(a)(1).

A. Parties and *Amici*: All parties, intervenors and *amici* appearing before the district court and in this Court are listed in the Brief for Plaintiff-Appellant.

B. Rulings Under Review: References to the ruling at issue appear in the Brief for Plaintiff-Appellant.

C. Related Cases: References to related cases are contained in the Brief for Plaintiff-Appellant.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rules 26.1 and 29(c), *Amici Curiae* Equal Employment Advisory Council and Chamber of Commerce of the United States of America provide the following corporate disclosure statement:

1. The Equal Employment Advisory Council and Chamber of Commerce of the United States of America have no parent corporations and no subsidiary corporations.
2. No publicly held company owns 10% or more stock in the Equal Employment Advisory Council or Chamber of Commerce of the United States of America.

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GLOSSARY

ADA	Americans with Disabilities Act
ADEA	Age Discrimination in Employment Act
APA	Administrative Procedures Act
Chamber	Chamber of Commerce of the United States of America
EEAC	Equal Employment Advisory Council
EEOC	Equal Employment Opportunity Commission
EPA	Equal Pay Act
FOIA	Freedom of Information Act
Section 83	Section 83 of the EEOC Compliance Manual
Title VII	Title VII of the Civil Rights Act of 1964

The Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* subject to the Clerk's Order filed and docketed on January 30, 2007 of the representation of consent to a joint brief *amicus curiae*. The brief urges this Court to reverse the district court's judgment in favor of the defendant and dismissal of the case with prejudice, and thus supports the position of Plaintiff-Appellant before this Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry

sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's members and many of the Chamber's members are employers subject to the federal employment nondiscrimination laws and regulations, as well as other equal employment laws and regulations. As employers, and as potential respondents to EEOC charges, EEAC's and the Chamber's members have a significant interest in the issues presented in this case – whether the EEOC's procedures governing the disclosure of information from agency charge files are inconsistent with the Freedom of Information Act and other federal laws, in violation of the Administrative Procedures Act.

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision will have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of their experience in these matters, EEAC and the Chamber are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

In 1999, the Venetian Casino Resort (Venetian) conducted a "mass hiring" of more than 4,000 individuals to staff a new casino hotel in Las Vegas, Nevada. *Venetian Casino Resort, L.L.C. v. Equal Employment Opportunity Comm'n*, 409 F.3d 359, 361 (D.C. Cir. 2005). As a result of this hiring event, the Venetian received approximately eleven charges of employment discrimination filed with the U.S. Equal Employment Opportunity Commission (EEOC). *Id.* The charges alleged discrimination in hiring on the basis of race and color in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as well as on the basis of age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq*. Although the charges eventually settled, the agency continues its own ADEA investigation.[1] *Id.*

During the EEOC's investigations, the agency asked Venetian to produce documents that the company determined contained confidential and proprietary information. *Id.* Venetian provided some of the documents requested, but declined to hand over others. *Id.* The agency in turn issued an administrative subpoena for the records the company refused to provide. *Id.* Venetian filed a petition for the agency to revoke or modify the subpoena, citing concerns that the

[1] The EEOC has independent authority to investigate possible violations of the ADEA. 29 C.F.R. §§ 1626.4, 1626.13.

agency's rules governing the disclosure of information from investigation files would permit the agency to release its confidential information to the charging party and others without any advance notice to the company. *Id.*

When the EEOC rejected Venetian's petition, the company sued in federal court seeking a declaratory judgment that the agency's disclosure procedures run counter to a variety of federal laws, including the Freedom of Information Act (FOIA), 5 U.S.C. § 552; the Trade Secrets Act, 18 U.S.C. § 1905; the Copyright Act, 17 U.S.C. §§ 101 *et seq*., and the Administrative Procedures Act (APA), 5 U.S.C. §§ 551 *et seq*. *Venetian Casino Resort v. Equal Employment Opportunity Comm'n*, 360 F. Supp.2d 55, 57-58 (D.D.C. 2004). More specifically, Venetian contends that the provisions of Section 83 of the agency's Compliance Manual ("Section 83"), as well as other informal agency practices, provide a "back door" through which the EEOC can disclose to charging parties, their counsel and third parties confidential business information submitted by an employer during the course of an investigation without first providing notice to the employer and an opportunity to object, which otherwise would not be permissible under federal law. *Id.* The company also sought an order enjoining the EEOC from requiring the company to submit confidential information under this disclosure policy and from releasing to the charging party confidential information that it already had provided. *Id.*

The EEOC asked the district court to dismiss the company's suit on ripeness grounds, and the district court agreed. *Id.* at 59. This court reversed and remanded the case, however, instructing the district court to first determine what the EEOC's disclosure policy is and then to decide whether the EEOC's disclosure rules do in fact contravene federal law. *Venetian Casino Resort v. Equal Employment Opportunity Comm'n*, 409 F.3d 359, 367 (D.C. Cir. 2005).

On remand, the district court once again ruled in favor of the EEOC. *Venetian Casino Resort v. Equal Employment Opportunity Comm'n*, 453 F. Supp.2d 157, 168 (D.D.C. 2006). The court concluded that while Section 83 does allow the EEOC to disclose confidential business information without any predisclosure notice to the employer, those procedures were approved by the Supreme Court in *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981). *Venetian*, 453 F.Supp.2d at 162-63. The disclosure policy set forth in Section 83 "supports Title VII's scheme of enforcement," the trial court explained, which "contemplates that a charging party must be able to access information needed to assess the feasibility of litigation." *Id.* at 163. The court further concluded that the Trade Secrets Act, the Freedom of Information Act, Executive Order 12,600, and the Copyright Act did not apply to the case because none provided a legal basis for an employer to challenge the agency's disclosure rules. *Id.* at 164-166. Finally, the court concluded that the agency's disclosure rules did not warrant judicial

intervention under the Administrative Procedures Act because they were not "arbitrary, capricious, or otherwise not in accordance with law." *Id*. at 168.

Venetian filed this appeal.

SUMMARY OF ARGUMENT

This case presents serious questions about the basic fairness of procedures that allow an employer's confidential business information to be disclosed by the U.S. Equal Employment Opportunity Commission (EEOC) without the benefit of notice to the employer – notice that would afford an employer the opportunity to take appropriate actions to protect that information. The employer in this case has already responded to a number of the agency's information requests and has indicated a willingness to provide additional responses, but for the fact that the EEOC's informal disclosure practices do not comport with federal laws that operate to safeguard confidential information provided to the government by employers.

The EEOC discloses information from case files pursuant to the Freedom of Information Act (FOIA) and Section 83 of the EEOC's Compliance Manual (Section 83). Under the agency's FOIA regulations, the EEOC is required to provide an employer with predisclosure notice and an opportunity to object before disclosing confidential business information. Predisclosure notice is not required under Section 83 procedures, however, and the agency further concedes that it

routinely discloses confidential employer information from case files, including to third parties, as an "investigative technique" with no predisclosure notice.

The EEOC's practice of disclosing confidential business information in this way runs directly counter to FOIA, as well as a number of other federal laws that operate to help safeguard such information. Under the Administrative Procedures Act (APA), a reviewing court may overturn an agency action that is "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Congress could not have intended for agencies to circumvent FOIA and other federal protections simply by creating a separate, informal process to the contrary, and therefore the agency's actions are "not in accordance with law," as required by the APA.

The EEOC routinely requires companies to provide confidential business information and records during charge investigations, information that, if disclosed to the charging party or others without predisclosure notice, could result in irreparable competitive harm to the company. The agency should not be permitted to continue this practice, which will likely have a chilling effect on employers' willingness to cooperate with agency investigations and lead to increased litigation.

ARGUMENT

I. EEOC PROCEDURES RELATING TO THE DISCLOSURE OF INFORMATION FROM AGENCY INVESTIGATION FILES DEPRIVE EMPLOYERS OF IMPORTANT FEDERAL PROTECTIONS INTENDED TO SAFEGUARD CONFIDENTIAL BUSINESS INFORMATION IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT

The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, and the Equal Pay Act (EPA), 29 U.S.C. § 206(d). Where an individual suspects unlawful discrimination has occurred, he or she is first required to file a charge of discrimination with the EEOC, which the agency must then investigate and attempt to resolve the charge through "conference, conciliation and persuasion." *See e.g.*, 42 U.S.C. § 2000e-5(b); 29 U.S.C. § 626(d).

During these charge investigations, the EEOC routinely gathers a wide variety of data and records from companies, including in some cases confidential and proprietary business information.[2] As a general rule, EEOC officials will not disclose evidence contained in the agency's investigation files to the general

[2] The agency has statutory authority to examine and copy evidence in the employer's possession and may issue an administrative subpoena for evidence and documents that an employer refuses to provide. 42 U.S.C. § 2000e-8(a) and § 2000e-9.

public. Under agency procedures, charge information may only be released to a charging party upon request, provided a Notice of Right to Sue has been issued and the 90-day "right to sue" period has not expired. EEOC Compl. Man. § 83.5, Persons to Whom Information in Files May Be Disclosed (Oct. 1987); EEOC Compl. Man. § 83.4, Persons to Whom Information May Be Disclosed (May 1992); EEOC FOIA Reference Guide, Summary of Exemptions (2006)[3]. Charge-related information and documents also will be released to the employer, but only after the charging party has filed a lawsuit. *Id.*

The EEOC discloses information from agency files pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and Section 83 of the EEOC's Compliance Manual ("Section 83"). EEOC Compl. Man. § 83, Disclosure of Information in Open Title VII Case Files (Oct. 1987); EEOC Compl. Man. § 83, Disclosure of Information in Open Files (May 1992). The dispute in this case centers on whether the EEOC's Section 83 disclosure rules, as well as other informal agency practices, which permit the EEOC to disclose confidential business information submitted by an employer without prior notice of the disclosure or an opportunity to object, is inconsistent with other federal laws, including FOIA.

[3] *available at* http://www.eeoc.gov/foia/hb-11.html.

1. The Freedom Of Information Act And Other Federal Laws Limit An Agency's Ability To Disclose Confidential Business Information Without Notice To The Submitter

There are several federal laws in place today that regulate the extent to which the government can release confidential business information provided to agencies by private corporations. The Freedom of Information Act (FOIA), 5 U.S.C. § 552, passed by Congress in 1966 to promote openness in government, requires federal agencies to make their records available to the public upon request, subject to nine specific exceptions. 5 U.S.C. §§ 552(a)(3)(A), 552(b). If an exemption applies, the agency may at its discretion withhold the information from a FOIA requestor. *Id.*

Several of the nine exemptions operate to protect the confidential information provided to federal agencies by corporations. Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), allows agencies to exempt from disclosure trade secrets and commercial or financial information that is considered privileged or confidential, for example, and represents a straightforward Congressional judgment that the disclosure mandate of FOIA should not apply to confidential business information that has been obtained by the government but which customarily would not be released to the public. Likewise, FOIA's Exemption #6, 5 U.S.C. § 552(b)(6), covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy."

Exemption #3, 5 U.S.C. § 552(b)(3), covers records that are specifically exempted from disclosure by statute.

Moreover, whenever a FOIA request is received by an agency, Executive Order No. 12,600, 52 Fed. Reg. 23,781 (June 23, 1987), requires the agency to give the submitter pre-disclosure notice before handing over any confidential commercial information. *Id.* Under the Executive Order, all federal agencies subject to FOIA must establish procedures that allow a submitter to designate records as such if the submitter believes that disclosure could reasonably be expected to cause substantial competitive harm. *Id.* If the designation is made, the agency is required to notify the submitter if someone makes a FOIA request for those records. *Id.* The Executive Order also requires agencies to allow the submitter a reasonable time to file objections to disclosure and to give "careful consideration" to the submitter's grounds for objecting. *Id.* If an agency decides to disclose the records anyway, it must inform the company in writing why it is not honoring the company's objections. *Id.* Such a notice of intent to release must be provided with enough advance notice to allow the company time to file a lawsuit to block the disclosure. *Id.*

The EEOC has promulgated regulations implementing these FOIA disclosure notice rules. 29 C.F.R. § 1610.19(a)-(b), (d). Under the EEOC's FOIA regulations, employers are expected to "in good faith" designate the information in

advance as "confidential commercial information" – defined as information that, if disclosed, "could reasonably be expected to cause substantial competitive harm." 29 C.F.R. § 1610.19(a)(1)–(b)(3). Once predisclosure notification has been given, the agency will provide a minimum of five working days for the employer to respond with a "detailed statement of objections to disclosure." 29 C.F.R. § 1610.19(c). The regulations require the agency to "consider carefully" any objections and, as the case may be, provide a written statement briefly explaining "why the objections were not sustained" a minimum of three working days prior to disclosure, to permit the employer to seek a court injunction to prevent release of the records. 29 C.F.R. § 1610.19(e)(1)-(2).

In addition to FOIA, the Trade Secrets Act, 18 U.S.C. § 1905, prohibits a federal employee from releasing information that "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm partnership, corporation, or association." This Court ruled in *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1151 (D.C. Cir. 1987), that any information that is covered by FOIA Exemption #4 is also covered by the Trade Secrets Act. Some information provided to agencies by employers also might be subject to the Copyright Act, 17 U.S.C. § 103, the disclosure of

which arguably falls within the scope of one or more of the FOIA exemptions. *See Weisberg v. U.S. Dep't of Justice*, 631 F.2d 824 (D.C. Cir. 1980).

Accordingly, federal agencies, including the EEOC, are strictly prohibited from disclosing certain types of confidential business information that may have been submitted by a company. Even where disclosure of confidential business information may be permissible, agencies must provide notice to the company prior to disclosure that the information has been requested with an opportunity to object.

2. The EEOC Follows Separate, Informal Disclosure Procedures That Place No Restrictions On The Agency's Ability To Disclose Confidential Business Information Provided By Employers During An Investigation

Although some federal protections exist to safeguard a company's confidential business information when a FOIA request is made, the EEOC allows charging parties to bypass FOIA by requesting copies of their files pursuant to Section 83 of the EEOC's Compliance Manual – an instructional guide for investigators and other EEOC staff. EEOC Compl. Man. § 83, Disclosure of Information in Open Case Files (May 1992); EEOC Compl. Man. § 83, Disclosure of Information in Open Title VII Case Files (Oct. 1987). While Section 83 requires agency staff not to disclose certain confidential information relating to charging parties and witnesses, it does not require that confidential employer information, including trade secrets or copyrighted materials, similarly

be withheld.[4] Moreover, unlike FOIA, Section 83 does not provide notice to the employer before any confidential business information is disclosed or opportunity for the employer to object to disclosure.

While Section 83 does provide that a requestor must sign an "Agreement of Nondisclosure" stating that he or she will not to disclose the information "except in the normal course of a lawsuit," there is no apparent enforcement mechanism to ensure compliance with the agreement. *See EEOC v. Aon Consulting, Inc.*, 149 F. Supp.2d 601, 605 (S.D. Ind. 2001) ("There is no indication . . . that [Section 83 Nondisclosure Agreements] have effective enforcement mechanisms where a charging party violates the agreement"). Moreover, it is unclear whether the agency even consistently requires charging parties and their counsel to sign the agreement prior to disclosure. Donald R. Livingston, *EEOC Litigation and Charge Resolution* 89 (BNA 2005) ("All parties to the charge who seek

[4] Among other things, Section 83.6 instructs agency staff to remove information concerning the "identities of, and statements by, witnesses who have provided confidential statements" and the name of any individual on whose behalf a "third-party charge" has been filed when the individual specifically asked for his or her identity remain confidential. EEOC Compl. Man. § 83.6(a)-(b), Removal of Confidential Material from Files Before Disclosure (Oct. 1987). Section 83 also calls for the withholding of certain "sensitive medical information," including information relating to the charging party and other witnesses. EEOC Compl. Man. § 83.5(g)(1) (May 1992).

information under Section 83 of the *EEOC Compliance Manual* must execute a nondisclosure agreement, although field offices often overlook or do not enforce this requirement").

There are two published versions of Section 83 in existence today. The older 1987 version suggests Section 83 may be used to obtain information from virtually *all* charge investigation files. EEOC Compl. Man. § 83.1, Introduction (Oct. 1987). Under the 1987 procedures, for example, Title VII charging parties can request a charge file by making *either* a FOIA request or a Section 83 request. ADEA and EPA charging parties must request copies of records from "closed" investigative files pursuant to FOIA only, but can make a Section 83 request to "review" the file if their charge was still under active investigation. EEOC Compl. Man. § 83.1(a) (Oct. 1987). Additionally, the 1987 version permits agency staff to disclose information contained in open ADEA/EPA charge files on their own initiative to "the parties or other persons incident to the investigation (*e.g.*, to witnesses and third parties when necessary to aid the investigation)." *Id.*

The EEOC's Office of Field Programs apparently drafted a different version of Section 83 in 1992. Appendix to Briefs at 148 (Declaration of Nicholas M. Inzeo). This version was never voted on or otherwise approved by the EEOC Commissioners. *Id.* Nor has the agency's leadership ever rescinded the 1987 version. *Id.* The 1992 version does not permit ADEA/EPA charging parties to

review open case files and states that information contained in those files will be disclosed pursuant to FOIA and the Privacy Act System of Records. EEOC Compl. Man. § 83.1(a), Introduction (May 1992). The Privacy Act System of Records permits, as one of six "routine uses," disclosure of "pertinent information" from open case files to a "third party as may be appropriate or necessary to perform the Commission's functions" – with no predisclosure notice. EEOC Privacy Act of 1974; Publication of Systems of Records, 56 Fed. Reg. 10,889, 10,889-90 (Mar. 14, 1991).

Although it is unclear which procedures are actually in use, both versions permit the EEOC to disclose confidential employer information from Title VII and ADA charge files (with no predisclosure notice to the employer), and from ADEA/EPA charges as well depending on which version applies and the status of the agency's investigation. Moreover, the agency acknowledged below that EEOC investigators can and routinely do share confidential business information supplied by employers with charging parties and witnesses in all types of cases as an "investigative technique" for the purpose of "elicit[ing] more information" – with no predisclosure notice given to the employer. *Venetian Casino*, 409 F.3d at 362.

Accordingly, the EEOC's current disclosure procedures permit the agency to disclose confidential employer information and without any prior notice to the employer.

3. The EEOC's Current Policy Of Disclosing Confidential Commercial Information To The Charging Party And Others With No Predisclosure Notice To The Employer Is "Not In Accordance With Law"

The district court below clearly erred when it concluded that the agency's disclosure practices could not be challenged under the Administrative Procedures Act (APA), 5 U.S.C. § 702. In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), the Supreme Court ruled that while neither FOIA nor the Trade Secrets Act provide an independent basis for challenging an agency's disclosure of confidential employer information, the APA does. *Id.* at 292, 319. The APA provides for a suit by someone who is "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. In particular, a reviewing court may overturn an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Accordingly, the Supreme Court ruled in that case that the company had the right to sue a federal agency under the APA because disclosure of information that would violate the Trade Secrets Act would be "not in accordance with law." *Chrysler*, 441 U.S. at 318 (citation omitted).

It is undisputed that the EEOC's disclosure practices, including Section 83 of the agency's Compliance Manual, authorize agency staff to disclose to charging parties and others confidential business information provided to the agency by an employer and with no predisclosure notice or opportunity for the employer to object. As the EEOC openly acknowledges, "FOIA procedures do not apply to

section 83 disclosures" and, therefore, "[n]either version of section 83 requires EEOC field office staff to notify persons that have submitted information (confidential or otherwise) to EEOC during an investigation when a request for that information is received under section 83 . . . ." Appendix at 149. Moreover, the agency further concedes that investigators routinely share confidential information from charge files as an "investigative technique" – again, without notice to the employer or opportunity to object. *Venetian Casino,* 409 F.3d at 362. These practices run directly counter to the requirements of FOIA, Executive Order 12,600, the Trade Secrets Act and other laws that either prohibit outright the disclosure of such information or at least require the agency to first notify the employer that a disclosure will be made. The agency's practices therefore are, by definition, "not in accordance with law."

Indeed, through Section 83 and other informal means, the EEOC has essentially established a separate disclosure regime that bypasses FOIA and other Congressional mandates to accomplish what otherwise would not be permissible. Although the EEOC contends that its disclosure practices, including those outlined in Section 83, are not intended to "pre-empt, supersede, or contravene . . . confidentiality protections that may apply by operation of law," that is, in fact, exactly what the agency has done by establishing separate, informal disclosure

procedures that in no way correspond with its own FOIA regulations and other federal requirements. Appendix at 150.

Congress could not possibly have intended for federal agencies to circumvent FOIA and other federal protections simply by creating a separate, informal disclosure process to the contrary. Rather, an agency's disclosure practices must operate in harmony with FOIA and other federal requirements, which in some measure attempt to balance competing rights and interests – *e.g.,* an agency's need for information, an individual's right to access government records, and a company's legitimate expectation that commercially sensitive information will be withheld from public scrutiny.

Significantly, the Supreme Court's decision in *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981), never decided the question raised in this case. Although the company in that case initially advanced arguments similar to Venetian's – namely, that disclosure of certain confidential records under Section 83 violated FOIA, the APA, and the Trade Secrets Act – these arguments were never addressed by the lower court, and thus were not before the Supreme Court. *Id.* at 594 n.4 ("The complaint also alleged that the EEOC disclosure rules violate the Administrative Procedures Act, 5 U.S.C. §§ 551, 553, the Trade Secrets Act, 18 U.S.C. § 1905, and the Freedom of Information Act, 5 U.S.C. § 552 . . . . Neither the District Court nor the Court of Appeals addressed any of these

allegations, and the issues they raise are not now before us"). Accordingly, contrary to the district court's ruling, *Associated Dry Goods* does not reflect the High Court's wholesale endorsement of Section 83 or any of the agency's other informal disclosure practices. Rather, the *Associated Dry Goods* decision merely stands for the broader proposition that Title VII generally does not prohibit the EEOC from disclosing information to charging parties from their own charge files, while leaving for another day the question of whether other laws might require the agency to withhold from the charging party confidential commercial information belonging to the employer.

II. COMPANIES STAND TO SUFFER IRREPARABLE COMPETITIVE HARM WHEN DENIED THE OPPORTUNITY TO SAFEGUARD CONFIDENTIAL BUSINESS RECORDS SUBMITTED TO THE EEOC DURING INVESTIGATIONS

Because the information a company provides to the EEOC ultimately may fall into the hands of a charging party (often a former employee with an axe to grind), most companies understandably are concerned about protecting any confidential business information provided to the agency over the course of an investigation. Accordingly, the fact that EEOC procedures allow the agency to circumvent the few federal protections available to employers wanting to safeguard such information raises serious concerns for companies that could suffer irreparable competitive harm as a result.

EEOC investigators *routinely* ask employers to hand over confidential and sometimes highly sensitive business information and records during charge investigations. *See EEOC v. Technocrest Sys., Inc*., 448 F.3d 1035, 1037 (8th Cir. 2006) (requesting "the complete contents of all personnel files and records" for all technical employees of the company); *EEOC v. Ford Motor Co.*, 26 F.3d 44 (6th Cir. 1994) (seeking detailed employment data for all workers employed at respondent's facility for a period of twelve years, including job titles, starting grade level and salary, assignments and promotions); *Motorola, Inc. v. McLain*, 484 F.2d 1339, 1341-42 (7th Cir. 1973) (demanding most recent federal EEO-1 report showing all of the company's employees, categorized by race, ethnicity, sex, and occupational group); *EEOC v. City of Milwaukee*, 919 F. Supp. 1247 (E.D. Wis. 1996) (seeking medical files of third parties); *EEOC v. C&P Tel. Co*., 813 F. Supp. 874 (D.D.C. 1993) (subpoena enforcement action for copies of employment tests used to screen job applicants, including validation studies and related research). Indeed, federal courts frequently give the agency fairly broad discretion to obtain such information from employers. *See, e.g., EEOC v. Tempel Steel Co.*, 814 F.2d 482, 485 (7th Cir. 1987) ("[t]he EEOC's authority to investigate under Title VII is quite broad").

Depending on the case, the EEOC might demand that an employer provide detailed – and sometimes highly-sensitive – information relating to recruitment,

hiring and promotional practices, workplace policy and procedure, organizational structure and succession planning, compensation and benefits, as well as many other employment-related practices that in one way or another shed light on the company's structure and operations. EEOC Compl. Man. § 26.9, Selection and Analysis of Evidence, Records Maintained by Employers (June 2001). Moreover, the agency can (and frequently does) require unrestricted access to computerized payroll, accounting, and human resource data relating to specific individuals, entire business units and work facilities, and sometimes even on a company-wide basis. EEOC Compl. Man. § 26.3, Selection and Analysis of Evidence, Selection of Records (June 2001).

Once this information is given to the EEOC, it becomes a part of the investigative file and subject to disclosure under the agency's disclosure rules, and if given to competitor, could provide a great deal of insight as to the confidential business operations and plans of a company. By using data concerning the size and character of the company's workforce in conjunction with Bureau of Labor Statistics compilations of average labor rates for different job classifications in a particular locality, for example, it is possible to calculate a company's expenditure on salaries within particular production facilities. Derivatively, such information also reveals the types and amounts of expenditures made on labor-saving machinery. By taking all of this information and combining it with the costs of

materials, which are fairly standard throughout an industry, a company's cost structure and profit margin can be determined. In addition, future labor commitments can be determined from this data by studying where the on-the-job trainees have been concentrated over a period of years. Indeed, even seemingly innocuous information about a company's recruitment activities, progression plans, and compensation systems can be used by a competitor to gain advantages in the recruitment of highly skilled workers.

While not every charging party or witness who obtains confidential employer information through the EEOC's current disclosure regime will have the inclination – or even the wherewithal – to exploit it by providing it to a competitor, an employer that is deprived of notice of the disclosure will have no opportunity to assess that risk and take protective measures where appropriate. Moreover, a person need not go so far as to share the information with a competitor to harm a company. A charging party or witness who simply shares the employer's proprietary information with co-workers or a labor union could competitively disadvantage a company and seriously disrupt operations.

III. EEOC'S DISCLOSURE PRACTICES WILL HAVE A CHILLING EFFECT ON EMPLOYERS' WILLINGNESS TO COOPERATE WITH AGENCY INVESTIGATIONS, RESULTING IN CHARGE PROCESSING DELAYS AND INCREASED LITIGATION

This lawsuit has brought to the fore an aspect of the agency's practices that until now has not been widely understood. Unfortunately, if allowed to continue, the EEOC's current disclosure practices will likely have a chilling effect on employers' willingness to cooperate with agency investigations, as they understandably will be reluctant to provide thorough and comprehensive responses to charge allegations if the agency will not guarantee the basic protections afforded by FOIA and other federal laws.

The result will be longer investigations and increased litigation, as companies wanting to protect trade secrets and other sensitive business information will have no choice but to force the agency to go through the time-consuming process of compelling the production of the information it seeks. Indeed, the odds of increased litigation seem particularly high in light of the agency's recent focus on "systemic" discrimination, which more often than not requires the extensive production of competitively sensitive data surrounding such issues as hiring, compensation, promotion and other employment practices.[5]

[5] In April of last year, the EEOC's Commissioners voted to approve a plan that would make systemic discrimination a "top priority" at the agency. EEOC Systemic Task Force Report 2, 5 (Mar. 2006), *available at* http://www.eeoc.gov/abouteeoc/task_reports/systemic.html.

Lengthier (and more contentious) investigations, and an increase in litigation, will come at tremendous expense to both employers and the agency, and undoubtedly will place additional burdens on the courts that will increasingly be called upon to resolve production disputes.

CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully urge the Court to reverse the district court's order.

Respectfully submitted,

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August 14, 2007

CERTIFICATE OF COMPLIANCE

This is to certify that the Brief *Amici Curiae* of the Equal Employment Advisory Council and Chamber of Commerce of the United States of America in Support of Plaintiff-Appellant and in Support of Reversal complies with Fed. R. App. P. 32(a)(7)(B). The brief is written in 14 point Times New Roman type and has 5,419 words, as determined by the word processing program Microsoft Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the Brief *Amici Curiae* of the Equal Employment Advisory Council and Chamber of Commerce of the United States of America in Support of Plaintiff-Appellant and in Support of Reversal were served on August 14, 2007 to each of the following by placing the copies in the United States mail, first class postage prepaid, addressed as follows:

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