

Sickle,²⁸⁹ Vail,²⁹⁰ Stanley,²⁹¹ [299]Roberts,²⁹² and Dealy²⁹³ does not set forth facts which show any violation. [300]

APPENDIX B

Abbreviations used throughout this Initial Decision are as follows:

- CX - Complaint counsel's exhibit
- RX - Respondent's exhibit
- Tr. - Transcript page
- CB - Complaint counsel's brief
- CPF - Complaint counsel's proposed finding (reply findings of fact)
- CRB - Complaint counsel's reply brief
- RB - Respondent's brief
- RPF - Respondent's proposed finding
- RRB - Respondent's reply brief

OPINION OF THE COMMISSION

BY PERTSCHUK, *Commissioner*:

I. BACKGROUND

A. The Law

Congress enacted the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681, *et seq.* (1976), in order to ensure that "consumer

²⁸⁹ In the case of Mr. Van Sickle, the record shows that a notice was sent to the insurance company correcting the item Mr. Van Sickle disputed (CX 305, 306; Tr. 3824-25). There is no evidence in the record to support complaint counsel's speculation that the recipient insurance company regarded this correction notice as self-serving (CPF 1061; see also p. 266, n. 254).

²⁹⁰ The record shows that a reinvestigation was conducted after Mr. Vail disputed his report and that the results were transmitted to the requesting company with corrections (CX 292, 293, 294A-B, 295, 297A-B, 299A-B).

²⁹¹ The record evidence surrounding Mr. Stanley's contact with Retail does not support complaint counsel's position that reinvestigation in this instance was not conducted within a reasonable time (CCB, p. 70; CPF 1006). Mr. Stanley received disclosure on either January 24 or 25, 1972, (RX 495D, G). Retail notified the recipient company of its intention to reinvestigate on January 28, 1972 (RX 495F). On January 31, 1972, the reinvestigation was ordered (RX 495B; CX 271C). This brief delay was explained in a memorandum to the Home Office as being due to the branch office's attempt to locate the report on Mr. Stanley for homeowner's insurance which Mr. Stanley stated was cancelled at the same time as his automobile insurance; it was the automobile report which he disputed (RX 495B). This explanation, on its face, appears reasonable, and no finding of violation is made.

²⁹² While consumer Roberts' testimony was presented under these paragraphs, his own testimony indicates that, after he disputed information disclosed to him, respondent conducted a reinvestigation which was sent to the insurance company involved (Tr. 3375). In addition, the record contains documentary evidence showing a reinvestigation (CX 1464A-C).

²⁹³ The testimony of consumer Dealy does not support a finding of violation. He testified that, while he disputed information in his file and he was told there would be a reinvestigation, he never was contacted by Retail regarding the results (Tr. 3402). A reinvestigation was conducted (CX 343 O-Q). Complaint counsel's contention that there is a duty to contact the consumer for disclosure of reinvestigation results (Tr. 3403) is rejected.

reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information * * * ." FCRA, 602(b).

To protect the confidentiality of information concerning consumers, the statute permits "consumer reporting agencies"¹ to [2]disclose "consumer reports" only to those who have a legitimate business need for the information.² Because Congress recognized [3]that some inaccuracy was inevitable, *see* 115 *Cong. Rec.* 2411 (1969) (remarks of Sen. Proxmire), it chose not to render consumer reporting agencies strictly liable for inaccuracies in a report. Instead, it (1) required the use of "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom [a] report relates," FCRA, Section 607(b) (emphasis added); (2) prohibited, as a general rule, the communication of obsolete adverse information, that is, most adverse information reported after seven years, FCRA, Section 605; (3) required the updating of information obtained from an investigative consumer report³ before it could be included in a

¹ The Act focuses on information contained in a "consumer report," that is, "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" and "which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family or household purposes, or (2) employment purposes, or (3) other purposes authorized under Section 604." [FCRA, 603(d)] Section 603(d) contains several exclusions from the definition, including reports "containing information solely as to transactions or experiences between the consumer and the person making the report * * *."

A "consumer reporting agency" is, in turn, defined as a "person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in * * * the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." [FCRA, Section 603(f)] The permissible purposes, set forth in Section 604, are quoted in note 2 *infra*.

² Section 604 of the FCRA provides as follows:

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

- (1) In response to the order of a court having jurisdiction to issue such an order.
- (2) In accordance with the written instructions of the consumer to whom it relates.
- (3) To a person which it has reason to believe —

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

³ An "investigative consumer report" is a

consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any

(Continued)

subsequent consumer report, FCRA, Section 614; and (4) imposed restrictions on the use of public record information. FCRA, Section 613.

Congress also imposed a variety of procedural requirements designed to enable consumers to identify and correct inaccurate information. For example, the users of consumer reports must inform the consumer of the name and address of the consumer reporting agency responsible for preparing a consumer report that was used to deny credit, insurance, or employment or to increase the charge for credit or insurance. FCRA, Section 615(a). Also, the statute requires consumer reporting agencies upon request (and without regard to whether a user of the file has taken adverse action against the consumer) to inform him or her "clearly and accurately" of the "nature and substance" of information in its files on the consumer at the time of the request, the [4]sources of the information,⁴ and, with certain limitations, the identity of the recipients of any consumer report on the consumer. FCRA, Sections 609, 610.

If the consumer disputes the completeness or accuracy of any item of information contained in his or her file, the reporting agency must "within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute * * * is frivolous or irrelevant." If the information is found to be inaccurate or can no longer be verified, the agency must promptly delete the information. FCRA, Section 611(a). In case the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute, FCRA, Section 611(b), and, unless there are reasonable grounds to believe that the statement is "frivolous or irrelevant," the reporting agency, in any subsequent consumer report containing the information in question, must clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate summary. FCRA, Section 611(c). The statute directs the reporting agency, following deletion of information found to be inaccurate or unverified, or the addition of any notations as to disputed information, to notify previous recipients of the information designated by the consumer that the information has been deleted or to send them the consumer's version of the dispute. FCRA, Section 611(d).

Administrative enforcement of the FCRA is assigned to the

such items of information.

FCRA, Section 609(e).

⁴ Except in the course of discovery in an action brought under the FCRA, the consumer reporting agency need not disclose the sources of information acquired solely for use in preparing an investigative consumer report.

Commission, except to the extent that enforcement is specifically committed to other government agencies under Section 621(b). For the purposes of the Commission's exercise of its enforcement responsibilities under the FCRA, a violation of any requirement or prohibition imposed by the statute constitutes an unfair or deceptive act or practice in violation of Section 5 of the FTC Act, 15 U.S.C. 45 (1976). FCRA, Section 621(a).

B. The Respondent

Equifax Inc.⁵ is one of the nation's largest consumer reporting agencies.⁶ Directly or through its subsidiaries, among [5]other things, it supplies financial and credit reports for use in evaluating the financial reputation and payment history of individuals who seek credit; sells personnel selection reports used to evaluate applicants for employment; supplies insurance companies with information used to determine the desirability of applicants as risks for insurance; and prepares information used to assess claims made against insurers.

Since April 1, 1977, consumer reports, including personnel reports and reports sold to insurance companies for underwriting purposes and claim investigations, have been the responsibility of Equifax Services, Inc., a wholly-owned subsidiary. These reports are prepared in Equifax Services' 219 branch offices and 1000⁷ "suboffices." As of May 1974, respondent employed approximately 4600 salaried field representatives to perform the investigative work underlying the reports. (ID 75, 89)⁸

II. COMPLAINT AND INITIAL DECISION

The complaint in this case charged Equifax Inc. with a variety of

⁵ Respondent was known as Retail Credit Company when the complaint in this case issued. It was renamed Equifax Inc. effective January 1, 1976.

⁶ Some of respondent's activities are not those of a "consumer reporting agency" as defined by Section 603(f) of the FCRA.

⁷ These numbers of offices are accurate as of April 1976.

⁸ The following abbreviations will be used in this opinion:

ID	-	Initial decision finding no.
ID p.	-	Initial decision page no.
Tr.	-	Transcript page no.
CX	-	Complaint counsel's exhibit no.
RX	-	Respondent's exhibit no.
RAB	-	Respondent's appeal brief.
CAB	-	Complaint counsel's appeal brief.
R. Ans.	-	Respondent's answering brief.
C. Ans.	-	Complaint counsel's answering brief.
RRB	-	Respondent's reply brief.
CRB	-	Complaint counsel's reply brief.
RPF	-	Respondent's proposed finding no.

violations of the Fair Credit Reporting Act and Section 5 of the Federal Trade Commission Act. Violations of the FCRA alleged in the complaint include furnishing information about consumers to persons respondent has no reason to believe intend to use the information for one of the permissible purposes set out in the statute; reporting the existence of obsolete, adverse information; and failing to disclose to consumers, upon request, the nature and substance of information in its files. The complaint also alleged that respondent employs certain procedures which do not assure the maximum possible accuracy of information concerning individuals about whom its reports relate, including a "salary/production [6] system" which "requires or compels" its personnel to prepare an unreasonable number of reports, and quotas which "require or compel" its personnel to prepare a certain proportion of reports containing adverse or derogatory information.

The complaint also charged several violations of Section 5, including misrepresentations to consumers by respondent's investigative personnel that they are agents or employees of the companies to which the consumers have applied for benefits; representations to its customers (those who purchase its reports) that information was gathered in in-person interviews in cases when, in fact, the interviews were conducted by telephone; and employing authorization forms for the release of medical information which misrepresent that the information is being sought for the exclusive use of insurance companies. Finally, the complaint alleged that respondent's investigators have misrepresented to consumers the purposes of those investigations which are designed to evaluate claims for loss or injury under an insurance policy.

After a lengthy trial, Administrative Law Judge ("ALJ") Theodor P. von Brand entered a carefully documented and well-reasoned initial decision sustaining most of the complaint allegations. He found, however, that several were not supported by the record and that two of the alleged violations of Section 5 were immunized by the McCarran-Ferguson Act, 15 U.S.C. 1011, *et seq.* (1976), as the "business of insurance." The case is now before the Commission on cross-appeals filed by complaint counsel and respondent from certain of the ALJ's findings and also from his proposed order.

III. FAIR CREDIT REPORTING ACT CHARGES

A. Reasonable Procedures to Assure Maximum Possible Accuracy

In enacting the Fair Credit Reporting Act, Congress' primary

concern was the dissemination of reports containing inaccurate adverse information⁹ about consumers. The Senate report declared that “[t]he purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a credit report.” S. Rep. No. 91-517, 91st Cong., 1st Sess. 1 (1969). Senator Proxmire, upon introducing [7]the Senate bill, stated why he was concerned about even small amounts of inaccurate information in credit reports:

Perhaps the most serious problem in the credit reporting industry is the problem of inaccurate or misleading information. There have been no definitive studies made of just how accurate is the information in the files of credit reporting agencies. But even if it is 99 percent accurate—and I doubt it is that good—the 1 percent inaccuracy represents over a million people. While the credit industry might be satisfied with a 1-percent error, this is small comfort to the 1 million citizens whose reputations are unjustly maligned.

115 *Cong. Rec.* 2411 (1969).

Similarly, Representative Zablocki, one of the authors of the House bill, expressed his concern about the impact on individuals:

[W]hen we consider the fact that each time there is an error by an agency, an individual suffers not only embarrassment and inconvenience but financial loss and possibly even the loss of his job, his insurance, and even his mortgage, then we have put the danger of incorrect reports in proper perspective.

Id. at 2517.

Congress, as noted previously, imposed on reporting agencies not strict liability, but an affirmative duty to take reasonable steps to assure that the information in a consumer report is correct. Section 607(b) provides that “[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”

While the legislative history and the statute itself shed little light on the meaning of the words “reasonable procedures to assure maximum possible accuracy,” it is clear that Congress intended to mandate something more than the use of some care to avoid inaccurate reporting, and something less than a duty to achieve absolute accuracy or even “maximum possible accuracy” in every report. We construe Section 607(b) to require reporting agencies to do whatever is reasonable under the circumstances to minimize the chances that consumers will be harmed by inaccurate reporting. If

⁹ “Adverse information,” as used in this opinion and in the order, means information which may have, or may reasonably be expected to have, an unfavorable bearing on a consumer's eligibility or qualification for credit, insurance, employment, or other benefit, including information which may result, or which may be reasonably expected to result, in a denial of or increased costs for such benefits. (See RPF 1(h).)

an agency employs a procedure which does not offer the best assurance of producing the most accurate reports, it ought to have a strong justification for doing so. [8]

With some qualifications, we uphold the judge's findings that respondent has failed to meet this duty.¹⁰

1. Pressures To Develop Adverse Information

The complaint alleged that respondent has imposed quotas which "require or compel" its investigative personnel to prepare a "certain proportion" of reports containing adverse information. According to the complaint, these alleged quotas "have the tendency and capacity to promote incomplete or inaccurate reports." Because of Congress' concern about the serious damage which the misreporting of adverse information can inflict on consumers, we should be skeptical of any procedure which may induce employees to falsify, unduly emphasize, or exaggerate adverse information.

While the complaint implicitly asserted that quotas for the production of adverse information are inherently incompatible with the rigorous standard prescribed by Section 607(b), the ALJ found unreasonable only the particular system used by respondent. Respondent appeals from Judge von Brand's conclusion that its system was not reasonable, and complaint counsel appeal from the judge's failure to decide that such quotas are inherently unlawful.

The parties agree that respondent has conducted "quality audits" of the reports prepared by its branch offices and that these audits have included measurements of each office's production of "declinable" information (adverse information which might cause an insurance company to decline an underwriting application or to fail to renew an existing policy) and "protective" information (adverse information which might cause an insurer to charge a higher premium). (ID 281-82, 294-95; RPF 754(a), (b))¹¹ In 1975, respondent altered the audit procedure so as to obtain regional rather than individual office results and, the following year, it stopped auditing protective and declinable information. (ID 297)

Before these changes were implemented, however, branch offices were ranked into upper, middle and lower third positions according [9]to how their current performances in producing protective and declinable information compared with those of all other branch offices during the preceding year. (ID 305) This ranking created

¹⁰ We agree with respondent that complaint counsel had the burden of proving their case by a preponderance of the evidence. See, e.g., *Leonard F. Porter, Inc.*, 88 F.T.C. 546, 627 (1976). Respondent has acknowledged that the ALJ understood complaint counsel's evidence was to be tested by this standard. (Transcript of Oral Argument 16)

¹¹ Besides measuring protective or declinable information, auditors would attempt to determine whether the reports under review satisfied respondent's standards for completeness and for clerical accuracy.

pressure on respondent's employees. The judge found that "[t]here was considerable rivalry among respondent's offices, and everyone wanted to be at the top of the performance category in terms of all phases of branch office performance measured by quality audits, including production of declinable information," although "[s]ometimes a Regional Vice President was satisfied with performance in the middle third." (ID 311 & n.101)

The ALJ determined that, in the quality audits, too few reports were sampled to permit a valid survey of the performance of the individual branch offices (ID 335-36; ID p. 239),¹² and respondent does not challenge that finding. Nor does respondent question the finding that the same percentage of adverse information could not be expected from each office "because of differing geographic as well as economic and social factors." (ID 332)

Respondent does appeal, however, from the ALJ's finding that the quality audits and the subsequent rankings of offices impliedly set quotas for the production of unfavorable information. (ID 343) Respondent describes the audits simply as a training tool designed to improve the quality of its reports and asserts that it did not impose sanctions upon field representatives or "significant" sanctions upon branch office managers who failed to develop adverse information. (RAB 61-62)¹³

We need not decide whether, as the ALJ found, the pressures created by respondent's quality audits may properly be characterized as "quotas," implicit or explicit.¹⁴ The quality audits clearly resulted in the setting of objectives which field representatives [10]were expected to meet in order to assure that their offices would score well in the audits. The audits placed a premium on the production of adverse information and induced employees to prepare reports which contained inaccurate adverse information.

Contrary to respondent's contentions, the record clearly shows that respondent used the audit results for purposes other than simply identifying candidates for additional training. The amount of bonus money received by a branch office manager was based in part on audit performance,¹⁵ and the performance of the field representa-

¹² Some of respondent's own managers, including regional vice presidents, expressed doubts that the audit data were necessarily representative. (ID 331)

¹³ Related to this assertion, the judge found that "[t]he record does not demonstrate an overall pattern of overt sanctions such as firings or the withholding of salary increases or promotions as penalties for the failure to achieve specific levels of protective/declinable information." (ID p. 238)

¹⁴ Respondent argues that the audit system could not impliedly have set a quota because the ALJ did not, and could not, state what the quotas are. The record, however, is replete with references to specific objectives which were communicated to respondent's employees. (E.g., ID 319; Tr. 1761-62)

¹⁵ Respondent asserts that

it is true that performance on home office audits was one factor taken into account in determining a

(Continued)

tive in the quality audits was "one factor among several" considered by the branch managers when they made their salary recommendations. (ID 312-13)

The significance of the quality audits to respondent's managers is indicated by evidence that they took steps to pressure employees to produce enough adverse information to permit their offices to score well in the audits. The manager of one office informed his field representatives that " * * * until such time as each individual met the declinable objective [for two types of reports] * * * there would be no salary increases for any [11]members of the unit." (ID 319(c))¹⁶ Investigative personnel were made aware that they were expected to obtain the specified amounts of protective and declinable information. (*E.g.*, Tr. 1761-62, 1845;¹⁷ ID 319, ID p. 239; see RPF 770.) A supervisor in another of respondent's branch offices was placed on probation because of management's judgment that his unit's production of declinable information was too low. (ID 319(h); RX 446B)

Respondent's higher level management brought pressure to bear on lower level management, usually branch managers, to achieve high audit scores (ID 299, 318),¹⁸ and branch managers, [12]in turn,

manager's bonus (ID at 238), but it was a minor factor that might or might not affect a given bonus (RPF 407-13), and some managers either were not even aware that it was taken into account or considered it an insignificant factor. (RPF [sic] 774c)

RAB 61 n.56. While performance on the quality audits was just one of several factors, we cannot find that it was sufficiently "minor" that it would not induce a manager to attempt to score well on the audits. In any case, the combination of incentives (such as the managers' bonus) and disincentives clearly induced many employees to take the quality audits seriously, and to conclude that they were expected to produce at least the specified amount of protective and declinable information.

Nor can it be very helpful to respondent's case that "some managers either were not even aware that it [performance on home office audits] was taken into account or considered it an insignificant factor." (RAB 61 n.56) (emphasis added)

¹⁶ Contrary to respondent (R. Ans. 54), we believe the ALJ properly relied on the memorandum (CX 1283A) cited in the finding despite complaint counsel's failure to call its author as a witness. Because the document speaks for itself, it was not complaint counsel's burden to proffer testimony as to its meaning.

¹⁷ Even though respondent called a number of current and former employees who testified that they were unaware of pressures to produce adverse information, the ALJ was entitled to find that the pressure existed. That not all employees may have been aware of, or affected by, the pressures is not inconsistent with a finding that other employees were pressured to produce the requisite amount of adverse information. Indeed, the documentary evidence cited by the ALJ requires such a finding. (ID 319)

The ALJ found the testimony of these witnesses, and that of most of the other former employees called by complaint counsel, credible as to the shortcuts they took to meet their production quotas. (ID pp. 287-88) We find no basis to accord their testimony less weight on the issues of whether pressures were imposed on them to produce adverse information and the effects of any such pressures on the manner in which they prepared their reports.

We have been presented no persuasive reasons by either complaint counsel or respondent to upset the careful credibility determinations made by the ALJ as to the various witnesses called in this case.

¹⁸ For example, one Regional Vice President told his managers:

All of us naturally would like to be furnishing customers with a service that ranks above other offices and other regions. All of us would like to be in the top third as we measure an office and region.

CX 1127A.

Another Regional Vice President expressed his dissatisfaction with the performance of one of the branches in his territory:

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transmitted that pressure to their field representatives. A rivalry developed among branch offices and among regions to outdo each other in the audits. (ID 311)

In light of these findings, we are not troubled by the absence of an overall pattern of overt sanctions applied to employees who produced "unsatisfactory" amounts of adverse information. Incentives, like sanctions, are designed to influence behavior, and the incentives employed by respondent, together with the more subtle sanctions, impressed upon many field representatives and their supervisors the importance of ranking high in the quality audits.

The ALJ found that the audit procedure had the potential "to adversely influence report writing * * * ." (ID p. 239) The record supports this conclusion. For example, the record includes evidence of the efforts of one manager to teach field representatives to phrase adverse information in a forceful manner. A memorandum written by this branch manager to one of his suboffices urging the omission of qualifying phrases such as "it is believed" and "sources believe" (CX 1565A) was designed to strengthen the impact of the adverse information which was discovered, thus increasing the branch's production of declinable information. (ID 329(b))¹⁹ The goal, according to the manager [13] of the Albuquerque branch office, was to "put the decline across," that is, to transform what would otherwise merely be "protective" information into "declinable" information. (ID 329(a))²⁰ We agree with the ALJ that when the goal is "maximum possible accuracy," it is not reasonable to discourage the qualification of adverse information the certainty of which is in doubt, and that respondent's quality audits had this impermissible effect.

Additionally, the evidence shows that some management personnel urged lower level managers and field representatives not to

*I know you and your people are going to be disappointed with the Declinable of 5.4% in the second round analysis * * * , but I also know that the personnel in Albuquerque will immediately set about to make sure the next round analysis will reflect only upper third rankings in all categories!*

CX 772 (emphasis added).

¹⁹ Respondent contends that the point of the memorandum was not to eliminate qualifying information from reports when that qualifying information was needed to make the report accurate (RAB 64-65), but was, instead, simply a product of the manager's view that "if a source stated to a field representative that he was not certain that an individual was involved in an accident, but that he believed he was, that would not be a satisfactory basis for submitting the report." (RAB 64) We reject respondent's construction of the document. The memorandum, while urging elimination of these qualifying phrases, says nothing about omitting from reports information about which the source is uncertain. Moreover, although this communication states that these qualifying phrases "tend to disturb the confidence of the underwriter in our report," a concern which could well be unrelated to an interest in ranking high in an audit, a subsequent memorandum to the Regional Vice President, quoted in ID 329(a), supports the ALJ's inference that the suggested omission of the phrases was designed to increase the office's production of declinable information.

We are, therefore, not persuaded by the testimony that these instructions were simply part of an effort "to provide as concise and accurate [a] report as we could, and our effort was to eliminate unnecessary words and unnecessary phrases." (Tr. 11819)

²⁰ The ALJ properly was unpersuaded by the explanation offered by the author. (Tr. 11823-29)

report information which would tend to negate derogatory information discovered during the course of an investigation. A Regional Vice President, for the sake of improved audit performance, wrote to a branch office manager that “[o]ne of the biggest problems” contributing to the office’s placement in the lower third of all offices in one of the audits

was that when your people would develop declinable information it was worded in such a way that its effectiveness was decreased. These were usually such comments as:] [“]this is the only known instance known instance of driving while intoxicated[”] or that the subject had stopped drinking completely three months ago and was now reformed.

ID 330. [14]

A former field representative testified that, to reach his prescribed level of declinable information, he would attempt to make it appear that an “excessive” drinker drank “a little more than he actually did.” Where sources could not report how often the person had been seen drinking, the field representative would fabricate a number. (Tr. 1782)²¹

Despite this evidence, respondent complains that the record does not include any reports in which adverse information was falsified. (RAB 59) However, in view of the testimony and the [15]written instructions cited above, we do not find this shortcoming fatal. The record demonstrates that field representatives, in their effort to meet the objectives inspired by the quality audits, have been instructed, in effect, to misreport adverse information. We recognize that proof that a challenged procedure has consistently yielded reports free of inaccurate adverse information would shake a claim that a procedure is unreasonable. Similarly, proof that its use has resulted in inaccurate reporting would bolster a claim that it is not a “reasonable procedure to assure maximum possible accuracy.” Cf.

²¹ With respect to the credibility of this witness, *see* note 17 *supra*. The testimony of the former employee’s office manager, Mr. Yox, cited by respondent (Tr. 8491-93; RPF 775(c)(1)), does not refute Mr. Crepeau’s testimony quoted in the text that he was induced to exaggerate information. Mr. Yox disagreed with Mr. Crepeau’s testimony that the former field representative had once rewritten a report after an earlier version had been returned to him with instructions that it be worded more strongly. (Tr. 1783, 8491-92) Mr. Crepeau, however, did not testify that the practice mentioned in the text was induced by these purported instructions.

Nor is there a direct conflict between Mr. Crepeau’s testimony that instructions he received from his manager to “pick up on [his] declines * * * and protectives” affected how he wrote his reports (Tr. 1762) and the testimony of his manager that he did not “expect” Mr. Crepeau to produce a “specified percentage” of declinable and protective information. (Tr. 8490) The former manager testified that he informed his field representatives of the results of the quality audits (Tr. 8490) and Mr. Crepeau may well have inferred from these communications that he was expected to produce more adverse information, whether or not his manager intended to communicate such an expectation.

As noted by respondent, numerous current and former employees testified that the system did not affect the way in which they prepared and wrote their reports. Indeed, some of complaint counsel’s witnesses so testified. However, we do not find fault with respondent’s procedure because it caused widespread distortion of adverse information. Our conclusion that it did not meet the test set by Section 607(b) is based on the incentives it created for those employees who were either unable or unwilling to make the effort necessary to reach the objective without exaggerating or distorting the information uncovered by their investigations.

Bristol-Myers Co., 85 F.T.C. 688, 743 n.9, 745 (1975); *Coca-Cola Co.*, 83 F.T.C. 746, 809 (1973). However, in view of the difficulties of locating reports containing inaccurate adverse information, regardless of whether such reports exist, and of proving the causes of the inaccurate reporting, we do not believe that the record need contain actual inaccurate reports to sustain a ruling that respondent's procedures were not reasonably designed to assure maximum possible accuracy and conclude that the procedure was inconsistent with Section 607(b).

Indeed, as we have already observed, Section 607(b), rather than prohibiting inaccurate reporting, imposes upon reporting agencies an affirmative obligation to follow "reasonable procedures to assure maximum possible accuracy." It is the failure to follow reasonable procedures, and not the production of inaccurate reports, which violates Section 607(b). We are aware of nothing in the legislative history or the text of the statute which supports respondent's assertion that a reporting agency may not be liable under Section 607(b) unless a challenged procedure is shown already to have resulted in some inaccurate reporting.²²

Respondent correctly observes, however, that several courts have declined to consider claims that reporting agency procedures failed to meet the standard established by Section 607(b) absent a showing that an inaccurate report had been produced. Our analysis of this issue, however, is not greatly assisted by [16]decisions rendered in private FCRA lawsuits brought by consumers seeking damages for noncompliance with the statute. In private damage actions, it is not surprising that courts will be unwilling to resolve difficult liability issues absent evidence that the alleged violations have resulted in harm to the plaintiff.

The Commission's enforcement role is different from that of the individual consumer seeking to vindicate his or her own rights under the statute. The Commission is directed to treat a violation of any requirement or prohibition imposed by the FCRA as a violation of Section 5 of the FTC Act. It is settled that specific injury need not be shown to establish that a practice is "unfair or deceptive" under Section 5, *see. e.g., Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir.), *cert. denied sub nom. MacKenzie v. United States*, 423 U.S. 827 (1975), and Congress has not expressed any intention

²² Under respondent's construction of the statute, liability could not be established even if on its face, a procedure would mandate the production of inaccurate adverse reports. For example, respondent would seemingly argue that a quota system explicitly requiring each investigator to produce 10 adverse reports each day and, if necessary to meet the quota, to falsify adverse information, could not be challenged unless and until it could be shown that the procedure had actually resulted in the production of inaccurate adverse reports. Such a quota system, however, clearly would not be a "reasonable procedure to assure maximum possible accuracy," and on that basis alone would be a violation of the statute whether or not harm could be shown.

that the Commission be required to establish that an alleged violation of the FCRA has already injured consumers, even assuming Sections 616 and 617 require such proof in cases brought by consumers.²³

A procedure which encourages the production of adverse information is likely to lead employees to prepare their reports in a manner detrimental to the legitimate interests of the consumers about whom reports are written. This risk was realized in this case. Because we can hardly conclude that procedures which pressure employees to produce adverse information are necessary to the proper operation of consumer reporting agencies,²⁴ and are unaware of any justification for their use which would outweigh the risks which they pose, we find that they violate Section 607(b).²⁵

Although our analysis requires us to conclude that the ALJ was correct in holding that respondent's quality audit procedure violated Section 607(b), it also compels us to find that he erred in holding that the procedure was flawed only because [17]the audits were based on unrepresentative audit data and invalid comparisons among offices.²⁶ This error resulted in the entry of an order which fails to prevent the abuses which can be expected to result from any procedure placing a premium on the production of adverse information.

The judge reasoned that the methodological flaws had the effect of pressuring some employees, and the potential to pressure many others, to meet goals which, taking account of the special characteristics of the areas they worked, could not be met without their engaging in the practices we have described above. Nevertheless, while the flaws identified by the ALJ increased the likelihood that the system would result in inaccurate reporting, we believe that other systems which promote production of adverse information are likely also to be unreasonable.

Respondent has recognized that its employees vary in their abilities and their diligence. Its President and Chief Executive Officer, denying that the company has set specific quotas for protective or declinable information which should be developed "by a specific man or by a specific territory," testified that "[i]t has been a

²³ We should add that while Section 5 cases can be useful in construing the FCRA, we rely on our understanding of Section 607(b) in concluding that inaccuracy need not be shown. We need not rely on our authority under Section 5 "to arrest trade restraints in their incipiency." *FTC v. Brown Shoe Co., Inc.*, 384 U.S. 316, 322 (1966).

²⁴ That such procedures are dispensable is supported by respondent's decision to discontinue auditing protective and declinable information. See p. 8 *supra*.

²⁵ This violation of the FCRA, and each of the other violations which we find in this case, is also an unfair or deceptive act or practice in violation of Section 5 of the FTC Act. FCRA, Section 621(a).

²⁶ See p. 9 *supra*.

widely accepted thesis that it [the amount of protective and declinable information] varied widely by line of service, by * * * man, by geography, by the type of the environment in which the reports were made and a lot of other factors." He also testified that

there has never been any feeling that there was that degree of uniformity on pertinent information by line of services, by territory and by individual.

So it would be unfair and inequitable to have a policy that would seek to develop some kind of a quota system or some kind of an average percentage of pertinent information * * *

Tr. 5017-18, 5068.²⁷ [18]

Thus, as respondent recognizes, even if most employees can meet a given objective, that is, produce enough adverse information to qualify for a "reward" or avoid a "punishment," by using careful investigative techniques and accurately reporting the information they obtain, the less able, or less diligent, employee may not. These employees, like several of respondent's former employees, when pressed to produce an amount of adverse information which is suitable for other employees, may reasonably be expected to fabricate, exaggerate, or otherwise misreport.

We, therefore, agree with complaint counsel that the order should prohibit any procedure

whereby the performance of branch offices, regions, or other organizational units, with respect to the production of adverse * * * information is ranked against other organizational * * * units or individuals, or against previous performance by the same organizational units or individuals.

Proposed Order, ¶ II(7) (CAB 80). With some minor alterations, we will adopt this order provision.

We recognize, however, that it is not the surveys themselves which are unlawful, only the pressures their dissemination may be expected to create. Because we believe that rankings and other comparisons of performance are likely to create the kinds of pressures to produce adverse information which are demonstrated by this record, we believe their use should be prohibited, and so order. If respondent can develop a system of sampling which it believes will prevent the kinds of pressures shown on this record, it may, of course, move to modify the order.

Finally, we note respondent's objection to complaint counsel's

²⁷ The manager of one of respondent's branch offices, called by respondent, similarly testified that the percentages of protective and declinable information which field representatives will develop vary by the area they work (Tr. 8603; ID 333), and respondent has acknowledged that "field representatives have varying levels of experience and training * * *, [and] work in a variety of geographic areas * * * which have differing characteristics affecting the ease with which reports may be completed * * *." (R. Ans. 48)

proposal that we prohibit it from “compelling or *inducing* its * * * personnel to complete or prepare a *certain* proportion * * * ” [emphasis added] on the ground that the words “inducing” and “certain” are vague. (R. Ans. 58–59) We will instead prohibit respondent from rewarding or punishing, or representing that it will reward or punish, employees on the basis of the amount of adverse information they produce, or taking any action to encourage employees to produce any specified number, or proportion, of reports containing adverse information.²⁸ [19]

2. Production Quotas

The complaint also challenged respondent’s imposition of a production quota which requires the field representative to complete a specified number of cases each month. Unlike pressures to produce adverse information, the production quota is not inherently inconsistent with the obligation imposed by Section 607(b).

The parties do not challenge the ALJ’s description of the production quotas. Each full-time, salaried field representative is expected to meet a “production standard.” The standard is set on a monthly basis and requires the field representative to produce reports which generate revenue exceeding his or her salary and expenses. The amount by which revenue must exceed salary and expenses is a product of the “reporting standard,” which varies among the offices and according to the length of service of the particular field representative. Field representatives’ monthly production standards are determined by dividing their salary and expenses by their reporting standard; the higher the reporting standard the less revenue the representative is expected to generate that month. (ID 109–11) Much of the evidence adduced at trial was directed to the question whether the company’s reporting standards resulted in quotas requiring field representatives to produce so many reports that they were compelled to take shortcuts which sacrificed the accuracy of their reports.²⁹ [20]

²⁸ Thus, our order will not preclude respondent from distributing to field representatives information and statistics showing, for example, “the number of alcoholics in the population,” (R. Ans. 59) so long as it takes reasonable steps to assure that the field representatives to whom these materials are sent are clearly informed that the materials are for information only and that they are not expected to produce any particular amount of adverse information.

Moreover, the order’s prohibition against rankings of performance in producing adverse information (Order, ¶ I.D.) and against rewarding and punishing employees on the basis of the amount of adverse information they produce (Order, ¶ I.C.(1)) will not preclude respondent from *measuring* an individual field representative’s production of adverse information and taking the employee’s low production as a signal that the employee may be failing to investigate his or her cases carefully. Paragraph I.C. (1), however, would require that respondent base any adverse action against an employee on a determination that the employee is defaulting on his or her obligation to produce accurate rather than adverse reports.

²⁹ Management expects field representatives to meet their production standard on a quarterly basis, unless the failure can be justified by factors beyond the employee’s control. (ID 114) Management also expects field

(Continued)

Although field representatives receive their normal compensation even if they fail to meet their production standard, the ALJ found that field representatives are aware of the existence of the standards, that managers of the branch offices have occasionally acted to enforce the standards, and that the standards have affected the manner in which some employees have done their jobs.³⁰

The ALJ held that use of the quotas violated Section 607(b) because “[a] substantial number of field representatives * * * were unable to complete the work in either the normal workday or workweek in accordance with Company procedures. They compensated for such inability by contacting unqualified sources, faking sources, misstating time coverage, hurrying through interviews, failing to ask a full range of questions, using the telephone in a manner not in accord with Company procedures, or working excessive overtime * * *.” (ID 405)

Although the ALJ found that “[g]enerally field representatives did not fake sources in those instances where unfavorable * * * information was developed” (ID 402) and that “there is no evidence in the record of a report where *adverse* information has been falsified” (ID p. 243) (emphasis added), he concluded that the procedure was unreasonable; according to the judge, Section 607(b) does not distinguish between adverse and favorable reports. (*Id.*)

Respondent first challenges the ALJ’s finding that a substantial number of employees have been unable to meet their [21]production requirements without resorting to shortcutting techniques. Judge von Brand relied principally on the testimony of 16 former employees called by complaint counsel. He found unpersuasive respondent’s proof, including several statistical studies and the testimony of a number of present and former employees that they were able to meet their production quotas.

We affirm the ALJ’s findings as to the credibility of complaint counsel’s witnesses.³¹ We also find that the testimony offered by these witnesses demonstrates that a substantial number of employees could not meet their quotas without “cutting corners.” Testimo-

representatives to prepare their reports in accordance with “Time Service” objectives which require that an office, within a set time after receiving a request for a report, complete it and mail it back to the requesting customer. Branch managers have been told that “[t]ime is an essential and marketable element of our business” and records have been maintained to measure an office’s performance. (ID 348, 352)

Although part-time field representatives are compensated on the basis of the number of reports they actually produce (ID 130) and, accordingly, are not expected to produce a certain number of reports to justify their salaries, a part-time employee might “cut corners” in order to produce enough reports to meet Time Service objectives. (ID 384)

³⁰ One branch office manager testified that he might give a field representative who falls behind the production standard “a boost or a kick and possibly assign him an extra case per day or whatever it will take, whatever is necessary to bring him into the black.” (ID 347)

³¹ See note 17 *supra*.

ny by other witnesses that *they* could meet *their* quotas does not undercut this limited finding; nor is it rebutted by the statistical evidence offered by respondent showing, at most, that the *typical* field representative could work enough cases to meet his or her quota.

Respondent also challenges the ALJ's holding that a procedure which does not promote the production of inaccurate reports containing *adverse* information about consumers nevertheless can properly be found to violate Section 607(b). We find respondent's argument persuasive. The expressions of congressional purpose behind the FCRA clearly demonstrate that the statute was intended to curtail the reporting of inaccurate *adverse* information.³²

The ALJ found little evidence that the production quotas increased the production of reports containing inaccurate adverse information. We agree that evidence of such an effect is scant, [22] but for the reasons stated earlier, *see pp. 14-15 supra*, do not consider the amount of evidence of actual harm dispositive. Rather, we must examine the incentives which respondent's practice is likely to create. Here, there is evidence, presented by complaint counsel's own witnesses, showing that, while field representatives often took shortcuts in reporting *favorable* information (for example, by misreporting the number of sources whom they had contacted),³³ they were careful not to fake adverse information. (*E.g.*, Tr. 316, 1837) We suspect the reason is that field representatives knew they were more likely to get caught faking unfavorable information.

The FCRA permits the consumer to learn the "nature and substance" of the information in his or her file and requires reporting agencies to reinvestigate information disputed by the consumer. It is apparent that field representatives, absent overriding pressures, such as those created by the audits, are deterred from

³² *See pp. 6-7 supra*. The concern about preventing harm to the subjects of reports is also reflected in the statement of purpose which accompanied the statute:

It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information *in a manner which is fair and equitable to the consumer* * * * .

FCRA, Section 602(b) (emphasis added).

Section 602(a)(1), recognizing the banking system's dependence upon accurate credit information, should be read in conjunction with Section 602(b) and the legislative history; it, therefore, does not persuade us that this consumer protection measure was designed to proscribe procedures which are not likely to harm the consumer about whom a report is written.

³³ We do not mean to suggest that this is necessarily a good result. The individual about whom an overly favorable report is written may or may not benefit, but the businesses which depend on accurate information may be harmed, and consumers as a group may be required to subsidize the bad risks who are extended credit or insurance. However, there is little reason to doubt that the customers of reporting agencies can protect themselves against the harm resulting from excessive under-reporting of adverse information.

falsifying adverse information, because reports containing such information are more likely to be challenged and reinvestigated.³⁴ The supposed failure of evidence with respect to the pressures to produce adverse information, *see* p. 14 *supra*, was not inconsistent with a finding of a violation of Section 607(b); nevertheless, our understanding of the reason for the lack of evidence of harm flowing from the production quotas—and the corroborative testimony offered by complaint [23]counsel's own witnesses—requires us to conclude that the production quotas do not violate Section 607(b).

We recognize, however, that there are some risks inherent in the combined imposition of production quotas and pressures to produce adverse information. The combination of production quotas and pressures to produce adverse information has the potential to encourage the preparation of a larger number of reports containing adverse information than would be completed absent these combined procedures.³⁵ The development and confirmation of adverse information is generally more time-consuming than the development of favorable information (ID 375), at least when care is taken to ensure that the information is accurate. Accordingly, there is a substantial risk that employees, pressed simultaneously to do more work and to prepare more reports containing adverse information, will be induced to save time by reporting adverse information which they have either faked, exaggerated, or failed to confirm.

We are sensitive, however, to the fundamental needs of firms to promote productivity and we do not lightly curtail such efforts. Since production quotas, at most, may exacerbate the evil inherent in the imposition of pressures to produce adverse information, this risk will obviously be dissipated by our prohibition of the imposition of such pressures. We are not persuaded of the need for additional relief.

3. Production Credit and Compensation for Reinvestigations

Complaint counsel appeal from the ALJ's dismissal of the com-

³⁴ It is respondent's policy to fire employees who are found to fabricate report information. (ID 407) Although the ALJ found that the production quotas have induced employees to take shortcuts other than fabricating sources and other report information, such as "hurrying through interviews" and "using the telephone in a manner not in accord with Company procedures," (ID 405; p. 20, *supra*) there has been no showing that these shortcuts would likely induce the misreporting of adverse information. (As to the use of the telephone, *see* pp. 80-81 & n.107-08.)

It does not appear that the kind of distortion or exaggeration likely to be induced by the pressures to produce adverse information, discussed at pp. 12-14 *supra*, is generally a firing offense.

³⁵ The production quotas require employees to produce more reports than they might otherwise. The adverse information pressures induced employees to see to it that specified percentages of all of the reports they prepared included protective or declinable information.

plaint's challenge to respondent's alleged policy of paying or crediting³⁶ a field representative for a reinvestigation conducted pursuant to Section 611 of the FCRA³⁷ only if the reinvestigation [24] proves that the employee was correct in the initial investigation. Complaint counsel contend that the policy provided field representatives an incentive to try to prove they were right the first time and, therefore, discouraged the correction of errors in the original report. We affirm the ALJ's dismissal of this claim. Field representatives handle only a few reinvestigations each month and there has been no showing that the loss of the few production credits or the small amount of compensation involved would provide employees a meaningful incentive to conduct inadequate reinvestigations or to misreport the results.³⁸

Indeed, a field representative could be expected to fear that any misreporting of the results of a reinvestigation would be detected by the consumer whose dispute of the original information triggered the reinvestigation. Although the prospects of detection are uncertain, we doubt that the modest incentive to falsify information afforded to the investigator by the challenged procedure would offset the risk of his or her being caught by a consumer who has already complained about the information in question and who might be expected to be skeptical about the results of the reinvestigation.³⁹ Therefore, we find that the procedure [25]is consistent with Section 607(b).⁴⁰

³⁶ Only part-time field representatives are paid on the basis of the number of reports they prepare. Full-time field representatives are salaried but are expected to meet the production standard described at p. 19 *supra*. At issue here is respondent's alleged failure to compensate the part-time field representatives and to give the full-time employees production credits for their reinvestigations when the original report is found to be inaccurate.

³⁷ The reinvestigation requirement is described at pp. 42-47 *infra*.

³⁸ If the compensation system could be expected to affect the manner in which field representatives conducted their reinvestigations and worded the results, it could also be expected to provide them an incentive to do an accurate job in the first place.

Although complaint counsel offered a few examples of misreporting which may have occurred as a result of the procedure, this scanty evidence does not convince us that the procedure is unreasonable. Although a few *law violations* are sufficient to warrant issuance of an order, *see* p. 33 *infra*, here, the alleged law violation is the use of an unreasonable procedure. That a procedure may induce a handful of employees to produce inaccurate reports does not establish that the procedure itself is unreasonable. Proof of some inaccurate reporting is neither essential nor necessarily sufficient to sustain a finding of a violation of Section 607(b). *See* p. 15 *supra*.

For this reason, although we affirm the final sentence of finding 507 that "[t]here is insufficient detail * * * in this record to determine that a pattern of inaccurate reporting has taken place by virtue of such compensation procedures," we do not believe that this lack of evidence would, by itself, preclude a finding of violation.

³⁹ The ALJ found that the impact of the failure to provide production credit or compensation may be especially great "in those areas involving subjective judgment on the part of the field representative * * * where differences of opinion are possible, [and] there would be a tendency to deny the consumer the benefit of the doubt * * * ." (ID 507) He correctly found, however, that in such cases, it is respondent's policy generally not to assign a reinvestigation to the field representative who conducted the original investigation. (ID 496) In any case, the impact of the practice of denying credit or compensation has not been shown sufficient to affect the conduct of the reinvestigation.

⁴⁰ The ALJ understood that the case had been presented to him on the theory that the interaction of various company procedures and policies, such as the production quotas, time pressures on field representatives, the methods by which employees are compensated, and the inducements to produce adverse information, could result in the misreporting of consumer report information. (ID p.233) On appeal, however, complaint counsel have elected essentially to challenge separately the reasonableness of the various procedures and have not attempted to show

(Continued)

4. Health and Arrest Information

Complaint counsel attempted to prove at trial that the collection of health and arrest information from lay sources, that is, neighbors and other acquaintances who do not have formal training or professional experience in assessing people's health or the nature of their contacts with the criminal justice system, is inconsistent with respondent's obligation to follow reasonable [26]procedures to assure maximum possible accuracy. The ALJ found that the record does not support complaint counsel's claim.

Reliance on lay sources for such technical and sensitive information is highly troublesome.⁴¹ Indeed, the Privacy Protection Study Commission has observed that "[c]ollection of such technical information [*i.e.*, health information that only a professional is competent to report] from anyone other than the individual himself, a medical source, or a close family member invites inaccuracies." U.S. Privacy Protection Study Commission, *Personal Privacy in an Information Society* 178 (1977). The reporting of arrest information and other information about an individual's criminal record raises the same concerns.

Nevertheless, with the limited attention that was directed to this issue at trial and in the briefs filed with the ALJ and the Commission, we cannot conclude that the manner in which respondent has relied upon lay sources is incompatible with Section 607(b).⁴² Indeed, basic common sense would suggest that, in certain instances, neighbors and other acquaintances are capable of being reliable sources for information about a person's health or criminal record. Their reliability might depend on a variety of factors, including the kinds of information they are reporting, *their* sources (first-hand observation, the applicant, members of the applicant's family, as opposed to mere gossip) and any biases which may affect

how the procedures, in combination, risk the misreporting of information. (Of course, time pressures and the method by which field representatives are compensated are part and parcel of their challenge to respondent's production quotas.)

We have not ignored the possible interaction of these policies and procedures, *e.g.*, p. 23 *supra*, but conclude that, whether viewed separately or in juxtaposition with the other challenged procedures, the production quotas and the method of compensating employees for reinvestigations have not been shown to violate Section 607(b).

⁴¹ A person may display symptoms entirely unrelated to the illness or injury to which a lay witness may ascribe them— for example, a person may appear drunk when suffering from a diabetic reaction. Similarly, the occurrence of an arrest may inaccurately be inferred from actions which in themselves lack any legal significance, such as the person's entering a police cruiser in the company of law enforcement personnel or a police officer's presence at the person's house for reasons unrelated to criminal law enforcement.

⁴² Respondent appears to acknowledge that official records are the most reliable source of information on an individual's criminal record. (R. Ans. 24) Failure to confirm such information through official records in those cases where they are available could not be part of a reasonable procedure to assure maximum possible accuracy. Complaint counsel have not satisfied their burden of proof that respondent has failed to instruct field representatives to confirm this information through official records, where available, or that the representatives have not complied with the company's instructions.

the credibility of either the informant or [27]the informant's sources.⁴³ Here, we do not have a record which permits us to define, with any precision, the circumstances in which lay sources may not properly be used, to determine whether respondent has in fact depended upon lay sources in those circumstances, and even if we could find that it had, to fashion a meaningful remedy.

Despite our concerns about the use of lay sources, we cannot find a violation on the basis of this record and therefore affirm the ALJ's findings.

B. Refusals To Disclose Files to Consumers and To Reinvestigate Disputed Information

The complaint contains a number of allegations concerning the respondent's duty to disclose information to consumers and its concomitant responsibility to reinvestigate disputed information and correct inaccuracies. In enacting the FCRA, Congress recognized that, no matter how careful consumer reporting agencies are to avoid error, some inaccuracy is inevitable. As Senator [28]Proxmire noted when the consumer credit bill was introduced in the Senate:

It would be unrealistic to expect credit reporting agencies to be absolutely correct on every single case. But it seems to me that consumers affected by an adverse rating do have a right to present their side of the story and to have inaccurate information expunged from their file. Considering the growing importance of credit in our economy, the right to fair credit reporting is becoming more and more essential. We certainly would not tolerate a Government agency depriving a citizen of his livelihood or freedom on the basis of unsubstantiated gossip without an opportunity to present his case. And yet this is entirely possible on the part of a credit reporting agency. 115 *Cong. Rec.* 2412 (1969).

Therefore, besides mandating the use of "reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom a report relates," Congress imposed a variety of procedural requirements intended to enable consumers to

⁴³ A reasonable procedure to assure the maximum possible accuracy of this information would, at the very least, attempt to ensure that field representatives do not rely on lay sources when, because of the sources' own particular limitations, or the nature of the information being reported, the sources are unlikely to be reliable. Field representatives should not be expected to make these judgments on an *ad hoc* basis; a consumer reporting agency which was interested in preventing the misreporting of such sensitive information would at least provide its employees with instructions which would guide them in making these difficult judgments.

This case was not tried on the theory that respondent failed to meet this obligation, but we wish to emphasize that we take no comfort from the instruction quoted by the ALJ, at ID 517, which provides in part:

when reporting * * * [arrest] information [and local police records are unavailable], put it in the same language as we developed it, such as "there is talk in the community that your subject has had police difficulties, but police records are not available to verify this information."

Such an instruction can hardly suffice to alert field representatives to the factors they should consider in assessing the reliability of a source's account of such vague, and potentially damaging, information.

identify and correct inaccurate information. We agree with the comment that a major goal of the FCRA "is the creation of a system of 'due process' under which consumer subjects may learn of adverse reports, be confronted with the information therein, and be able to correct or supplement false or misleading entries." Note, *Judicial Construction of the Fair Credit Reporting Act: Scope and Civil Liability*, 76 *Colum. L. Rev.* 458, 466 (1976).

Compliance with the consumer disclosure, reinvestigation and correction provisions of the statute is fundamental to achievement of Congress' goal of assuring "maximum possible accuracy" in consumer reports. For the scheme to work, however, consumers must have ready access to the information, for disclosure is the trigger for the other corrective provisions. Additionally, in enacting the FCRA, Congress intended not only to prevent consumer reporting agencies from flatly refusing to disclose information to consumers, but also to bar the use of more subtle techniques to achieve the same end.⁴⁴ [29]

While the record shows that respondent has, commendably, gone beyond the requirements of the Act in some respects,⁴⁵ it also shows that respondent's employees have engaged in violations of the statute which warrant an order to cease and desist.

1. Failure To Disclose "Nature and Substance" of Information in Respondent's Files

Section 609 of the FCRA requires consumer reporting agencies, upon request and proper identification, to disclose to the consumer the "nature and substance" of all information (except medical information) in its files on the consumer at the time of the request, the sources of the information,⁴⁶ and the recipients of any report on the consumer which the reporting agency has furnished for employment purposes within the two-year period preceding the request, and for any other purpose, within the six-month period preceding the request. The complaint alleged that respondent has violated Section

⁴⁴ The Senate report illustrates these concerns:

Credit bureaus sometimes build roadblocks in the path of the consumer. For example, the credit bureau industry trade publication, in frankly discussing this problem, states that some bureaus discourage consumer interviews "by placing a nuisance charge on the investigation, or merely placing the date of the interview as much as 2 weeks away."

S. Rep. No. 91-517, *supra*, at 3.

⁴⁵ The record shows, for example, that since June 1974, it has been respondent's policy to provide consumers who visit its branch offices visual disclosure of their files. (RX 576 A-E) Since October 1976, it has also been respondent's policy to supply copies of reports to consumers after they have had visual access or, in the case of telephone disclosure, on a subsequent visit to the office. (Copies are normally furnished, however, only if the consumer agrees with the report.) (RX 122A, C-E) In addition, the record shows that respondent sometimes waives the payment by the consumer of the disclosure fee authorized by the statute. (ID 560)

⁴⁶ A consumer reporting agency may refuse to disclose investigative sources.

609 by failing to make full and accurate disclosures to consumers upon request.

The ALJ found that respondent's practice varies among offices. While employees in some offices have gone beyond the statutory requirements and provided *verbatim* disclosures, in others, they have disclosed "a summary or paraphrase of the report" or "only the part of the report which the discloser 'assumed was the factor' that [30] had caused the consumer to be rated or denied insurance * * * ." (ID 541)⁴⁷

Moreover, "[i]n practice, some field personnel, while purporting to give the nature and substance of reports, failed to give adequate or complete disclosure." (ID 542) Important omissions from the disclosures included references to various consumers' being "said to be a fast and careless driver," having a drinking problem, and having "questioned" morals. (ID 543, 547)

The judge also found that some employees paraphrased or summarized items "in such a way that the full meaning, and in some cases, the derogatory tone of the report, was not conveyed to the consumer." (ID 551) For example, one consumer was told that, according to her report, she "had recently had a run-in with [her] former husband, a severe one," while the report actually stated that she had been assaulted by her husband and incurred 22 stab wounds as a result. (ID 553)

Respondent argues that, in many of the instances of incomplete disclosures relied on by the ALJ, the evidence is insufficient to support the finding of a violation. (RAB 80) We believe, however, that the omissions and dilutions of derogatory information found in this record are violations which go to the heart of the Act's procedural scheme.⁴⁸ Such practices are totally [31]inconsistent with

⁴⁷ We are not persuaded, as claimed by complaint counsel, that respondent's management instructed its office personnel to tone down or omit from disclosure derogatory information contained in the reports.

⁴⁸ Respondent challenges several of the findings of incomplete disclosure. We affirm each of the challenged findings, except for ID 544, 552 n.208, and ID 550. The witnesses cited in the first two findings testified that they had inquired why their policies had been canceled or denied. Respondent was under no duty to disclose information which, for all we can tell from the record, did not contribute to the insurer's decision. As noted at p. 32 *infra*, a consumer who requests disclosure of his or her file or of a report is entitled to more than a reading or a paraphrasing of the portions which respondent's staff believes relevant to the particular adverse action which prompted the consumer's inquiry, and the reporting agency may not assume that a consumer who requests disclosure of his or her file is only interested in why a particular adverse action was taken. There is no reason, however, to require disclosure of the entire file when the consumer plainly expresses an interest in only a portion of it. ID 550 was apparently based on a mistaken belief that the consumer's testimony was un rebutted. (ID 550 n.207) Because it was contradicted by one of respondent's witnesses (Tr. 8336-37) and the ALJ has made no assessment of the relative credibility of the two witnesses, we will vacate this finding.

We are persuaded that ID 546 n.203 properly addresses the objections respondent raises to Mr. Smith's testimony.

The subsequent deletion of the information described in ID 552 is not inconsistent with the ALJ's finding that it was not disclosed. The consumer's challenge to the general information which was disclosed placed respondent on notice that she also disputed the more specific information which was not disclosed. That the general disclosure prompted this consumer to challenge its accuracy does not mean that the disclosure was adequate. Section 609 does

