

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF CAPITAL ONE
SERVICES, INC.

Docket No. C2008-3

**EMERGENCY MOTION TO CLARIFY APPLICATION OF THE DELIBERATIVE
PROCESS PRIVILEGE TO DEPOSITION OF JESSICA D. LOWRANCE**

(August 26, 2008)

Capital One Financial Services, Inc. (Capital One) hereby moves for a provisional ruling clarifying that the Postal Service cannot invoke the deliberative process privilege to avoid responding to deposition questions or document requests relating to the Deposition of Jessica D. Lowrance (Deposition), scheduled for August 27, 2008. Due to the time-sensitive nature of the issue, Capital One has made this Motion on an emergency basis, and requests only a ruling that applies to questions and documents relating to the Deposition. Capital One intends to file at a later date a Motion to Compel regarding the Postal Service's responses to its Interrogatories, which will address the application of the deliberative process privilege to those interrogatories.

INTRODUCTION

Because the Postal Service has asserted a blanket claim of "deliberative privilege" in its Objections to Capital One's Interrogatories, Capital One seeks clarification at this time of the application of the privilege to tomorrow's Deposition. See, e.g., Objection of the United States Postal Service to Document Requests of Capital

One Services, Inc. (COS/USPS-DR-1-17) (August 19, 2008) (“Objection”) at 6-8 (describing an overarching “deliberative privilege” objection to all of Capital One’s document requests without any effort to identify responsive documents or explain why the privilege applies to each document). As the Postal Service has admitted, Ms. Lowrance will not be available for follow-up questions after Friday, August 29, 2008. If the Postal Service claims an over- broad application of the privilege **and instructs Ms. Lowrance not to respond**, there may not be time to resolve the issue under the Commission’s normal procedures before Ms. Lowrance leaves the Postal Service.

The deliberative process privilege is inappropriate in the context of this case for three reasons:

- First, under well-established precedent, including the D.C. Circuit and the Commission’s own precedent, the Postal Service cannot invoke the deliberative process privilege where, as here, the agency’s decision making process itself is the subject of litigation.
- Second, even assuming the privilege applied, the Postal Service has not properly invoked it here, nor can it meet the procedural requirements.
- Third, even if the privilege applied and the Postal Service properly invoked it, the concrete public interest in transparency and disclosure of information relevant to Capital One’s complaint far outweighs any vague interest on the part of the Postal Service in keeping the information secret, particularly in the context of a complaint alleging discrimination and other violations of law.¹

¹ It is not at all clear that the deliberative process privilege should apply under *any* circumstances to proceedings before the Commission, as federal courts may recognize such common law privileges only through the operation of

Accordingly, in advance of the deposition and to expedite the proceedings, Capital One requests an order precluding the Postal Service from refusing to respond to questions relating to documents, conversations, or other information, on the basis of the deliberative process privilege (or similar executive privilege).

ARGUMENT

I. **The deliberative process privilege does not apply where, as here, the decision-making process itself is at issue.**

Without bothering to identify a single responsive document, the Postal Service broadly asserts claims in response to Capital One's initial document requests that "many of the documents requested contain information that is predecisional, and therefore protected from disclosure by the deliberative process privilege." *Objection of the United States Postal Service to Document Requests of Capital One Service, Inc. (COS/USPS-DR-1-17) (August 19, 2008) at 6.* What that argument ignores is a well-established line of precedents from the United States Court of Appeal for the D.C. Circuit that recognize the obvious: a claim of "deliberative privilege" makes no sense in the context of a statutory challenge to the agency's decision-making process itself.

As the D.C. Circuit has recognized, "[t]he privilege was fashioned in cases where the governmental decision-making process is *collateral* to the plaintiff's suit. ***If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield.***" *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145

Federal Rule of Evidence 501—a rule that does not apply to Commission proceedings. Indeed, the Commission's general admissibility rule is far broader than the one recognized by the Federal Rules. *Compare* Commission Rule 31, 39 CFR § 3001.31(a) ("[R]elevant and material evidence which is not unduly repetitious or cumulative shall be admissible.") *with* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any *non-privileged matter* that is relevant to any party's claim or defense . . .") (emphasis added).

F.3d 1422, 1424 (D.C. Cir. 1998) (citations omitted and emphasis added).²

Furthermore, where, as here, “a statute makes the nature of governmental officials' deliberations the issue, the privilege is a non sequitur.” *Id.* “The central purpose of the privilege is to foster government decisionmaking by protecting it from the chill of potential disclosure. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 44 L. Ed. 2d 29, 95 S. Ct. 1504 (1975). If Congress creates a cause of action that deliberately exposes government decisionmaking to the light, the privilege's *raison d'etre* **evaporates.**” *Id.*; see also *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995) (“[W]here the documents sought may shed light on alleged government malfeasance, the privilege is routinely denied.”) (internal quotation marks omitted).

The Commission's own precedent has recognized that the deliberative process privilege cannot prevent discovery of the Postal Service's decision-making process in the Electronic Mail Classification Proposal, 1978, Op. and Rec. Dec., PRC Docket No. MC78-3 (December 17, 1979)(ECOM Decision). In that case, the Commission allowed full discovery of the Postal Service's decision-making processes to determine why the ECOM contract was awarded to Western Union, whether Western Union's competitors were given due consideration, and whether granting the business opportunity to a sole company without consideration of competitors was anti-competitive and discriminatory. The Postal Service's claim of the deliberative process privilege was denied, and the Commission allowed the Officer of the Commission to inquire into the Postmaster

² The sole ruling from the R-97 rate case cited in the Opposition (R-97-1/60) is readily distinguishable as that ruling arose in an entirely different context—a rate case in which the documents sought were truly collateral—and involved the narrow question of whether the information requested was “factual” or “deliberative”—not an issue of any relevance here.

General's decisionmaking (requiring an affidavit of the Postmaster General). The Commission also ordered the production of documents, including the unredacted minutes of a Board of Governors meeting. See Appendix A of ECOM Decision.

In this case, Capital One has similarly called into question the decision-making process by which the Postal Service awarded an NSA to Bank of America and denied the same deal to Capital One. As in the ECOM case, any justification of the deliberative process privilege "evaporates" and cannot stand.

II. Even if the privilege applied, the Postal Service has not and cannot reasonably meet the requirements necessary to validly assert the privilege.

Even when the deliberative process privilege applies, it cannot be invoked blithely in the way the Postal Service has invoked it here. "These [privilege] exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Accordingly, rigorous procedural requirements apply to the narrow circumstances in which an agency can successfully invoke the privilege.

For example, an agency asserting the privilege must satisfy the following requirements: "(1) a formal claim of privilege by the 'head of the department' having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege." *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). The Postal Service has not even attempted to satisfy one of these requirements.

In short, even if the Postal Service could validly invoke the privilege here—and it cannot for all the reasons stated in Section I—the Postal Service has fallen woefully short of meeting the necessary burdens to assert a valid privilege claim.

III. The harm to the public—and to the Postal system—of shielding potentially discriminatory actions by the Postal Service far outweighs any interest by the Postal Service in keeping its “deliberations” secret.

Even if an agency satisfies all the criteria for protecting a document or other evidence under the deliberative process privilege, “nondisclosure is not automatic. The privilege is “a qualified one,” *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984), and “is not absolute.” *First Eastern Corp. v. Mainwaring*, 21 F.3d 465, 468 n.5 (D.C. Cir. 1994). Thus, in determining whether to honor an assertion of the privilege, a court must weigh competing interests.” *Texaco Puerto Rico*, 60 F.3d at 885; accord *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992) (“[T]he privilege may be overridden where necessary to promote the paramount interest of the Government in having justice done between litigants, or to shed light on alleged government malfeasance, or in other circumstances when the public's interest in effective government would be furthered by disclosure.”) (internal quotation marks and citations omitted).

Here the public and the government have a far greater interest in seeing that the law is upheld, and postal law and policy fairly administered, than in protecting the “internal deliberations” of Postal Service employees, particularly when those “deliberations” in and of themselves may constitute unlawful behavior. See generally *Texaco Puerto Rico*, 60 F.3d at 885 (“Given the discretionary nature of the deliberative process privilege, and the district court's warranted conclusion that DACO acted in bad

faith over a lengthy period of time . . . we resist the urge to tinker with the court's determination that the wholesalers' interest in due process and fairness outweighed DACO's interest in shielding its deliberations from public view.”).

CONCLUSION

For all these reasons, Capital One respectfully requests that the Commission specify that the Postal Service may not claim the deliberative process privilege **to instruct the witness not to respond or not to provide documents** in the August 29, 2008 deposition.³ To do otherwise would allow the Postal Service to cloak its actions in secrecy and would deprive Capital One of its sole opportunity to obtain crucial testimony from a key witness.

Respectfully submitted,

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³ If there is a concern about the commercial sensitivity of certain responses, the Commission might consider applying protective conditions to specific portions of the Deposition, but a broad instruction by counsel to the witness not to respond would close the door completely on the Complainant's ability to obtain key testimony for the record.