

PRESIDING OFFICER'S
RULING NO. C2008-3/42

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Complaint of Capital One Services, Inc.

Docket No. C2008-3

RULING ESTABLISHING PROTECTIVE CONDITIONS
FOR MATERIAL FILED PURSUANT TO ORDER NO. 208

(Issued May 8, 2009)

On May 7 and 8, 2009, the Postal Service filed certain responses to discovery requests identified in Order No. 208, issued April 29, 2009.¹ The Postal Service filed portions of this material under seal and requests that protective conditions be applied.² The Postal Service asserts that Capital One has previewed these documents under a confidentiality agreement between Capital One and the Postal Service, and will continue to have access to the source set from which these documents were selected. *Id.* at 3 and 7.

The Postal Service's motion for protective conditions is granted subject to any future demonstration that this material is not entitled to protective status. See Statement of Compliance With Protective Conditions, ¶ 14. To accommodate the request for advance notice before granting access to the protected material, the Commission will require each person seeking access to the protected material to file a

¹ Partial Response of the United States Postal Service to Order No. 208 and Motion for Partial Reconsideration, May 8, 2009 (Motion). See *also* Order on Capital One Motion to Compel and Extension of Deadlines Certified to the Commission by Presiding Officer's Ruling No. C2008-3/38, April 29, 2009 (Order No. 208).

² Motion at 3. Several issues are identified in the Motion. This ruling only addresses the immediate application of protective conditions. Further comment on this issue may be provided in response to the Postal Service's Motion.

notice with the Commission identifying the person by name, company, and title. Notice must be filed pursuant to rules 9-12 of the Commission's Rules of Practice and Procedure. 39 CFR §§ 3001.9-12. The Commission will post the notice on its website.

As the requesting party of this discovery material and in light of the Postal Service's representation that Capital One has previewed this information and continues to have access to the source material, Capital One will be granted immediate access.

Access by other parties will not be granted for 48 hours after a notice is filed to allow the Postal Service to interpose an objection. If the Postal Service does object, it must provide written justification for its position. The person who is the subject of the objection may submit a written response to the objection no later than 48 hours thereafter. The matter will be referred to the Presiding Officer for resolution.

RULING

1. The request for application of protective conditions contained within the Partial Response of the United States Postal Service to Order No. 208 and Motion for Partial Reconsideration, filed May 8, 2009, is granted.
2. The protective conditions following the signature of this ruling govern access to all material described in Order No. 208.

Dan G. Blair
Presiding Officer

STATEMENT OF COMPLIANCE WITH PROTECTIVE CONDITIONS

The following protective conditions limit access to materials provided in Docket No. C2008-3 by the Postal Service, which is described in Order No. 208 and filed as protected material (hereinafter, "these materials"). Individuals seeking to obtain access to these materials must agree to comply with these conditions, complete the attached certifications, provide the completed certifications to the Commission, and serve them upon counsel for the party submitting the confidential material.

1. Only a person who is either:
 - (a) an employee of the Postal Regulatory Commission (including the Public Representative in this docket) with a need-to-know; or
 - (b) a participant in Postal Regulatory Commission Docket No. C2008-3, or a person employed by such participant, or acting as agent, consultant, contractor, affiliated person, or other representative of such participant for purposes related to the litigation of Docket No. C2008-3, shall be granted access to these materials. However, no person involved in competitive decision-making for any entity that might gain competitive advantage from use of this information shall be granted access to these materials. "Involved in competitive decision-making" includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material.
2. No person granted access to these materials is permitted to disseminate them in whole or in part to any person not authorized to obtain access under these conditions.
3. The final date of any participant's access shall be the earlier of:
 - (a) the date on which the Postal Regulatory Commission issues its final order or otherwise closes Docket No. C2008-3;
 - (b) the date on which that participant formally withdraws from Docket No. C2008-3; or

- (c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. C2008-3 participant on whose behalf that person obtains access, whichever comes first. The participant immediately shall notify the Postal Regulatory Commission and counsel for the party who provided the protected material of the termination of any such business and consulting arrangement or retainer or affiliation that occurs before the closing of the evidentiary record.
4. Immediately after the Commission issues its final order or otherwise closes Docket No. C2008-3, a participant (and any person working on behalf of that participant) who has obtained a copy of these materials shall:
 - (a) certify to the Commission that the copy was maintained in accordance with these conditions (or others established by the Commission); and
 - (b) certify that the copy (and any duplicates) either have been destroyed or returned to the Commission.
5. The duties of any persons obtaining access to these materials shall apply to material disclosed or duplicated in writing, orally, electronically, or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of excerpts from or parts of the document, as well as to the entire document.
6. All persons who obtain access to these materials are required to protect the document by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of the document as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially-sensitive, and privileged information.
7. These conditions shall apply to any revised, amended, or supplemental versions of materials provided in Docket No. C2008-3.
8. The duty of nondisclosure of anyone obtaining access to these materials is continuing, terminable only by specific order of the Commission, or as specified in paragraphs 10 through 15, below.

9. Any Docket No. C2008-3 participant or other person seeking access to these materials by requesting access, consents to these or such other conditions as the Commission may approve.
10. The party submitting the confidential material shall clearly mark the following legend on each page, or portion thereof, that it seeks to protect under this agreement: "Confidential—Subject To Protective Conditions In Docket No. C2008-3 Before the Postal Regulatory Commission" or other markings that are reasonably calculated to alert custodians of the material to its confidential or proprietary nature.
11. Any written materials — including but not limited to discovery requests and responses, requests for admission and responses, deposition transcripts and exhibits, pleadings, motions, affidavits, written testimony and briefs — that quote, summarize, or contain materials protected under these protective conditions are also covered by the same protective conditions and certification requirements, and shall be filed with the Commission only under seal. Documents submitted to the Commission as confidential shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as confidential documents.
12. Any oral testimony, argument or other statements that quote, summarize or otherwise disclose materials protected under these protective conditions shall be received only in hearing sessions limited to Capital One representatives and other persons who have complied with the terms of the protective order and have signed the attached certifications. The transcript pages containing such protected testimony shall be filed under seal and treated as protected materials under paragraph 11.
13. Notwithstanding the foregoing, protected material covered by paragraphs 11 or 12 may be disclosed to the following persons without their execution of a compliance certificate. Such disclosure shall not exceed the extent necessary to assist in prosecuting this proceeding or any appeals or reconsideration thereof.
 - (a) Members of the Commission.
 - (b) Court reporters, stenographers, or persons operating audio or video recording equipment for such court reporters or stenographers at hearings or depositions.

- (c) Any other person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper.
 - (d) Reviewing courts and their staffs. Any person seeking to disclose protected information to a reviewing court shall make a good faith effort to obtain protective conditions at least as effective as those set forth in this document. Moreover, the protective conditions set forth herein shall remain in effect throughout any subsequent review unless overridden by the action of a reviewing court.
14. A participant may apply to the Commission for a ruling that documents, categories of documents, or deposition transcripts, stamped or designated as confidential, are not entitled to such status and protection. The party that designated the document or testimony as confidential shall be given notice of the application and an opportunity to respond. To revoke confidential status, the proponent of declassification must show by a preponderance of the evidence that public disclosure of the materials is consistent with the standards of the Freedom of Information Act, 5 U.S.C. 552(b)(1)-(9), and Commission precedent.
15. Subpoena by Courts or Other Agencies. If a court or other administrative agency subpoenas or orders production of confidential information which a participant has obtained under the terms of this protective order, the target of the subpoena or order shall promptly (within two business days) notify the party who designated the document as confidential of the pendency of the subpoena or order to allow the designating party time to object to that production or seek a protective order.

CERTIFICATION

The undersigned represents that:

Access to these materials provided in Docket No. C2008-3 by the Postal Service, which is described in Order No. 208 and filed as protected material has been authorized by the Commission. The cover or label of the copy obtained is marked with my name. I agree to use the information only for purposes of analyzing matters at issue in Docket No. C2008-3. I certify that I have read and understand the above protective conditions and am eligible to receive access to materials under paragraph 1 of the protective conditions. I further agree to comply with all protective conditions and will maintain these materials in strict confidence in accordance with all of the protective conditions set out above.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____

CERTIFICATION UPON RETURN OF
PROTECTED MATERIALS

Pursuant to the Certification which I previously filed with the Commission regarding information provided in Docket No. C2008-3 by the Postal Service, which is described in Order No. 208 and filed as protected material (hereinafter, "these materials" or "the information"), received on behalf of myself and/or the party which I represent (as indicated below), I now affirm that I have:

- () Remained eligible to receive access to these materials under paragraph 1 of the protective conditions throughout the period these materials have been in my possession;
- () Complied with all conditions, and have maintained these materials in strict confidence in accordance with all of the protective conditions set out above;
- () Used these materials only for purposes of analyzing matters at issue in Docket No. C2008-3; and
- () Returned these materials to the Postal Regulatory Commission; or
- () Destroyed all copies of these materials that I obtained or that have been made from these materials.

Check all that apply.

Name _____
Firm _____
Title _____
Representing _____
Signature _____
Date _____