



March 15, 1999

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Hon. Margaret P. Crenshaw, Secretary
Postal Rate Commission
1333 H Street, NW, Suite 300
Washington, D.C. 20268-0001

Dear Ms. Crenshaw:

This transmits materials responsive to new section 3663 of Title 39, United States Code (Public Law 105-277, signed October 21, 1998). Section 3663 directs the Commission to submit annually to each house of Congress a comprehensive report of the costs, revenues, and volumes associated with international mail. 39 U.S.C. § 3663(a). In connection with this requirement, section 3663 also directs the Postal Service to provide to the Commission data that will be required to produce the annual report. 39 U.S.C. § 3663(b). These data are to be provided by March 15 of the year the report is due.

In Order No. 1228, issued February 16, 1999, the Commission outlined its expectations for provision of data needed to produce the first annual report on July 1, 1999. The materials provided here include the International Cost and Revenue Analysis (ICRA) Report, which contains the majority of the information identified by the Commission as required to produce its report. As anticipated in the reply comments filed by the Postal Service in Docket No. IM99-1, however, it has not been possible to date to complete preparation of all of the documentation contemplated by Order No. 1228. Many of the detailed supporting materials had to be developed specially to accompany the ICRA using Commission methodologies, which would normally not have been produced for internal purposes. The internal version of the ICRA, without all of the documentation, would normally not have been produced by March 15. Limitations on resources and on personnel with expertise to complete this work caused production delays that prevented timely completion of an integrated set of documentation. The remaining materials will be transmitted by March 26. The enclosed listing identifies the items transmitted at this time.

The Postal Service's comments filed in Docket No. IM99-1 noted that some of the materials supporting the ICRA would not be directly analogous to documents typically produced to support the domestic CRA report. In this

regard, the Postal Service believes that the data and information submitted will be adequate to explain and support the ICRA, and to meet the Commission's expectations under Order No. 1228. In the event there are questions, however, the Postal Service is prepared to respond to any inquiries as expeditiously and efficiently as possible, and, if necessary, to provide, as appropriate, such additional materials determined by the Commission to be meet the requirements of section 3663.

Furthermore, every effort has been made to provide data and information that will enable the Commission to properly analyze each international mail product or service "under methods determined appropriate by the Commission for the analysis of rates for domestic mail," as contemplated in section 3663. 39 U.S.C. § 3663. Accordingly, the ICRA Report provided here has been produced employing methodologies previously adopted by the Commission for the analysis of domestic mail services. In this regard, however, the Postal Service must emphasize that the versions of the ICRA Report actually employed by the Postal Service in its international business and in the design of international postal rates and fees are based on Postal Service methodologies that differ in important respects, and that could significantly alter analyses of certain of the international services. Accordingly, the Postal Service intends to provide, when it is completed, a version of the ICRA Report based on Postal Service methodologies, together with a discussion of pertinent differences in the context of the approaches actually used to design international rates and fees.

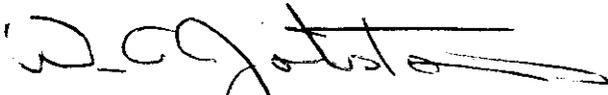
Finally, as the Commission noted in Order No. 1228, the Postal Service believes that the materials provided are commercially sensitive, and that they should not be made publicly available. It is the Postal Service's judgment that most of the items provided here and to be provided later are internal documents of a commercially sensitive nature that under good business practices it would not normally disclose publicly. The Postal Service has traditionally withheld international cost, revenue, and volume information from public disclosure, particularly given the intense nature of competition in international markets. The Postal Service competes not only with private couriers in the expedited and parcel sectors, but also with foreign postal administrations in the carriage of bulk outbound international letters.

We note that nothing in the plain language of 39 U.S.C. § 3663 establishes congressional intent that the documents provided to the Commission in connection with its reporting responsibilities should be made public. Specifically, section 3663 does not incorporate into this reporting process procedures outlined in 39 U.S.C. § 3624 for formal hearings on rate and classification matters under 5 U.S.C. §§ 556 and 557. Consequently, we do not believe that Commission rules relating to discovery and production of documents in such proceedings should govern access to these materials.

Accordingly, the Postal Service requests that the Commission withhold from public disclosure the international cost, revenue, and volume materials and associated documents that it is submitting pursuant to section 3663. In this regard, we note the similarity between the objectives furthered by nondisclosure here and the policy embodied in Section 102(a)(10) of the Commission's periodic reporting rules (39 C.F.R. § 3001.102(a)(10)), which permits delay up to one year in providing billing determinant information for the competitive categories of domestic Express Mail, Priority Mail, and Parcel Post. This provision grew out of the Postal Service's concern, expressed in Docket No. RM89-3, that the provision of this information would result in commercial harm to the Postal Service. Furthermore, we note that the Department of Justice has expressed guidelines for interagency referral and consultation when agencies receive Freedom of Information Act requests for information contained in documents originating at another agency. I have enclosed a copy of these consultation procedures. We respectfully request that the Commission follow these guidelines, if it receives public requests for the Postal Service documents submitted in connection with section 3663.

Although the Postal Service submits that it is reasonable for the Commission not to disclose this information pending the production of its report, the Postal Service also understands that the degree to which the data and information submitted are specifically incorporated in the Commission's report is a matter that will be subsequently determined. In this regard, the Postal Service notes that nothing in section 3663 requires the Commission to make its report available to the public; rather, the statute merely requires that the Commission "transmit [it] to each House of Congress." In a separate document to be submitted later, the Postal Service intends to provide a discussion of the commercial sensitivity issues in the context of the specific material provided. This document will identify with greater precision the information that the Postal Service believes the Commission should withhold from its report and other reasons why such information is commercially sensitive.

Sincerely,



William T. Johnstone
Managing Counsel
International Law and Ratemaking

Enclosures

**39 U.S.C. § 3663
Enclosures and Schedule**

<u>Item</u>	<u>Designation</u>	<u>Date</u>
FY 1998 ICRA	Exhibit 1	3/15
Volume 1, Documentation	Workpaper 1A	3/15
Volume 2, Documentation	Workpaper 1B	3/15
Appendices, Documentation	Workpaper 1C	3/26
	Workpaper 1D	3/26
	Workpaper 1E	3/26
	Workpaper 1F	3/26
	Workpaper 1G	3/26
FY 1997 Billing Determinants	Exhibit 2	3/15
SIRVO Handbook	Exhibit 3A	3/15
SIRVI Handbook	Exhibit 3B	3/15
MIDAS Handbook	Exhibit 3C	3/15
Inspector General Report (FR-AR-99-004)	Exhibit 4	3/15
FY 1997 USPS ICRA	Exhibit 5	3/15

FOIA UPDATE

OIP Guidance: Referral and Consultation Procedures

When searching for records requested under the Freedom of Information Act, it is not uncommon for an agency to locate a responsive document that originated outside of the agency. This occurrence can present an agency with the threshold jurisdictional question of whether such a document is an "agency record" under the FOIA. In those cases in which the document is determined to be an "agency record," the agency then must decide whether it should (a) process the record for the requester directly, (b) refer the record to the originating agency for its disclosure determination and direct response to the FOIA requester, or (c) consult with that originating agency before making a direct FOIA response.

"Agency Record" Inquiry

The threshold question of whether a document either created or otherwise obtained by an agency is an "agency record" under the FOIA should be resolved by determining whether the document is physically possessed by the agency and whether it was within the agency's "control" at the time the FOIA request was made. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989). Based upon an overall review of relevant FOIA precedents, it appears that the category of documents most frequently found not to be "agency records" under the Act are "personal materials in an employee's possession, even though the materials may be physically located at the agency." *Id.* at 145 (citing Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 157 (1980)). For a detailed discussion of the criteria to be employed by federal agencies in determining whether particular materials properly qualify as "personal records" under the FOIA, see FOIA Update, Fall 1984, at 3-4 ("OIP Guidance: 'Agency Records' vs. 'Personal Records'").

Similarly, documents originating with Congress, where that body has specifically reserved control over them, have been held not to be "agency records." *See, e.g., Golan v. CIA*, 607 F.2d 339, 344-48 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980); Washington Post Co. v. Department of Defense, 766 F. Supp. 1, 16-18 (D.D.C. 1991). As well, documents originating with the courts, again assuming some reservation of control, *cf. Department of Justice v. Tax Analysts*, 492 U.S. at 146-47, also have been held not to be "agency records." *See, e.g., Valenti v. Department of Justice*, 503 F. Supp. 230, 232-33 (E.D. La. 1980) (grand jury transcript). One court likewise has suggested that "communications between the President and his immediate advisors" which find their way to an agency covered by the FOIA would not qualify as "agency records" either. McGehee v. CIA, 697 F.2d 1095, 1108 (D.C. Cir.) (dictum), vacated in part on other grounds upon panel reh'g, 711 F.2d 1076 (D.C. Cir. 1983).

On the other hand, "generally materials obtained from private parties and in the possession of a federal agency [are] agency 'records' within the meaning of FOIA." Weisberg v. Department of Justice, 631 F.2d 824, 827-28 (D.C. Cir. 1980) (copyrighted photographs used in criminal investigation held to be "agency records"); see, e.g., Hercules, Inc. v. Marsh, 838 F.2d 1027, 1029 (4th Cir. 1988) (army ammunition plant telephone directory prepared by contractor at government expense held to be "agency record"); General Elec. Co. v. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984) (internal company report submitted in connection with licensing proceedings held to be "agency record"). Accordingly, the agency in possession of such records is responsible for making any FOIA disclosure determination that might be required.

Referral of Records

With respect to records originating with another agency, one principle is beyond any doubt: "[W]hen an agency receives a FOIA request for 'agency records' in its possession, it must take responsibility for processing the request. It cannot simply refuse to act on the ground that the documents originated elsewhere." McGehee v. CIA, 697 F.2d at 1110. Some controversy once existed, however, over exactly what this "responsibility" entails. In the McGehee case, the D.C. Circuit Court of Appeals confronted an agency's extremely broad position that it had no obligation to take any action whatsoever regarding records originating in another agency; it responded by suggesting rigid administrative procedures by which the agency would process such records itself, primarily using consultations. See id. at 1110-12. This aspect of the McGehee decision was regarded as interlocutory and nonbinding on the issue, so it was advised that agencies not alter their longstanding practices of referring records to their agencies of origination. See FOIA Update, Summer 1983, at 5; see also FOIA Update, June 1982, at 5 (recommending FOIA referral as matter of practicality).

With the passage of time, this traditional FOIA practice has largely ceased to be an issue. Agencies have continued to refer requested records to originating agencies for direct FOIA responses -- and when litigation has resulted, the government generally has not raised any issue over which agency is the "proper party defendant," but instead has provided affidavits from the originating agencies to justify any contested nondisclosure. The practice has continued, as a practical matter, with acceptance both tacit and widespread. See, e.g., Oglesby v. Department of the Army, 920 F.2d 57, 69 & n.15 (D.C. Cir. 1990); Fitzgibbon v. CIA, 911 F.2d 755, 757 (D.C. Cir. 1990); Zang v. FBI, 756 F. Supp. 705, 706-07 & n.1 (W.D.N.Y. 1991).

Accordingly, the question for FOIA officers now is how best to handle the records of another agency in a given case -- by acting independently, by making a full record referral, or by merely consulting with the other agency. The short answer is that the agency that is best able to determine a record's sensitivity, and in turn its exemption status, is the agency that should process that record under the Act. While this may vary in particular cases, as a general rule the agency that originated a record is usually the most appropriate agency to make a FOIA-disclosure determination regarding it. The primary advantages of record referrals are overall administrative efficiency and consistency of response.

With respect to classified information, referrals are even mandatory, because Section 3.1(b) of Executive Order No. 12,356 limits declassification authority to the agency that authorized the original classification. In addition, as a matter of agency policy, the Department of Justice generally refers all law enforcement records to their agencies of origination for their FOIA determinations. See 28 C.F.R. {16.4(d) (1990) (Justice Department regulation). (However, the agency that is currently leading an ongoing law enforcement investigation most likely will be in the best position to determine whether disclosure of any record of that investigation, regardless of where it originated, would interfere with ongoing law enforcement proceedings.) In any event, agencies that routinely exchange standard types of information should consider formal or informal agreements governing treatment of one another's records in order to conserve scarce administrative resources. See, e.g., 28 C.F.R. {16.4(g) (1990) (Justice Department regulation concerning such agreements).

Further, agencies should be alert to two general principles regarding FOIA referrals. First, it is never appropriate to make a full referral of records (or of the responsibility for directly responding to a requester) to an entity that itself is not subject to the Act. Accordingly, a referral may not be made to Congress, the judiciary, state governmental bodies, private businesses, or to individuals. Second, as a matter of sound administrative practice, whenever an agency refers a record to another agency for response, it should advise the requester of this fact and of the identity of the agency to which the referral was made -- except in the unusual case in which to do so would itself disclose a sensitive, exempt fact. See, e.g., FOIA Update, Spring 1991, at 6 (advising how to make referrals to law enforcement agencies in context of third-party FOIA requests).

Consultations

Interagency FOIA consultations, as distinct from record referrals, are particularly appropriate in two types of situations. First, they are well suited to the circumstance in which an agency deals with a responsive record that it originated itself, but which contains items of information that were furnished by (or perhaps are of special interest to) another agency. By carefully consulting with that other agency, either formally or informally, an agency can make a more informed disclosure decision regarding its own record.

Consultations also are especially useful in informing an agency of any sensitivity of records originating with entities not subject to the FOIA. Indeed, in the case of confidential business information, such consultations often are mandatory under Executive Order No. 12,600, and its implementing regulations. As with referrals, requesters ordinarily should be advised that the agency is consulting with a record's originator whenever this process delays an agency's FOIA response.

Conclusion

In sum, an agency considering requested documents that originated outside of the agency must first determine whether the documents are "agency records." Where such a record originated with another agency, the agency must determine whether it or the originating agency can best respond to that part of the FOIA request. Only through appropriate use of referral and consultation practices can an agency ensure the making of fully informed and consistent FOIA disclosure determinations.

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