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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

September 3, 1999

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

Dear Ms. Crenshaw:

This is in response to your letter of August 27, 1999, to Mary Elcano, which invites the Postal Service to respond to arguments presented in the August 18, 1999, Freedom of Information Act appeal letter of Piper & Marbury.

In its letter, Piper & Marbury (hereinafter, "P&M") makes several arguments which mischaracterize the Freedom of Information Act (FOIA), 5 U.S.C. 552; the Postal Reorganization Act, 39 U.S.C. 101 *et seq.*; and pertinent case law.

By operation of 39 U.S.C. § 410(b), the FOIA is made applicable to the Postal Service, subject to the narrow exemptions from mandatory public disclosure reflected in 5 U.S.C. § 552(b). FOIA subsection (b)(3) incorporates by reference the additional exemptions in 39 U.S.C. § 410(c). At page 5 of its letter, P&M asserts that chapter 36 of the Postal Reorganization Act, particularly section 3663, "overrides" section 410(c)(2). The Postal Service finds no basis for this statutory interpretation and considers that a more appropriate approach is to presume that the various provisions of the Act are intended to work in harmony with each other, as well as with the FOIA.

Notwithstanding the provisions of the Postal Reorganization Act which hold the Postal Service accountable for the achievement of various public policy objectives, section 410(c)(2) is intended to protect from public disclosure sensitive commercial information in the hands of the Postal Service, if such disclosure would be inconsistent with "good business practice." In the case of *National Western Life Insurance v. United States Postal Service*, 512 F.Supp. 454, (N.D. Tex.1980), the court held that the standard to be applied in identifying information within the scope of this exemption

is readily ascertainable by looking to the commercial world, management techniques, and business law, as well as to standards of practice adhered to by large corporations.

512 F.Supp. at 459. Thus, contrary to the thrust of the P&M appeal letter, the Commission was correct to conclude, in its July 29, 1999, response to the P&M FOIA request, that section 410(c)(2) places the Postal Service to some degree on an equal footing with private competitors with respect to its disclosure obligations, at least when the public hearing process of chapter 36 of the Act do not apply.

At page 4, footnote 2 of its letter, P&M asserts, again without foundation, that section 410(c) (2) is limited to protecting "trade secrets . . . and similar information whose value would be destroyed if made public . . ." A detailed explanation of the Postal Service's interpretation of section 410(c)(2), as applied to the information in question, is contained in its Memorandum Concerning Categories of Information that Should Be Deleted from Commission Report to Congress on International Mail Costs, Volumes and Revenues. That memorandum has provided a foundation for the Commission's application of section 410(c)(2) to the P&M FOIA request. The Postal Service submits that P&M has provided no persuasive basis for the Commission to deviate from its response to that request.

P&M refers to the holding in *National Western Life*, at page 4 of its appeal letter and argues that the court

treated §410(c)(2) and [the] FOIA's 'commercial exemption' of 5 U.S.C. § 552(b)(4) together. [Citation omitted.] Thus, § 410(c)(2) does not 'place [the Postal Service] on an equal footing with private competitors' when it comes to public access to information. [Footnote omitted]

However, the Postal Service invites the Commission's attention to fact that the passage of the court's opinion to which UPS refers (pages 461-462) does not treat those provisions as synonymous. At page 462, the court made clear that its reference to various FOIA subsections, including (b)(4), was for the purpose of obtaining guidance in clarifying the meaning of the term "commercial" in section 410(c)(2). The court's conclusion that the information at issue in that case was not exempt from disclosure under the FOIA was based solely upon its determination that the information was not "commercial" within the meaning of section 410(c)(2).

The Postal Reorganization Act establishes the Postal Service's dual character. The Postal Service is an agency with a host of public service obligations. It is subject to the FOIA, which applies to the Postal Service only to a limited extent, pursuant to specific additional exemptions in 39 U.S.C. § 410(c). In accordance with its public service obligations, the Postal Service is chartered to compete, much like a commercial

enterprise, in the provision of certain services. The exemption in subsection (c)(2) was enacted explicitly for the purpose of protecting the Postal Service's commercial interests from the harm which would flow from public access under the general provisions of the FOIA.

At page 4 of its appeal letter, P&M points to the requirement in section 101(a) that the Postal Service provide "efficient" services. It then argues that "the public cannot judge the efficiency of the Postal Service's international services without knowing the costs (and the associated cost coverages) the Postal Service incurs to provide these services. P&M also argues that public access to such information is required because Congress established as a basic postal policy in section 101(a) that "[t]he costs of . . . the Postal Service shall not be apportioned to impair the overall value of such service to the people." After citing section 403(a), P&M argues (at page 5) that "Congress could not have intended to deprive the public of the information (including product-specific costs and cost coverages) needed to insure the public that these policies of overall value and fairness in rates are being met."

Taken to its logical conclusion, P&M's argument would invalidate the application of all FOIA exemptions to the Postal Service. Under P&M's scheme of statutory construction, if Congress has affirmed that there is a public interest in a postal matter, then there can be no restriction on the public's access to agency records concerning that matter. The argument is patently defective on its face. Through the FOIA and related statutes, Congress has established a policy which, in its judgment, already strikes the proper balance between the public's interest in Postal Service compliance with the general policy objectives of the Postal Reorganization Act, and the public's interest in the protection of the commercially sensitive and other information in the hands of the Postal Service, as assessed by it in accordance with criteria outlined in section 410(c). Under limited circumstances, such as those within the ambit of section 410(c)(2), Congress has determined that the more compelling public interest is the one served by imposing limits upon the public's access to records which federal agencies are authorized to collect, generate and maintain, in the execution of their public responsibilities.

The holding in *National Western Life* affirms the soundness of the Commission's response to the P&M FOIA request. The court declared that

in creating the United States Postal Service, the Congress intended that it should operate more like a private business than a governmental agency. Nevertheless, the Postal Reorganization Act . . . did not remove all semblance of a public agency from the Postal Service . . . [.] The Postal Service is still subject to public responsibility, as evidenced by the applicability to the Postal Service of the Freedom of Information Act.

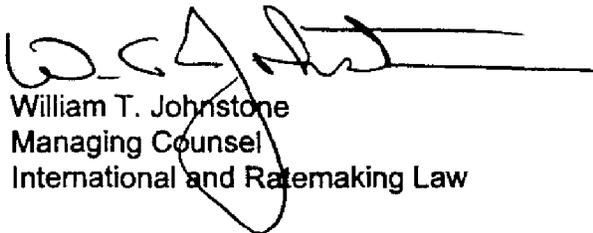
454 F.Supp. at 462. Notwithstanding the Postal Service's accountability as a public agency, the court emphasized that section 410 (c)(2) "qualifies as an exemption statute under 5 U.S.C. § 552(b)(3)" to protect Postal Service information from disclosure when such protection would be consistent with good business practice. *Id.* at 459.

Although public access to certain postal records may be limited by the terms of section 410(c)(2), the Postal Service's accountability to the public regarding the provision of services, and the fulfillment of its statutory obligations is not diminished as a result. Congress maintains its general oversight function. In addition, other federal agencies are authorized, in the conduct of their responsibilities, to examine, audit, investigate or influence the Postal Service's exercise of its authority.

Under the Postal Reorganization Act, the Commission also has important responsibilities for carrying out postal policy as expressed by Congress in the Act. However, nothing in the Act or the FOIA compels the Commission, or any agency in the discharge of any responsibility related to the Postal Service, to disclose commercial postal information, if such disclosure would be contrary to good business practice, within the meaning of section 410(c)(2). No such Congressional intent can be discerned from the original enactment of the Postal Reorganization Act or any subsequent amendments, including the relatively recent adoption of section 3663.

Accordingly, the P&M FOIA appeal should be denied.

Sincerely,



William T. Johnstone
Managing Counsel
International and Rate-making Law

cc: John McKeever, Esq.
Piper & Marbury