

BEFORE THE
POSTAL RATE COMMISSION

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

In the matter of
Postal Rate Commission's duty to
analyze and report on international mail costs,
volumes, and revenues; Proposed Rule

COMMENTS OF

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

The Reporters Committee is a voluntary unincorporated association established in 1970 by news editors and reporters to defend the First Amendment and freedom of information rights of the print and broadcast media. The Reporters Committee sponsors, as a special project, the FOI Service Center, which advises reporters on issues of access to governmental records and proceedings.

The FOI Service Center of the Reporters Committee handles calls daily from reporters and editors around the country who are frustrated in their efforts to obtain information from the federal government. They have faced arbitrary use of the exemptions to the Freedom of Information Act, lengthy delays in responses to their FOI and other requests and outright refusal by federal agencies to acknowledge the public's interest in information about the workings of its government.

The failure of federal agencies to provide information on their activities affects the ability of reporters to cover government activities accurately and promptly.

In turn, the inability of reporters to gain information that should be available to the public ultimately means many citizens who rely upon the media cannot get information. They cannot reap the benefits of open government intended by Congress when it initially enacted the FOI Act and as it has repeatedly amended it in the years since its passage.

PURPOSE OF THESE REPORTERS COMMITTEE COMMENTS

The purpose of these Reporters Committee Comments is to urge the Postal Rate Commission (herein "Commission") to reject its proposed regulations which appear at 39 CFR Part 3001 of the Federal Regulations and would add section 30001.103 to subpart G of 39 CFR Part 3001, where the Commission proposes:

Information contained in these reports that is considered to be commercially sensitive should be identified as such, and will not be publicly disclosed except as required by applicable law.

This regulation is in response to the Commission's duty to analyze and report on international

mail costs, volumes, and revenues under section 3663.

We think that the information contained in the reports submitted by the Commission pursuant to the proposed regulation should be disclosed to the greatest extent possible. In our view, the Commission must consider the clear legal precedent established by the United States Court of Appeals for the Ninth Circuit in Church of Scientology of California v. United States Postal Service, 633 F.2d 1327 (9th Cir. 1980). The proposed regulation is based on language within section 410(c)(2) of the Postal Reorganization Act. However, section 410(c)(2) does not qualify as an Exemption 3 statute under the FOI Act.

The proposed regulation promises to protect information that is not necessarily exempt under the FOI Act. See Church of Scientology of California v. United States Postal Service, 633 F.2d 1327 (9th Cir. 1980).

The language of the proposed regulation, indicating that “commercially sensitive” information can be withheld from public disclosure, is too broad to fall within the stringent requirements of Exemption 3. Particularly, the law and the proposed regulation fail the specificity requirement of Exemption 3.

Because the FOI Act’s Exemption 4 protects information which if released could cause substantial competitive harm, it would be possible for the Commission to comply with 410(c) of the Postal Reorganization Act that it not release information that would not be disclosed under “good business practice” by adopting the enforcement prong of Exemption 4 which the courts have said protects against disclosure of information that could cause “substantial competitive harm.”

THE LAW IMPLEMENTED DOES NOT FALL WITHIN EXEMPTION 3 OF FOIA

In Church of Scientology, the court determined that section 410(c) of the Postal Reorganization Act does not satisfy Exemption 3 of the FOI Act because it allows total discretion to disclose or withhold any or all of its investigatory files. Therefore, whether 410(c)(2) – which permits the Commission to withhold commercially sensitive information which under “good business practice” would not be disclosed – particularly satisfies Exemption 3 of FOI Act is not of issue. Church of Scientology clearly indicates that 410(c), despite its specific disclosure provisions, falls short of exemption status.

Nevertheless, we challenge the sufficiency of this regulation as one which does not fall within the strenuous requirements of Exemption 3 to the FOI Act. The purpose of the FOI Act is to provide for public access to government records, and exemption to such free disclosure should be narrowly drafted. Specifically, to qualify for Exemption 3, the manner in which the information is withheld from the public leaves “no discretion on the issue” or “particular criteria for withholding refers to particular types of matters to be withheld.” See Government in the Sunshine Act, Pub. L.No. 94-409, 90 Stat. 1241, 1247 (1976).

The regulation proposed by the Commission is based on withholding language of section 410(c)(2) of the Postal Reorganization Act. In Church of Scientology, the United States Postal Service conceded that section 410(c) does not meet the discretion requirement. Likewise, the language in this subsection does not satisfy the particularity requirement for Exemption 3, and thus, the regulation would not either.

THE LAW IMPLEMENTED FAILS EXEMPTION 3 STATUS UNDER CASE LAW

In Church of Scientology, the court examined whether section 410(c)(6) of the Postal Reorganization Act qualified under Exemption 3 of the FOI Act. Upon a detailed analysis of legislative history and policy of the act, and review of the caselaw on point, the court determined that there was “no congressional intent to exempt the Postal Service from the rigors of the FOIA.” Church of Scientology, 633 F.2d at 1333. More importantly, the court determined that “it is of no moment that (c)(6) narrows the range of documents,” and that section 410(c) provides the Postal Service with “total discretion to give or restrict any or all of its investigatory files.” Id. Thus, the court concluded, section 410(c)(6) is not an Exemption 3 statute.

Likewise, section 410(c)(2) is not an Exemption 3 statute. As the court pointed out, it does not matter that (c)(6) narrows the ranges of documents to be withheld. Similarly, it does not matter that (c)(2), too, attempts to narrow the range to “commercially sensitive” information. Under the well-established principle of *stare decisis* – let the decision stand – the Commission should recognize that the court has spoken to interpretation of 410(c) provisions. The court in Church of Scientology held that 410(c) does not satisfy the strict requirements of Exemption 3 status, thus, and subsections of 410(c), including 410(c)(2), must likewise fail.

To put it simply – 410(c) has been determined by the Ninth Circuit to fail Exemption 3 status. The interpretation of 410(c) is controlling in the present case. Under separation of powers principles, the Commission cannot “legislate” otherwise by attempting to circumvent the clear judicial interpretation of 410(c) of the Postal Reorganization Act as it comes within the FOI Act.

“COMMERCIALLY SENSITIVE” DOES NOT SATISFY THE SPECIFICITY REQUIREMENT OF EXEMPTION 3

Additionally, the “commercially sensitive” language of 410(c)(2) does not satisfy the exemption requirements for Exemption 3 status. In Church of Scientology, the court noted the legislative history and policy behind the Postal Reorganization Act. According to the court:

[B]y limiting the applicability of some federal laws, Congress intended to free the service from “shared management” so it could operate its day-to-day affairs in a more “businesslike way” [citation omitted]. In this effort, Congress surely did not mean to place the Postal Service on a pedestal removed from the reaches of social policy and legislation. To the contrary, Congress envisioned that its fundamental postal reform would place responsibility for “managing the system” in a single place, but “with appropriate safeguards against abuse of that responsibility and appropriate assurances of continued congressional surveillance.” [citation omitted].

Church of Scientology, 633 F.2d at 1333 (emphasis added). The purpose of section 410(c)(2) was not to remove what the Postal Services termed “commercially sensitive” information from the reach of FOI Act. As the United States Court of Appeals for the District of Columbia explained in Iron & Sears v. Dann, 606 F.2d 1215, 1220 (D.C.Cir. 1979), it is clear that Congress, by enacting the FOI Act “did not want the exemption to be triggered by every statute that in any way gives the administrators discretion to withhold documents from the public.” It is clear that Exemption 3 is not triggered by section 410(c)(2), therefore, the purpose of the FOI

Act is frustrated by the Commission's interpretation of 410(c)(2).

In Church of Scientology, the United States Postal Service conceded that section 410(c) fails to meet the requirements of subsection (A) of Exemption 3 "because it gives the agency complete discretion to grant or withhold investigatory files by providing that the section incorporating the FOIA 'shall not require disclosure' in certain cases." 633 F.2d at 1330. Therefore, for purposes of these comments, we turn our analysis directly to section 410(c)(2)'s failure to satisfy the requirement of subsection (b) of Exemption 3 – that Congress have articulated "particular criteria." To determine whether Congress has articulated "particular criterion," we must examine congressional intent behind the measure, as well as the amount of discretion afforded to the agency.

It is clear, by previously referenced language of the Church of Scientology court that Congress did not intend, by enactment of the Postal Reorganization Act, that reports and information supporting reports submitted by the Commission fall beyond the reach of FOI Act. The Commission must supply information as requested to comply with the FOI Act. Otherwise, the goals of the Postal Reorganization Act – to maintain efficiency and fair and equitable rates – are frustrated because the public is not able to fully assess the services provided by the Commission.

Finally, section 410(c) affords the Postal Services Commission complete discretion to disclose or withhold all commercially sensitive information. Thus, it is of no issue that 410(c)(2) attempts to narrow the discretion to commercially sensitive internal documents that "under good business practice" would not be disclosed. Section 410(c) grants the Commission total discretion, thus 410(c)(2) provides insufficient specificity as required by subsection (B) of Exemption 3.

We greatly appreciate the opportunity to review these proposals.

Respectfully submitted,


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