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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

PRESIDING OFFICER'S
RULING NO. C99-1/15

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Complaint on Post E.C.S.

Docket No. C99-1

PRESIDING OFFICER'S RULING ON
UNITED STATES POSTAL SERVICE
RESPONSE TO RULING NO. C99-1/14
AND MOTION FOR ISSUANCE OF
TENTATIVE RULING ON DISCLOSURE

(March 20, 2000)

On February 22, 2000, the Postal Service filed a pleading that responds to my Ruling No. 14 directing it to provide potentially discoverable documents for *in camera* inspection, and requests additional procedural relief to protect the confidentiality of that material. United States Postal Service Response to P.O. Ruling No. C99-1/14 and Motion for Issuance of Tentative Ruling on Disclosure, February 22, 2000. In addition to confirming that it was contemporaneously filing documents in compliance with the ruling, the Service reports that it "discovered in the course of preparing this filing that a number of additional privileges and grounds for objection apply to the documents." *Id.* at 2. For this reason, the Service requests an opportunity to supplement the Descriptive List of claimed privileges it had previously filed.¹

Further, the Service asks for establishment of procedures under which I would issue a preliminary or tentative ruling identifying documents to be disclosed prior to their release—either publicly or under protective conditions—to allow parties having proprietary or commercial interests in the information contained therein to comment on the potential risk of harm that could be caused by disclosure, and on the need for protective conditions or redactions to prevent such harm. According to the Service, this measure will ensure informed determinations on the status of each document before the risk of competitive

¹ The Service stated a desire to supplement its objections further with respect to two documents in a Notice filed on March 8. See note 2, *infra*.

harm to a stakeholder becomes imminent.² *Id.* at 4-5. Finally, the Service requests that the documents it has provided be returned once *in camera* inspection has been completed. *Id.* at 5.

Complainant United Parcel Service responded to the Postal Service's pleading on February 29. Answer of United Parcel Service to United States Postal Service Motion for Issuance of Tentative Ruling on Disclosure, February 29, 2000. UPS opposes the Service's effort to introduce supplemental listings of document categories and additional objections at this point, arguing that they are untimely, too vague to allow adequate evaluation, and unfair when it appears that resolution of a protracted discovery dispute is finally near. *Id.* at 1-3. Complainant also opposes the Service's request to establish the preliminary ruling procedure, on the grounds that interested outside parties have had the opportunity to express their views; that the Service has already presented arguments on behalf of these other stakeholders; and that the proposed mechanism will only serve to cause further delay in the proceeding without providing any additional benefits or safeguards. *Id.* at 3-4. Therefore, UPS argues, the procedure advanced by the Postal Service is unnecessary and should be rejected.

Supplemental Category Listings and Objections. Notwithstanding the opposition of Complainant, I shall allow the Postal Service to update its listings of document categories and supplement the objections it has already interposed for the documents currently at issue. The Service reports that these additions to its previously filed Descriptive List are the product of its detailed examination of responsive documents preparatory to filing them

² In support of its proposed procedures, the Service filed the comments of Canada Post Corporation, which "vigorously opposes any release of [its] documents to the public because of the likelihood that such documents could be used by [its] competitors...to their advantage in establishing similar services[.]" and joins in the Service's request for a tentative ruling procedure. United States Postal Service Notice of Filing Comments of Canada Post Corporation and Supplemental Statement Regarding Disclosure, March 8, 2000, Attachment at 1-2. In the same pleading, the Service seeks to supplement its objection relating to two documents in one described category. *Id.* at 1.

Separately, Tumbleweed Communications Corp.—a provider of electronic document delivery software that both licenses its products to the Postal Service and UPS, and competes with them—filed comments bearing on release of its commercially sensitive information. Tumbleweed Communications Corp.'s Comments on the Release of Commercially Sensitive Information to UPS and the Public, February 24, 2000. Tumbleweed argues that any release of its documents should be subject to the protective conditions set forth in Order No. 1283, and joins in the Service's request for establishment of a preliminary ruling procedure to allow it to express its views on the terms of disclosure prior to release.

as directed in Presiding Officer's Ruling No. C99-1/14. Disallowing such additions would deprive the Commission of the Postal Service's more detailed and fully articulated presentation of the grounds for protecting the documents at issue from public disclosure, and for this reason I am disinclined to discourage efforts of this kind in future controversies by so ruling. However, Complainant has not yet availed itself of an opportunity to respond to these additions on their merits, as it did with respect to the original Descriptive List.³ Therefore, I shall grant Complainant and all other interested parties an opportunity to submit a response. Responses shall be due 10 days from the issuance of this ruling.

Requested Return of *In Camera* Materials. As the Postal Service requests, I shall also confirm that the documents it provided for *in camera* inspection on February 22 will be returned to the Service as soon as their availability is no longer required for the purposes of this proceeding. This treatment is in keeping with the established Commission practice of offering to return such sensitive materials to their owners after the conclusion of the proceeding in which they were provided. However, it should be borne in mind that § 31a of the rules explicitly reserves "[t]he right of the presiding officer, the Commission, and reviewing courts to disclose *in camera* data to the extent necessary for the proper disposition of the proceeding...." To the extent any of the documents subject to *in camera* inspection are found to be discoverable, and thus may become part of the evidentiary record in this proceeding, it will be necessary to retain them under appropriate conditions following their examination.

Requested Preliminary Ruling and Comment Procedures. However, I shall not adopt the additional preliminary ruling and comment procedures proposed by the Postal Service. As UPS notes, adding a further layer of procedure to ruling on claims of privilege would serve to encumber and protract what is already a painstaking process. The Postal Service and other stakeholders in the information contained in the documents in controversy have submitted their views,⁴ and I shall consider these comments carefully before ruling on disclosure of any of these materials.

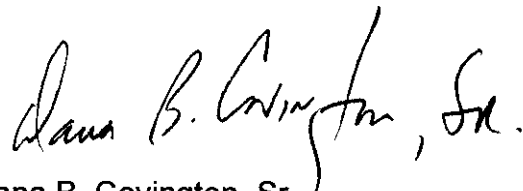
³ Response of United Parcel Service to the United States Postal Service's Privilege Log, September 9, 1999.

⁴ See note 2, *supra*.

Furthermore, it is not evident that any additional procedure is required to prevent potentially damaging forms of disclosure. The "notice and possible objection" procedure adopted in Order No. 1283 will provide advance notice to the Postal Service when any individual seeks access to material subject to protective conditions.⁵ I would expect the Service to consult with any other stakeholder in the protected material in determining whether to exercise its opportunity to lodge an objection to an individual's access. This mechanism should enable the Postal Service and other parties with interests in the confidentiality of the documents to intervene should it appear that access would compromise them.

RULING

1. The request of the Postal Service to supplement its Descriptive List of Documents, including the Category Listings therein, contained in the United States Postal Service Response to P.O. Ruling No. C99-1/14 and Motion for Issuance of Tentative Ruling on Disclosure, filed February 22, 2000, is granted. Replies to the supplemental listings are due on March 30, 2000.
2. The request of the Postal Service for confirmation that *in camera* materials will be returned to it, contained in the United States Postal Service Response to P.O. Ruling No. C99-1/14 and Motion for Issuance of Tentative Ruling on Disclosure, filed February 22, 2000, is granted.
3. The Motion of the United States Postal Service for Issuance of Tentative Ruling on Disclosure, filed February 22, 2000, is denied.


Dana B. Covington, Sr.
Presiding Officer

⁵ See Order No. 1283 at 10-12; Order No. 1287, Appendix A at 1-2.