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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

PRESIDING OFFICER'S
RULING NO. R2000-1/28

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

Postal Rate and Fee Changes

Docket No. R2000-1

PRESIDING OFFICER'S RULING
GRANTING DOUGLAS F. CARLSON MOTION TO COMPEL
RESPONSE TO INTERROGATORIES (DFC/USPS-18, 19(c) & 20(b)-(e))

(Issued April 3, 2000)

Douglas F. Carlson filed a motion to compel answers to interrogatories on March 7, 2000 (Motion).¹ The Motion was in response to the Postal Service's objection to interrogatories filed on February 25, 2000 (Objection).² Carlson initially filed a set of six multi-part interrogatories on February 15, 2000.³ The Postal Service filed answers to the uncontested interrogatories on February 29, 2000.⁴ The interrogatories inquire about the Breast Cancer Research stamp and semipostal stamps in general. The Postal Service bases its objections on relevance, commercial sensitivity, and privilege. The basis for the objection to each interrogatory is further explained and analyzed in ruling on the Motion.

¹ Douglas F. Carlson Motion to Compel United States Postal Service to Respond to Interrogatories DFC/USPS-18, 19(c) & 20(b)-(e).

² United States Postal Service Objection to Interrogatories DFC/USPS-18, 19(b), and 20(b-e).

³ Douglas F. Carlson Interrogatories to the United States Postal Service (DFC/USPS-18-23).

⁴ Responses of the United States Postal Service to Interrogatories of Douglas Carlson (DFC/USPS-19(a, b), 20(a), 21, 22(a, b, c, d, f, h, i)).

On March 10, 2000, the Office of the Consumer Advocate (OCA) filed an answer in support of Carlson's Motion.⁵ The OCA notes that the answers to the interrogatories will assist the OCA in developing a Courtesy Envelope Mail (CEM) proposal in this docket. The OCA alleges that the answers to the interrogatories not only will "lead to admissible evidence," but also would be admissible as evidence themselves. The OCA states that a Postal Service burden or relevance claim cannot withstand scrutiny, and further states the Postal Service simply asserts a privilege claim without providing reasons for its applicability.

The Postal Service filed an answer in opposition to the motion to compel on March 14, 2000 (Answer).⁶ The Answer responds to the allegations made in the Motion and reiterates the reasons for the Postal Service's objections.

Analysis. The Postal Service objects to interrogatories 18, 19(c) and 20(b-e) concerning the Breast Cancer Research stamp on the grounds of relevance. The Service alleges that the Breast Cancer Research stamp is beyond the scope of this proceeding and that there is no relationship between the legislation for the Breast Cancer Research stamp and the proposals at issue in this proceeding. Carlson contends the interrogatories about the Breast Cancer Research stamp are relevant because the answers could cast doubt on the Postal Service's rationale for rejecting the CEM proposal in Docket No. R97-1. Carlson leaves open the possibility that a participant may wish to submit a new proposal for CEM in this rate case. OCA states that answers to the interrogatories will assist the OCA in developing its own CEM proposal in this docket and generally supports Carlson's relevance claim. The interrogatories appear to be relevant, as alleged by two different participants, for the purpose of contrasting and comparing the Postal Service's actions concerning the

⁵ Office of the Consumer Advocate Answer in Support of Douglas F. Carlson Motion to Compel Responses to DFC/USPS-18, -19(c) and -20(b)-(e).

⁶ United States Postal Service Answer in Opposition to Motion of Douglas F. Carlson to Compel United States Postal Service to Respond to Interrogatories DFC/USPS-18, 19(c), and 20(b-e).

Breast Cancer Research stamp and the CEM proposal. The Postal Service objection based on relevance is denied.

The Postal Service objects to interrogatories 18(t) and 20(c-e) because the questions ask for postal management's opinions. Upon review of interrogatories 18(t) and 20(c-e), it is clear that the questions can be answered by either stating facts, opinions, or a combination of both. An interrogatory otherwise proper is not necessarily objectionable because an answer would involve an opinion or contention that relates to fact or the application of law to fact. Rule 26(c). The questions are otherwise proper and should be answered.

The Postal Service further alleges that the answers to interrogatories 18(t) and 20(c-e) delve into matters reserved exclusively for postal management. The Service cites for comparison PRC Order No. 1254 which states: "the alteration of ZIP Code boundaries is clearly an operational matter within the exclusive jurisdiction of Postal Service management." This Order must be read in the context of determining whether or not to hear a complaint against the Postal Service. Interrogatories were not at issue. A matter reserved exclusively for postal management, such as discussed in Order No. 1254, may still be the topic of an interrogatory.

The Postal Service objects to interrogatory 18(t) on the grounds of deliberative process privilege. Interrogatory 18(t) requests documentation and analyses explaining why the Postal Service could not or chose not to include indicia of postage on the Breast Cancer Research stamp. No information responsive to this interrogatory has been identified. The Service alleges this question delves into pre-decisional matters that were never implemented.

The deliberative process privilege requires a communication to be both pre-decisional and deliberative. For a document to be pre-decisional, it must be developed before the deliberative process is complete. Although status as pre-decisional is retained after a decision is made, protection is lost if the document is expressly incorporated or adopted into a final decision. A pre-decisional document also loses

protection when a final decision is not officially rendered, but the document itself is used as the basis of a decision. A choice not to implement, as in the instant case—indicia of postage on the Breast Cancer Research stamp, is nevertheless a decision. The Service shall disclose responsive post-decisional documentation that explains the decision, the decisional document itself, pre-decisional documentation that has been expressly adopted or incorporated into the decision, and pre-decisional documentation that is the basis of the decision not to include indicia, if a formal decision has not been rendered.

The second requirement is the information must be deliberative. Purely factual documents, even if used in a deliberation, are usually not protected. The Postal Service has not claimed any responsive information to be deliberative in nature. The Service shall disclose responsive information that does not meet the deliberative requirement, and responsive information that is factual in nature.

The deliberative process privilege is a qualified privilege. Once the pre-decisional and deliberative requirements are met, the decision-maker applies a balancing test. Procedurally, the initial burden is on the party asserting the privilege to show that the document or communication is both pre-decisional and deliberative. The decision-maker typically utilizes a Vaughn index to initially review documentation or communications that a party is seeking to protect. The burden is then on the requesting party to demonstrate that the need for the information outweighs the regulatory interest in preventing disclosure.

When the Postal Service has documents developed for management for which it claims the deliberative process privilege, the Service should accompany its objection with a Vaughn index. This will allow the decision-maker to review the various aspects of the privilege claim and determine if any of the information is discoverable. Otherwise, the Service should state that no responsive information exists, if that is the case. This will obliterate the need to prepare a Vaughn index.

The Postal Service objects to interrogatory 20(b) based on commercial sensitivity because it would require providing market research on customer confusion related to the Breast Cancer Research stamp. The Postal Service states that it has identified no responsive information to this question, but would like to preserve its rights on any follow-up or related discovery questions. This ruling does not bar the Postal Service from objecting to follow-up or related discovery questions where an adequate basis for objection does exist. However, to object the responsive material will still have to be identified, and the Service will have to include a description of why it is commercially sensitive.

The Postal Service alleges a number of the interrogatory 18 questions border on abuse of process because the questions ask for information that can be independently obtained through published sources. Because an answer is available in a published source does not mean that a participant has readily available access to that source or even knows what source to consult. This is not a valid basis for objection. The Postal Service, being most familiar with Postal Service documentation and information, is the logical party to ask. The Postal Service also states that Carlson is aware of and has access to these sources. This statement implies that all resources available to a participant must be examined prior to filing an interrogatory. No such rule exists. Generally, an inquiry will not be made into what alternate resources might be available to a participant submitting a discovery request, and therefore this cannot be used as a basis for an objection.


Finally, the Postal Service alleges a number of the interrogatory 18 questions are "trivial."⁷ Questions 18(f)–(m) attempt to develop a hypothetical question, but in itself, this does not appear to be abuse of process. Without a more blatant showing of abuse of process, it is not a recognized basis for objection that a party considers a question

⁷ The Objection states interrogatory 20, but uses interrogatory 18(g) as an example. The Ruling is the same whether the Postal Service intended to state interrogatory 18 or interrogatory 20.

trivial. If the question is trivial, it should not tax the resources of the answering party to give a simple, straightforward answer.

RULING

The Douglas F. Carlson Motion to Compel United States Postal Service to Respond to Interrogatories DFC/USPS-18, 19(c) & 20(b)-(e) is granted consistent with the body of this ruling.


Edward J. Gleiman
Presiding Officer