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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

ORDER NO. 1331

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

George A. Omas, Vice Chairman;
Dana B. Covington; and Ruth Y. Goldway;

Complaint on Sunday and Holiday Collections

Docket No. C2001-1

ORDER AFFIRMING
PRESIDING OFFICER'S RULING NO. C2001-1/10

(Issued November 27, 2001)

On August 28, 2001, the Postal Service requested certification of an appeal to the Commission *en banc* of Presiding Officer's Ruling No. C2001-1/10.¹ The presiding officer granted the Postal Service request to certify the appeal to the Commission on September 19, 2001.² In the same ruling granting certification, the presiding officer requested that the Postal Service provide additional information to aid in the Commission's analysis of the issues involved. The Commission accepted the certification of appeal, and directed that the questions posed by the presiding officer should be answered to allow a complete understanding of the issues.³ The Postal Service subsequently declined to provide most of the information sought by the presiding officer and the Commission.⁴

¹ Motion of the United States Postal Service for Certification of Appeal From Presiding Officer's Ruling No. C2001-1/10, filed August 28, 2001.

² Presiding Officer's Ruling Certifying Appeal to Commission of Presiding Officer's Ruling No. C2001-1/10, issued September 19, 2001 (P.O. Ruling C2001-1/13).

³ Acceptance of Certification for Commission Review of Presiding Officer's Ruling No. C2001-1/10, issued September 19, 2001 (Order No. 1321).

⁴ Response of the United States Postal Service to Presiding Officer's Ruling No. C2001-1/13, filed October 9, 2001 (Postal Service Response). With the exception of updating the status of a Freedom of Information Act (FOIA) challenge in federal court that is considering similar issues to this appeal, the Postal Service did not provide responsive pleading to the questions asked by the Presiding Officer and the Commission.

On the basis of the information and arguments submitted in multiple pleadings by the participants, Presiding Officer's Ruling No. C2001-1/10 is affirmed.

Procedural history.⁵ Douglas F. Carlson filed the discovery request, interrogatory DFC/USPS-19, that is the subject of this dispute on May 25, 2001.⁶ The interrogatory requests nine data elements from the Collection Box Management System (CBMS) for every collection box in the United States. Interrogatory DFC/USPS-19 states:

DFC/USPS-19. Please provide the following information, in files in Microsoft Excel or similar format, from the Collection Box Management System database for every collection box in the United States that is in the database: location ID number, box address, description of address, service class, type of box, area of box, posted weekday collection times, posted Saturday collection times, and posted holiday collection times.

Shortly after this interrogatory was filed, the presiding officer became aware that Carlson and the Postal Service were engaged in litigation in federal court concerning a Freedom of Information Act (FOIA) request for essentially the same material.

The Postal Service objected to the discovery request on multiple grounds including privilege, relevance, and burden.⁷ The privilege argument raised the potential that public disclosure of the discovery response might jeopardize mail and mail carrier safety by allegedly allowing someone who examined the material to determine a mail carrier's line of travel. The Service also stated that the discovery request sought material that is commercially sensitive and not suitable for public disclosure. The Service's arguments based on relevance questioned whether the vast quantity of discovery material requested, at such a disaggregate level, could be useful in analyzing an issue at a nationwide level.

⁵ This discovery dispute involves extensive motions practice on complex issues. The cited documentation should be referenced to supplement this brief overview to obtain a more complete understanding where more detailed information is desired. Several of the motions for extension of time and associated rulings have been purposefully omitted from discussion for clarity.

⁶ Douglas F. Carlson Interrogatory to the United States Postal Service, filed May 25, 2001 (DFC/USPS-19).

⁷ Objection of the United States Postal Service to Carlson Interrogatories DFC/USPS-19-21, filed June 4, 2001.

On June 26, 2001, Carlson filed a motion to compel a response to interrogatory DFC/USPS-19.⁸ Carlson provided rebuttal arguments to each of the Postal Service's objections.

The Postal Service's subsequent response to Carlson's motion expanded on the Service's privilege and relevance arguments.⁹ The burden argument, however, was reassessed and revised downward. A significant aspect of the Postal Service response was an offer to provide the material under protective conditions in the event that the presiding officer was not persuaded by the Service's objections. The Postal Service stated:

Therefore, the Postal Service requests that if the Presiding Officer is inclined to grant Mr. Carlson (or the other intervenor) access to the CBMS materials that he has requested, over the continuing objections of the Postal Service, that it be done only under the standard terms of protective conditions utilized in Commission proceedings. . . . Use of protective conditions, particularly in a proceeding with as few participants as the instant one, would substantially satisfy the Postal Service's concerns regarding the potential harm of disclosure of the CBMS material at issue in the instant motion to compel.¹⁰

Upon review of the already extensive pleadings in this dispute, the presiding officer concluded "that the requested information is likely to lead to admissible evidence that has relevance in this proceeding."¹¹ The remaining issues for the presiding officer to consider before ruling on the motion to compel included the Postal Service's mail and mail carrier security concerns, the ongoing federal court FOIA challenge, and the possibility that the material might contain sensitive data that should not be disclosed to the public. Fortuitously, the Postal Service had suggested providing the material under

⁸ Douglas F. Carlson Motion to Compel the United States Postal Service to Respond to Interrogatories DFC/USPS-19-21, filed June 26, 2001. Douglas F. Carlson Motion to Compel the United States Postal Service to Respond to Interrogatories DFC/USPS-19-21-Erratum, filed July 2, 2001.

⁹ Response of the United States Postal Service in Opposition to the Carlson Motion to Compel Regarding DFC/USPS-19-21, filed July 9, 2001.

¹⁰ *Id.* at 13.

¹¹ Presiding Officer's Ruling on Motion to Compel the United States Postal Service to Respond to Interrogatories DFC/USPS-19-21, issued July 23, 2001 (P.O. Ruling C2001-1/6) at 5.

protective conditions. Directing production of the material under protective conditions essentially allowed the presiding officer to avoid having to rule on the security and sensitivity issues. Furthermore, the presiding officer would be able to defer to the federal court in the FOIA action to determine the suitability of the material for public disclosure. Therefore, the presiding officer granted the Carlson motion to compel a response to DFC/USPS-19, but allowed the Postal Service to provide the material under protective conditions.

The Postal Service filed a motion for partial reconsideration of P.O. Ruling C2001-1/6.¹² This motion presented two arguments: that an inappropriate standard of review was used by the presiding officer in P.O. Ruling C2001-1/6, and that Carlson had not articulated a use for all of the information in the database. The Postal Service contended that portions of the data sought in DFC/USPS-19 were never found relevant to issues in this proceeding, and that the ruling required disclosure of irrelevant material only because there would be no burden in doing so. The Service set forth its views of what data might be relevant, and sought to limit the scope of the material to be provided to what it considered relevant to the Complaint. In doing so, the Postal Service proposed to divide the CBMS database into 5 separate data sets that only contained what it considered relevant.¹³

¹² Motion of the United States Postal Service for Partial Reconsideration of Presiding Officer's Ruling No. C2001-1/6, filed July 27, 2001. Contrary to what has been typical Postal Service practice, the Postal Service did not provide the material that was not in dispute at this time.

¹³ The Postal Service motion does not suggest modifying the application of protective conditions. It requests that the scope of DFC/USPS-19 be limited to the following five subsets of the CBMS database. The first data set would contain the location ID number, box address, description of address, service class, type of box, and posted holiday collection times for the approximately one percent of collection boxes that specifically posted holiday collection times. The second data set would contain the posted weekday collection times for collection boxes in the 18 of the 85 districts that advanced collection times on holiday eves. The third data set would contain the posted weekday collection times and location ID number for collection boxes in the Rio Grande and the SE New England districts that advanced collection times on holiday eves. The fourth data set would contain the posted weekday collection times and posted Saturday collection times for collection boxes in the 6 of the 85 districts that changed holiday eve collection times to a Saturday schedule. The fifth data set would contain the location ID number, posted weekday collection times, and posted Saturday collection times (including unspecified descriptive fields) for collection boxes in the Royal Oak district that changed holiday eve collection times to a Saturday schedule. In each of the data set proposals, the Postal Service specifically included certain data fields, specifically excluded certain data fields, and did not mention others. The presiding officer concluded that the Postal Service proposed only to include data fields that were specifically mentioned for each data set.

Carlson opposed the Postal Service motion for reconsideration of the scope of the material to be provided in response to DFC/USPS-19, and simultaneously sought reconsideration of the holding that the response would be subject to protective conditions.¹⁴ Carlson's cross-motion argued that most of the material requested is publicly available in disaggregate form, thus protective conditions are not warranted. He expressed concern that by signing protective conditions for the database in aggregate form, he might be placing himself in legal jeopardy. His concern was that the Postal Service might challenge his use of the publicly available disaggregate data in other forums, contending it was obtained from the aggregate database provided under protective conditions.

Upon reconsideration, the presiding officer reaffirmed P.O. Ruling C2001-1/6 and again directed the Postal Service to provide a response to DFC/USPS-19, under protective conditions.¹⁵ The presiding officer reaffirmed the previous finding that the requested material as a complete body of information was likely to lead to the discovery of admissible evidence and was therefore relevant to this proceeding. The Postal Service proposal to provide five subsets of the database was not accepted. Subdividing the CBMS database to such an extent had the potential to distort, and prevent effective use of the data to analyze issues from a national perspective. As a secondary issue, the Postal Service mentioned for the first time that a portion of one data field was available only at the local level. The presiding officer ruled that the burden of producing this data element exceeded the benefit of its intended use. Thus, the scope of the discovery request was limited accordingly.

The cross-motion to reconsider whether the material should be provided without protective conditions also was denied. The presiding officer found the compromise

¹⁴ Douglas F. Carlson Cross-Motion for Reconsideration and Answer to the Postal Service Motion for Reconsideration of Presiding Officer's Ruling C2001-1/6, filed August 2, 2001. Popkin filed what was considered as a motion in support of Carlson. David B. Popkin Motion for Reconsideration of Presiding Officer's Ruling C2001-1/6 and Potential Motion for Late Acceptance, filed August 3, 2001. The Postal Service responded to both motions on August 9, 2001. Response of the United States Postal Service to Carlson Cross-Motion for Reconsideration and Response Regarding DFC/USPS-19 and Presiding Officer's Ruling No. C2001-1/6, filed August 9, 2001 (Response Concerning Reconsideration).

¹⁵ Presiding Officer's Ruling on Reconsideration of Presiding Officer's Ruling No. C2001-1/6, issued August 21, 2001 (P.O. Ruling C2001-1/10).

struck in P.O. Ruling C2001-1/6 both protected the Postal Service position and allowed release of all of the information that the Complainant argued was necessary to proceed with his Complaint. With this finding, the ruling in P.O. Ruling C2001-1/6 was affirmed.

Although denying both motions for reconsideration, the presiding officer took a further step in P.O. Ruling C2001-1/10 and proposed a compromise solution. The proposal was to exclude the data field raising the most sensitive safety and security concerns from the database, and provide the remainder of the database without protective conditions. The presiding officer explicitly directed that objections to this compromise solution should not delay production of the material under protective conditions per P.O. Ruling C2001-1/6.

The Postal Service filed a motion for certification of appeal to request full Commission review of P.O. Ruling C2001-1/10. Carlson subsequently filed in opposition to the motion for certification.¹⁶

The presiding officer determined that there were two underlying issues in P.O. Ruling C2001-1/6 and P.O. Ruling C2001-1/10. The first was whether the discovery request was reasonably calculated to lead to admissible evidence, or as applied in the instant case, did the interrogatory request seek relevant material. The presiding officer did not consider a judgment decision such as the relevance of an interrogatory request to be the type of question that fit the criteria for certification to the full Commission for review. The second issue was the appropriateness of applying protective conditions where commercial sensitivity is not the predominant factor. The presiding officer found this question met the criteria for certification and might have broad application to other discovery requests. Therefore, in P.O. Ruling C2001-1/13 the presiding officer certified this issue to the Commission. In Order No. 1321, the Commission concurred with the presiding officer and accepted the issue for review.

On October 9, 2001, the Postal Service submitted two filings. The first was a response to P.O. Ruling C2001-1/13. In this response, the Postal Service stated its position on the instant discovery dispute, and provided an answer to only one of the five

¹⁶ Douglas F. Carlson Answer in Opposition to Postal Service Motion for Certification of Appeal, filed September 7, 2001.

sets of questions posed by the presiding office in P.O. Ruling C2001-1/13.¹⁷ The second filing was a limited answer to DFC/USPS-19.¹⁸ The Postal Service determined what data from the CBMS it considered relevant, categorized or performed calculations on this data, and presented the result in summary form.

Carlson subsequently filed an answer in reply to the Postal Service Response.¹⁹ Carlson was critical of the Postal Service's failure to respond to four of the five questions posed by the presiding officer. Furthermore, he was critical of the Postal Service's partial, incomplete response to DFC/USPS-19, and the alleged effect on his due process right to discover information necessary to prove his case.

Commission Analysis. There are two predominant legal issues involved in this discovery dispute: whether the discovery request is reasonably calculated to lead to admissible evidence, or in the context of this dispute, whether the information sought is relevant to the Complaint; and the standard for applying protective conditions to a discovery response where commercial sensitivity is not the predominant factor.

The first issue, relevance, was not accepted as a basis for certifying the appeal to the Commission. Relevance is examined in light of Rule 25, which allows "discovery reasonably calculated to lead to admissible evidence during a noticed proceeding." The determination of relevance is a "weighing" type decision that is specific to the interrogatory in question and involves the judgment of the decision-maker. The judgment of the decision-maker in weighing the various factors is typically not an important question of law or policy that is contemplated for review by Rule 32. This type of decision, if made in error, can be corrected at a later time such as when the full Commission considers the merits of the Complaint before issuing its report. However, once an appeal is before the Commission on other grounds, the Commission may nevertheless consider relevance in the context of putting all issues to rest.

¹⁷ See USPS Response.

¹⁸ Response of the United States Postal Service to Carlson Interrogatory DFC/USPS-19, filed October 9, 2001.

¹⁹ Douglas F. Carlson Answer in Reply to Postal Service Response to Presiding Officer's Ruling No. C2001-1/13 and Order No. 1321, filed October 17, 2001 at 1.

The presiding officer found that the request to provide the CBMS database in interrogatory DFC/USPS-19 is likely to lead to admissible evidence that is relevant to this Complaint. The Postal Service disagreed, and other than filing a limited response on October 9, 2001, chose not to respond to the interrogatory. The Commission has reviewed the pleadings and events of this discovery dispute and is persuaded by the pleadings that the presiding officer's finding was correct. An analysis of nationwide information on the availability of pick-ups from collection boxes might provide insight on the levels of service and/or service needs on holiday and holiday eves and could lead to the discovery of admissible evidence.

The second issue, application of protective conditions, is a more complex issue because the request for protective conditions is distinguishable from the typical case where commercial sensitivity is the predominant factor. Every request for protective conditions is considered on a case-by-case basis. However, the Commission has not developed standards to guide either the determination of when protective conditions are appropriate, or the showing that the proponent of the protective conditions must make to successfully argue for protective conditions (or the alternative showing that a respondent must make to successfully argue that the material should not be released even with protective conditions.) These standards, when determined, will have a far-reaching impact on this and future discovery disputes. The Commission has accepted this issue for review on appeal.

Although this issue has been accepted for review, the Postal Service has left the Commission in a quandary. The presiding officer and the Commission requested the Postal Service to respond to five sets of questions that would aid in developing standards and provide specific information relevant to the facts of this dispute. Other participants then would have been ably to reply. The Postal Service only responded to one of the five question sets. Deprived of pertinent information and discussion, the Commission is loathe to establish standards that will also have broad application to future discovery requests.

If new standards for protective conditions had been established, then the appropriateness of applying the protective conditions to the discovery response granted

in P.O. Ruling C2001-1/6 (and affirmed in P.O. Ruling C2001-1/10) could have been reviewed.²⁰ Furthermore, arguments that pertain to the security issues alluded to by the Postal Service concerning the compromise solution presented in P.O. Ruling C2001-1/10 could have been evaluated.²¹ These arguments could have determined the appropriateness of the compromise solution calling for a more limited answer without protective conditions. However, without discussion of the potential impact of the compromise proposal, or any information justifying the application of protective conditions to the narrower database, the Commission does not have sufficient basis to disturb the judgment of the presiding officer. Therefore, the Commission affirms P.O. Ruling C2001-1/10 (and P.O. Ruling C2001-1/6.)

The discussion that follows provides details on the factors leading to the outcome of this ruling. Several issues that have arisen in this discovery dispute require further explanation and comment. The first is an explanation of why answers to the five sets of questions posed to the Postal Service would have facilitated action on this appeal. The second issue is the relationship of FOIA to Commission proceedings. The final comment addresses the responses that the Postal Service eventually provided to P.O. Ruling C2001-1/13 and to DFC/USPS-19.

Request for additional information. To assure that participants would provide the Commission with a full analysis of the broad issues certified for its decision, and the salient facts for applying general principles to the specific facts of this case, the presiding officer, and the Commission, requested responses to five sets of questions. The Postal Service as movant was requested to present its views first, and the other participants would then be free to offer replies. The questions were designed to provide the Postal Service and other participants the opportunity to comment on: the

²⁰ The presiding officer granted in P.O. Ruling C2001-1/6, and then affirmed in P.O. Ruling C2001-1/10, the Postal Service's request to provide the original response under protective conditions. Although the Postal Service request was granted and affirmed, the Postal Service has yet to respond to the interrogatory.

²¹ The questions posed by the presiding officer and the Commission to the Postal Service requested further comment on the compromise solution. The Postal Service did not provide a response to the compromise solution, stating without explanation that it could not begin to address whether the compromise solution addresses its security concerns.

appropriate standard for applying protective conditions where commercial sensitivity is not the predominant factor; any known abuse of protective conditions by a participant in this proceeding; substantiation of Postal Service security concerns; Postal Service concerns with the compromise solution; and the status of the FOIA proceeding.²² In accepting certification, the Commission agreed that answers to the questions would provide critical insight when the Commission considered standards that had the potential to set precedents in future applications. The Postal Service's failure to respond to the questions presented in P.O. Ruling C2001-1/13 and Order No. 1321 has deprived the Commission of information on issues that are central to evaluating its request for Commission reviews of P.O. Ruling C2001-1/10, and by association P.O. Ruling C2001-1/6.

The first question requested Postal Service comments on what standards should be used, and what showing should be made, for a presiding officer to apply protective conditions to an answer to a discovery request where commercial sensitivity is not the predominant factor in requesting protective conditions.²³ After providing an introductory background, question one states:

The Postal Service is requested to address in responsive pleadings its position on under what circumstances is it appropriate to apply protective conditions where the material is not competitive in nature. This should address the balance that must exist with keeping hearings open and accessible to the

²² The complete questions appearing on pages 6 through 8 of P.O. Ruling C2001-1/13 are reprinted as footnotes where appropriate.

²³ Question 1. The presiding officer accepted the Postal Service proposal for protective conditions because it significantly reduced the Service's concerns over mail and carrier safety by limiting the audience that would view this material. It also distanced the Commission from FOIA litigation occurring in federal court that eventually might resolve the issue of public disclosure of the same material. Any potential that unrestricted release of this material could cause the Postal Service competitive harm was not a concern in accepting the Postal Service's protective conditions proposal. [Footnote omitted]

Accepting a proposal for protective conditions is extraordinary relief that is contrary to the requirement that hearings on postal matters be open and accessible to the public. The Postal Service is requested to address in responsive pleadings its position on under what circumstances is it appropriate to apply protective conditions where the material is not competitive in nature. This should address the balance that must exist with keeping hearings open and accessible to the public. This should also address what the minimal showing should be for a proponent of protective conditions to successfully persuade a presiding officer to allow protective conditions.

public. This should also address what the minimal showing should be for a proponent of protective conditions to successfully persuade a presiding officer to allow protective conditions.

This, in effect, is the question certified to the Commission on appeal. Position statements would help the Commission consider what standards to apply to a request for protective conditions where commercial sensitivity is not the predominant factor, and what showing must be made by the proponent of the protective conditions. The Commission sought analysis and argument on the appropriate standards to apply to the instant discovery dispute. These issues bear directly on whether it was appropriate to approve protective conditions in P.O. Ruling C2001-1/6, as affirmed by P.O. Ruling C2001-1/10. The issues also bear directly on analyzing whether protective conditions should have been applied to part or all of the compromise solution appearing in P.O. Ruling C2001-1/10. Furthermore, developing standards on these issues would assist in considering similar requests for protective conditions in the future. The Postal Service did not respond to this question.

The second question examines the potential for abuse of the discovery process related to this Complaint, both for material provided under protective conditions, and for material provided free of protective conditions.²⁴ The first subpart of this question requests the Postal Service to “specify any known prior instances where Carlson has

²⁴ Question 2. The Postal Service alleges that Carlson may have ulterior motives for requesting access to the CBMS database, or in some way may be abusing the discovery process to gather information that would otherwise not be available to him. It will aid the Commission’s analysis if the Postal Service could provide more insight into these allegations by responding to the following questions.

For release of information under protective conditions, the Postal Service shall specify any known prior instances where Carlson has abused the privilege of receiving material under protective conditions by disclosure of that information or otherwise. The Postal Service shall also explain any known security risk that Carlson presents by gaining access to this material under protective conditions.

To foster evaluation of the compromise solution developed after reconsideration in P.O. Ruling C2001-1/10, the Postal Service shall provide any specific evidence that indicates Carlson seeks the requested information for purposes unrelated to this Complaint, and a description of what those purposes are. Additionally, the Postal Service shall specify and explain any potential competitive conflict that exists between the Postal Service and Carlson or any personal or financial gain that Carlson may acquire by knowledge of this material.

For material that is not provided under protective conditions, the Postal Service shall address the issue of preventing a member of the public, including a business entity, from using public material for

abused the privilege of receiving material under protective conditions by disclosure of that information or otherwise.” If a participant was known to have previously abused protective condition privileges, it would affect the future ability of that participant to receive material under protective conditions. Given the frequently confusing state of inferences and accusations made in the pleadings in this dispute, the Commission needed to definitively know whether there was any evidence of abuse by this Complainant.

The second subpart of this question was posed to explore the possibility that the material should not be made available to this participant under protective conditions for security reasons. The subpart requests the Postal Service to “explain any known security risk that Carlson presents by gaining access to this material under protective conditions.” If a known security risk existed, the material could properly be withheld from the participant requesting the material. Given the frequently confusing state of inferences and accusations made in the pleadings in this dispute, the Commission needed to definitively know whether there was any evidence that this Complainant posed a security risk to the Postal Service.

The pleadings were clear in demonstrating that Carlson might subsequently wish to use material from the CBMS in other forums. That is why he opposed protective conditions. Other than accusations and inferences, there was no indication that he might violate the provisions of protective conditions if applied to the discovery response. To the contrary, he indicated that he would not sign the protective conditions, and would thereby forego access to the material.

The remaining subparts of this question were posed to gain an understanding of how the material requested by P.O. Ruling C2001-1/10 in the compromise solution, to be provided without protective conditions, could be subject to abuse by this Complainant. The question first requested the Postal Service to “provide any specific evidence that indicates Carlson seeks the requested information for purposes unrelated

whatever purpose that person desires. In this situation, the Postal Service should address any reason to consider Carlson any differently from the remainder of the public. *Id.* at 6-7.

to this Complaint, and a description of what those purposes are.” Carlson’s potential use of the complete CBMS database, if provided without protective conditions, was clear in the pleadings. However, the compromise solution stripped the database of the most sensitive field, the address field. This makes it unclear to the Commission how Carlson could use this subset of the CBMS database in a way that would be detrimental to the Service. Continuing on this line of questioning, the Commission requested the Postal Service to “specify and explain any potential competitive conflict that exists between the Postal Service and Carlson or any personal or financial gain that Carlson may acquire by knowledge of this material.” A reason for proposing the compromise solution was to provide material without the burden of protective conditions. If a competitive conflict could be demonstrated, then protective conditions might be appropriate, defeating the purpose of the compromise solution.

The concluding subpart of the second question was posed to allow exploration of the ramifications of the implicit conclusion that if the provider of the discovery material does not make a sufficient showing that protective conditions are necessary, then the discovery request will be granted without protection. Every participant, and for that matter every member of the public, would then have unrestricted access to that material. Discussion on this topic would focus attention on the importance of properly supporting a request for protective conditions, beyond making unsupported allegations and inferences. The subpart states:

For material that is not provided under protective conditions, the Postal Service shall address the issue of preventing a member of the public, including a business entity, from using public material for whatever purpose that person desires. In this situation, the Postal Service should address any reason to consider Carlson any differently from the remainder of the public.

The Postal Service did not respond to these questions.

The third question provided the Postal Service with the opportunity to research and respond to its safety and security concerns with the compromise solution, and to provide some support for its safety and security statements originally made when

requesting protective conditions for the complete CBMS database.²⁵ The Postal Service, in its motion for certification, stated that it was not prepared to address its security concerns with the compromise solution at that time. Therefore, question three requested the Postal Service to “provide responsive pleadings that address its security concerns with the compromise solution.” Furthermore, the Commission requested the Postal Service to “include affidavits as necessary from the appropriate security personnel, the Postal Inspection Service, that explain the potential security concerns arising from the potential release of the more limited information identified in P.O. Ruling C2001-1/10.” There is no information available to the Commission to assess potential security concerns with the compromise solution, nor is there understanding of the security risk in releasing a partial CBMS database that does not include information identifying the location of the collection boxes. A response to this question is critical for the Commission to determine whether it was appropriate to not require protective conditions for the compromise solution.

The second subpart of question three addresses the safety and security statements that the Postal Service made when requesting protective conditions for the complete CBMS database. This issue was not analyzed when protective conditions were first approved to protect the complete database in P.O. Ruling C2001-1/6. The question requested the Postal Service to:

²⁵ Question 3. The presiding officer fashioned a compromise solution for release of a subset of the database not under protective conditions. The reasoning for doing this was to provide Carlson with a majority of the information sought in a method acceptable to him (not under protective conditions), to keep the hearing process as open to the public as possible, and to address the Postal Service’s security concerns. The Postal Service stated in its Motion, at 22, that “the Postal Service is not prepared even to address the security aspects of the alternative solution.” In analyzing the appropriateness of the compromise solution, the Commission may need to examine the Postal Service security concerns with the compromise solution. The presiding officer requests that the Postal Service provide responsive pleadings that address its security concerns with the compromise solution. This analysis should include affidavits as necessary from the appropriate security personnel, the Postal Inspection Service, that explain the potential security concerns arising from the potential release of the more limited information identified in P.O. Ruling C2001-1/10.

The Postal Service has on several occasions referenced the Postal Inspection Service as a source of information for the Postal Service’s security concerns. Given the possibility that the Commission will also review applying protective conditions to the complete database, the Postal Service should provide copies of any and all existing documentation from the Postal Inspection Service that formed the basis of the Service’s initial argument that public release of the complete database involves a security risk. *Id.* at 7-8.

provide copies of any and all existing documentation from the Postal Inspection Service that formed the basis of the Service's initial argument that public release of the complete database involves a security risk.

The Postal Service has thus far only provided bare statements that unrestricted access to the CBMS database would pose a threat to safety and security. Supporting statements would confirm the Postal Service's position. The Postal Service did not respond to these questions.

The fourth question recognized that participants did not have the opportunity to comment on the specifics of the compromise solution before it appeared in P.O. Ruling C2001-1/10.²⁶ The removal of the address field from the database appeared to significantly limit the potential for abuse, provide the Complaint with pertinent information necessary for him to continue to explore relevant evidence, and not require protective conditions. Question four invited the Postal Service "to discuss why the compromise could be detrimental to the interests of the Postal Service, or otherwise be contrary to public interest." For the Commission to reconsider the compromise solution, the Commission would first need to understand what concerns the Postal Service had with the proposal. Without the understanding that might be provided by responses to question four, the Commission has no basis to modify or withdraw the solution. The Postal Service did not respond to this question.

The Postal Service did respond to the fifth question that requested an update on "the status of the related FOIA proceedings, and any estimate as to when those proceedings might be brought to a conclusion."²⁷ The Postal Service's answer, further updated by Carlson, indicates that the resolution of the FOIA challenge is not imminent. Thus, the timing of the FOIA decision will come too late to affect a ruling in this dispute.

²⁶ Question 4. The compromise solution was developed following reconsideration of P.O. Ruling C2001-1/6, and first appeared in P.O. Ruling C2001-1/10. While every effort was made to take into consideration the positions of the participants that were presented in the previous pleadings, the presiding officer recognizes that the participants did not have the opportunity to comment on the specific compromise. The Postal Service is invited to discuss why the compromise could be detrimental to the interests of the Postal Service, or otherwise be contrary to public interest. *Id.* at 8.

²⁷ Question 5. Please provide the status of the related FOIA proceedings, and any estimate as to when those proceedings might be brought to a conclusion. *Id.* at 8.

Freedom of Information Act. P.O. Ruling C2001-1/6, affirmed by P.O. Ruling C2001-1/10, accepted the Postal Service's proposal to provide the response to interrogatory DFC/USPS-19 under protective conditions. Accepting the proposal allowed the presiding officer to defer to the federal court by not interfering with the ongoing FOIA challenge, and to limit to a small audience access to material that purportedly could potentially jeopardize mail and mail carrier safety. The Postal Service offer was deemed an acceptable solution, given the limited number of participants in this case, the allegation of potential harm to the Postal Service's interests, and the indication that the Complainant would have access to material allegedly needed to proceed with his Complaint.

The acceptance of the protective conditions offer was reasonable, and deference to the federal court was an additional benefit. However, the Commission is not required to defer to a federal court that is actively considering a FOIA challenge concerning similar material involved in a Commission discovery dispute. FOIA requests or challenges, and discovery under Commission rules, although sometimes sharing similar characteristics, have different standards and serve different purposes.

Any member of the public may make a FOIA request. Pure curiosity, interest, or speculation is sufficient justification to make the request. Additionally, there is no opportunity to protect material provided in response to a FOIA request.

In contrast, discovery requests under Commission rules are permissible only when reasonably calculated to lead to admissible evidence during a noticed proceeding. Only a participant in a Commission proceeding may utilize the Commission's discovery process. The determination of whether a participant may have access to discoverable material might be determinative of how effectively the participant can exercise the statutory right to proceed with a case before the Commission. Additionally, the Commission may protect sensitive material by imposing protective conditions. Thus, a participant in a Commission proceeding has greater access to information than an inquisitive citizen because he must demonstrate a justifiable need for that material, and because protection can be afforded to material that is sensitive.

The Postal Service argues that after Postal Service management decides not to provide a discovery response because of security or safety concerns, the proper redress for a participant in a Commission proceeding is to apply to the federal courts using FOIA. The Postal Service Response to P.O. Ruling C2001-1/13, at 2, states:

Focusing on the second point, it is the prerogative of postal management to decide, given identified concerns about mail security and employee safety, whether public access to electronic databases of its commercial and operational information is appropriate. Members of the public who request but are denied such access and wish to challenge that result may do so in federal court under the procedures of the FOIA. The federal courts provide the appropriate forum to review the determinations of postal management in this regard.

This statement is accurate regarding requests for information from the general public. Postal Service management has the responsibility to make the necessary decisions to ensure mail security and postal employee safety. The Commission will defer to management's obligations in this regard. The Commission's discovery procedures are compatible with, and respect, postal management's role in making security and safety decisions. When a potential security or safety issue is identified, and supported, regarding a relevant discovery request, the Commission will apply remedies tailored to address the specific concerns, and to protect the interests of the concerned party through application of protective conditions, *in camera* inspections, or by outright denial of access to the sensitive material.

In some instances, both parties to a discovery request recognize sensitive material is involved, and agree on a proper method of protection. In such a case, the Commission typically approves the agreement with only a minimal showing that special protection is warranted. However, when the necessity to protect material is controverted, as it is in this discovery dispute, some plausible showing of the potential harm is required to allow the Commission to fully understand the issues and decide on the appropriate action.

When P.O. Ruling C2001-1/6 was issued, protective conditions were approved for the complete CBMS database, because the Postal Service expressed concern over

mail and mail carrier safety, and their application allowed the presiding officer to avoid other potentially controversial issues. The controversy surrounding the approval of protective conditions was not apparent until the presiding officer was asked to reconsider P.O. Ruling C2001-1/6. The August 9, 2001, Postal Service Response Concerning Reconsideration, at 6, challenging Carlson's motion to remove protective conditions, identified the source of the Postal Service's security position by stating: "The concerns identified in the Postal Service's opposition to the motion to compel, however, come not from local officials (at Flushing or anywhere else), but directly from the officials charged with mail security—the Postal Inspection Service." The presiding officer affirmed P.O. Ruling C2001-1/6 in P.O. Ruling C2001-1/10 without requiring further support from the Postal Service, and proposed an alternative intended to satisfy the concerns of all participants.

The Postal Service requested certification of P.O. Ruling C2001-1/10, and the Commission agreed to review that ruling. This involves review of three separate decisions by the presiding officer. The first two decisions were announced in P.O. Ruling C2001-1/6. The third decision comes from P.O. Ruling C2001-1/10. Decision one was to allow access to the entire CBMS database. Decision two was to allow the Postal Service to provide the answer subject to blanket protective conditions. The Postal Service requested reconsideration of decision one, and Carlson requested reconsideration of decision two. P.O. Ruling C2001-1/10 affirmed both decisions one and two. P.O. Ruling C2001-1/10 also suggested as a proposed compromise, decision three, that a limited portion of the CBMS database be made available without protective conditions. The Postal Service contests decisions one and three. Carlson opposes certification, but argues that if certification is granted, then P.O. Ruling C2001-1/10 should stand.

Response of the Postal Service. The Postal Service Response that presents its legal argument on this controversy was accompanied by a limited response to interrogatory DFC/USPS-19. In its limited response to DFC/USPS-19, the Postal Service determined what material it thought was relevant, digested the material, and provided the material in summary form. The policy of the Commission is to allow the

participant requesting discovery material the leeway to analyze, compile, digest, and draw conclusions from discovery material as he sees appropriate. It can be helpful for a party embroiled in a discovery dispute to suggest an alternative data source or data presentation that might satisfy both parties. However, a party requesting information can not be unilaterally denied access by the party controlling the information in an adversarial proceeding. The Commission finds the response provided to DFC/USPS-19 does not comply with rulings P.O. Ruling C2001-1/6 or P.O. Ruling C2001-1/10, nor is it responsive to the original question asked by interrogatory DFC/USPS-19.

P.O. Ruling C2001-1/10 proposed a compromise solution that appeared to eliminate the potential safety or security risks involved with releasing the complete CBMS database.²⁸ This allowed the presiding officer to direct a response without protective conditions. The Postal Service opposed this solution and stated in its motion for certification, at 22, “the Postal Service is not prepared even to address the security aspects of the alternative solution.” In this appeal, the presiding officer and the Commission have provided the Postal Service the time and opportunity to explain its security concerns with the compromise solution so that the Commission could understand the Postal Service’s position. However, the Postal Service has chosen not to provide responsive information.

The Commission supports the Postal Service concern for safety and security, and recognizes its responsibility to ensure postal safety and security. The presiding officer, when presented with a simple statement raising safety or security concerns, acted to protect potentially sensitive material by approving protective conditions in P.O. Ruling C2001-1/6 and P.O. Ruling C2001-1/10. However, the Postal Service sought certification of those rulings, and the Service has been called upon to support the representations of its counsel. By failing to provide this information, the Postal Service has denied the Commission the opportunity to evaluate the facts pertinent to this dispute. The Postal Service’s recalcitrance is unwarranted, especially when the only

²⁸ P.O. Ruling C2001-1/10 further allowed the Postal Service to limit the data contained in the location ID field if the complete data field would be indicative of a carrier’s line of travel.

Commission requirement was for the Postal Service to provide support for its allegations beyond bare assertions.

The Postal Service Response to P.O. Ruling C2001-1/13, at 2, states:

As long as participants in Commission proceedings have access to the information they need for purposes of use in those proceedings, there should be no occasion for the Commission to seek to resolve broader issues of general public disclosure.

The Postal Service recognizes that Carlson does not consider access to the CBMS data under protective conditions a satisfactory outcome. Postal Service Response at 4. However, instead of providing an explanation to support this outcome, the Service has simply restated that this is the only outcome acceptable to the Postal Service. *Ibid.*

The Postal Service continues with "there should be no occasion for the Commission to seek to resolve broader issues of general public disclosure." This mischaracterizes the role of the presiding officer's decision making power. The presiding officer regularly resolves the issue of public disclosure whenever protective conditions are considered. Commission proceedings are conducted in conformance with the Administrative Procedure Act, and decisions must reflect a record generally open to the public. Even where a participant has access to the material that he needs, some justification must be provided for protective conditions. The goal is to make the information that is the basis for Commission decisions openly available to the greatest extent possible. This is the purpose of having public proceedings before the Commission.

The Postal Service initially did offer to provide a response to DFC/USPS-19 under protective conditions. Both P.O. Ruling C2001-1/6 and P.O. Ruling C2001-1/10 accepted the Postal Service proposal. However, the fact remains that the Postal Service, having ample opportunity to provide a response to DFC/USPS-19 under protective conditions, for various reasons has failed to do so. The Postal Service Response, at 2, now asserts that protective conditions would have met the Postal

Service's concerns in responding to DFC/USPS-19. This order affirms the rulings in P.O. Ruling C2001-1/6 and P.O. Ruling C2001-1/10 that it do so.

For the reasons explained above, all action on the reconsideration of P.O. Ruling C2001-1/10 requested by the Postal Service is terminated, and the ruling in P.O. Ruling C2001-1/10 is affirmed. The Postal Service shall answer DFC/USPS-19 by providing the complete CBMS database subject to protective conditions per P.O. Ruling C2001-1/6 by December 3, 2001. Furthermore, the Postal Service shall answer DFC/USPS-19 by providing a limited database free of protective conditions as specified in the compromise solution outlined in P.O. Ruling C2001-1/10 by December 10, 2001. The Postal Service has not provided support for an assertion of potential security and safety issues concerning the compromise solution for the Commission to evaluate. If there is a justifiable safety or security concern with the compromise solution that would warrant the application of protective conditions, the Postal Service may submit support for this concern by replying to applicable questions one through four as discussed above, and request protective conditions, by December 3, 2001.

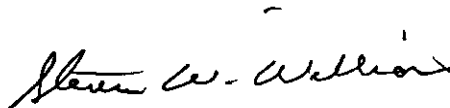
It is ordered:

1. The Commission shall terminate all action on the Postal Service's request for review of P.O. Ruling C2001-1/10 as accepted in PRC Order No. 1321, issued September 19, 2001.
2. The Commission affirms P.O. Ruling C2001-1/10, issued August 21, 2001.
3. The Postal Service shall answer DFC/USPS-19 by providing the complete CBMS database subject to protective conditions per P.O. Ruling C2001-1/6 by December 4, 2001.

4. The Postal Service shall answer DFC/USPS-19 by providing a limited database free of protective conditions as specified in the compromise solution specified in P.O. Ruling C2001-1/10 by December 11, 2001.

5. The Postal Service may provide a response to the questions in P.O. Ruling C2001-1/13 concerning the compromise solution in support of a request for protective conditions for the compromise solution by December 4, 2001.

By the Commission.
(SEAL)



Steven W. Williams
Acting Secretary