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ORDER NO. 1390

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

Before Commissioners: George Omas, Chairman;
Tony Hammond, Vice Chairman;
Dana B. Covington, Sr.; and
Ruth Y. Goldway

Complaint on Removal of Collection Boxes Docket No. C2003-1

ORDER AFFIRMING PRESIDING OFFICER'S RULING NO. C2003-1/3

(Issued February 4, 2004)

I. Summary

Procedural context. The Postal Service's request for reconsideration of a ruling denying a motion for protective conditions for certain survey data is before the Commission on certification from the Presiding Officer. The data in issue consist of the responses (or scores) associated with two questions in the Service's extensive Customer Satisfaction Measurement (CSM) survey. One question asks about the convenience of mail boxes; the other about the ease of mailing letters.[1]

The Service concedes that the referenced data are (a) relevant to threshold questions in the underlying complaint and (b) extremely limited in scope, but it nevertheless resists publicly disclosing them. This resistance is grounded mainly in the assertion that an "indivisible" claim of "inherent sensitivity" in the CSM data set as a whole confers a blanket privilege against disclosure of the two scores in issue here.

[1] The wording of both questions was disclosed on the public record in this case in Answer of the United States Postal Service, December 20, 2002, at 21-23. Request of the United States Postal Service for Reconsideration of Presiding Officer's Ruling No. C2003-1/2, July 21, 2003.

However, the Service also raises several other arguments in support of its position. Both complainant Douglas F. Carlson and the Office of the Consumer Advocate oppose the Service's position.[2]

Following *in camera* review of the data and evaluation of related pleadings, the Presiding Officer ruled that the Service's reliance on a blanket claim of privilege was flawed. He also found, among other things, that the Service erred in relying on a previous ruling (in a different docket) as controlling precedent in this case. *See* Order Accepting Certification of Presiding Officer's Ruling No.C2003-1/2, July 25, 2003, at 3-5.

Decision on reconsideration. We agree with the Presiding Officer's conclusions and, with one clarification, affirm his ruling in all material respects. The clarification is that data sensitivity remains an element of the balancing test that will be applied in Commission rulings on disclosure issues.[3] As to other material elements of the challenged ruling, we find that the Presiding Officer correctly concludes that the Service's assertion of an "indivisible" claim of "inherent sensitivity" over the entire CMS data set is flawed. The Service itself, by routinely disclosing the response to a question from the CSM survey concerning overall national performance, effectively contradicts the validity of an "indivisible" claim. The CSM data are widely acknowledged to cover myriad aspects of postal operations and service, and are not monolithic in any typical sense. Thus, no sound reason supports arbitrarily drawing a line between the single question on overall performance and all other questions.

In addition, the fact that other business organizations assert blanket claims of privilege in similar survey data is not dispositive. In part, this is because the Service, as a government-sanctioned provider of postal services, stands in a unique position relative to other commercial enterprises. We generally believe this should translate into

[2] Douglas F. Carlson Answer in Opposition to Postal Service Motion for the Establishment of Protective Conditions, December 24, 2002; Douglas F. Carlson Reply Comments Concerning Order No. 1379, August 18, 2003; and OCA Letter to the Secretary of the Commission, August 18, 2003.

[3] The Service indicates that the phrasing of the certified questions gives rise to this concern. In the context of the overall ruling, we understand the introductory clause as a general reference to "blanket" claims of sensitivity. Initial Comments of the United States Postal Service Upon Certification of Presiding Officer's Ruling No. C2003-1/2 (Initial Comments), August 11, 2003, at 12.

more accountability and disclosure, rather than less. More importantly, this case, with its focus on collection boxes, concerns the provision of monopoly services, where competitive harm is generally not an issue. This adds a dimension not typically present in the private sector.

We also agree that the Service's reliance on P.O. Ruling No. R2001-1/17, which authorized protective conditions for more extensive CSM data in Docket No. R2001-1, is misplaced. Despite some surface similarities, a closer look reveals that to the extent parallels exist, they are extremely limited. Essentially, the similarities between the cases extend only to the general type of data involved — CSM responses — and to the broad nondisclosure policy the Service invokes. In almost every other significant respect, there are critical distinctions. These include the amount of data that would be publicly released (extremely limited versus extensive); the proponent of the data's use (the Service versus the OCA); the reason for introducing it (as potential support for outright dismissal of the complaint, rather than an adjustment in rates); the type of case (a service complaint versus an omnibus rate case); and the stage of the case (pre-acceptance versus mid-discovery).

These distinctions support the limited utility of the previous ruling as precedent and the validity of the Commission's preference for case-by-case evaluation of claims related to the treatment of confidential or sensitive data. Thus, the fact that the Presiding Officer did not adopt the approach used in Docket No. R2001-1 is not an error. We find it is consistent with the Commission's position that protective conditions, although an appropriate option in some cases, necessarily limit public discussion and use of the material.

Impact of decision. The consequences of this order in terms of the immediate case are straightforward: if the Service chooses to rely on the referenced CSM material, it must disclose the data on the open record. In terms of future cases, the Service may seek — and in some instances obtain — protection for CSM data, either collectively or individually; however, decisions on the merits of granting such protection will be evaluated on a case-by-case basis.

The Commission will continue to apply a balancing test, and data sensitivity will continue to be a consideration. However, blanket claims of sensitivity in the CSM data will not be entertained. Instead, to the extent the Service (or other party) seeks to protect data or other information a specific, well-supported claim must be presented. Minimum standards will require that the supporting narrative be relatively detailed and issue-specific. If pertinent, the data's relationship to the Service's role in providing postal services should be addressed. Under this approach, claims of "inherent sensitivity" based on commercial business practices or broad industry standards generally will not suffice. This is largely because such standards are often quite general; usually lack a clear or direct relationship to case-specific postal issues; and typically do not reflect the type of unique statutory mandates that underlie Postal Service operations and Postal Rate Commission responsibilities.

As further guidance, we note several other considerations discussed in the participants' pleadings that will inform future decisions on protective conditions. These include the overall role (or standing) assumed by the proponent of the data's use; the purpose the data serves; and the extent to which protective conditions interfere with or compromise the Commission's interest in — and ability to provide — open and public proceedings.

II. Related Considerations

Other Postal Service arguments. The Service raises several other points that warrant mention. In particular, we have considered, and rejected, the allegation that the Presiding Officer overlooked the Service's incorporation by reference of two affidavits in Docket No. R2001-1 discussing competitive concerns. Initial Comments at 5-7. Instead, our reading of the certified ruling indicates that the Presiding Officer was aware that the previous affidavits had been filed and of the information provided therein, but found them lacking the specificity he deemed necessary to support shielding the CSM data in this case. We believe this conclusion is justified. The referenced affidavits provide generalities, but no specific evidence on how competitors would benefit from

knowledge of the Service's scores on the limited CSM data at issue here, which pertain to a feature of the Service's statutory monopoly. Accordingly, we find no error in this aspect of the ruling.

"Net return" theory. The Service also criticizes the Presiding Officer's alleged failure to consider that public disclosure of the CSM data could diminish its "net return" on the related data collection effort. It argues that potential competitors might be able to identify opportunities to divert business from the Postal Service that they might never have contemplated *but for* exposure to the CSM results. Further, it says competitors (even if fully aware of diversion opportunities) might reap a "competitive windfall" by saving the cost of their own research and might be able to engage in selective reporting of CSM results with respect to advertising and promoting their own products. *Id*. at 11-12. Given these possibilities, the Service argues that "sound reasons" exist to support its expectation that CSM research results are treated as sensitive and shielded from public disclosure. It also says that evidence of industry experience (in the affidavits provided when CSM data were in issue in Docket No. R2001-1) confirms that businesses and other organizations relying on similar CSM results do, in fact, conform their practices to such expectations. *Id.* at 12.

Without taking a formal position on the overall validity of the Service's "net return" theory, we find that it has no direct bearing in this case. Given the issues at stake, it is difficult to envision how competitors could achieve any material advantage from disclosure of the two responses sought here. Moreover, the Service provides no concrete evidence of competitive harm, despite having had an adequate opportunity to do so.

Weight accorded the public interest in disclosure. The Service presents two reasons why the weight accorded the interest in public disclosure could be considered "somewhat diminished" under the circumstances of this case. *Id*. at 18. One is that the situation here is not like typical litigation in court, where the ability to intervene is likely to be restricted by standing requirements. Instead, the Service suggests that interested members of the public could obtain access to the CSM data in issue by following the

procedures associated with the protective conditions. *Id*. at 18-19. The other reason — which the Service says is presumably more important — is that "members of the public probably have very little interest in the exact numerical scores at issue." *Id.* at 19. Therefore, it says that to the extent the Commission can meaningfully explain how it relied upon those numbers (if at all) without revealing their precise levels, any further "need" for the public to see the CSM numbers is probably illusory. *Ibid*. As noted above, the Postal Service is a government entity specifically made subject by Congress to public complaint proceedings. Given our conclusions on the absence of any substantive aspects of the Service's claims, we do not find it necessary to address the Service's final observation.

Practical alternatives. Finally, we acknowledge that in response to several concerns the Presiding Officer expressed with respect to the difficulties of dealing with material provided under the seal, the Service offers several practical suggestions geared to resolving or reducing inconvenience and other related problems. These suggestions might be useful in other situations; however, we view the Presiding Officer's ruling as addressing more fundamental concerns, so they are not persuasive here.

Guidance in case law. Although there appears to be no case law directly on point, opinions interpreting confidentiality and disclosure issues under the Freedom of Information Act (FOIA) provide some guidance and parallels. In passing the FOIA, Congress recognized a need for some exceptions to the general rule requiring openness. It therefore struck a balance of public and private interests, in Exemption 4, by permitting (but not mandating) an agency to withhold "commercial or financial information obtained from a person [that is] privileged and confidential." 5 U.S.C. § 552(b)(4*); Washington Post Co. v. HHS*, 690 F.2d 252, 269 (D.C. Cir. 1982); *Washington Post Co. v. HHS*, 865 F.2d 320, 326-27 (D.C. Cir. 1989).

An agency's discretion in this arena is not unfettered, and the courts have articulated several limits. There is an acknowledged restriction, for example, on "[d]isclosure [that] would provide competitors with valuable insights into the operational

strengths and weaknesses of a [company], while [its competitors] could continue in the customary manner of 'playing their cards close to their chest'." *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976). In the situation here, despite the Service's continued references to competitive harm, nothing presented on the record to date provides any concrete evidence that there is any potential for harm associated with disclosing the two CSM responses.

In conclusion, when viewed against the backdrop of several public policy considerations identified in the referenced legal opinions, Presiding Officer's Ruling No. C2003-1/3 and this Order reflect an appropriate balancing of competing interests.

It is ordered:

P.O. Ruling No. C2003-1/3 in Docket No. C2003-1, Complaint on Collection Box Removals, is affirmed.

By the Commission.

(SEAL)

Steven W. Williams
Secretary