

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

Postal Rate and Fee Changes

Docket No. R2006-1

PRESIDING OFFICER'S RULING
ON MAINTENANCE OF PROTECTIVE
CONDITIONS FOR DISCOVERY MATERIALS
PRODUCED BY GREETING CARD ASSOCIATION

(Issued November 20, 2006)

This ruling concerns a motion originally lodged by the Greeting Card Association (GCA) in this docket on October 27, 2006.¹ In its initial Request, GCA sought on behalf of its witness Dr. James Clifton² an expedited ruling directing that protective conditions apply to documents provided by GCA to the Association of Nonprofit Mailers (ANM) in response to interrogatory ANM/GCA-1. The basis of GCA's Request is, essentially, that the documents bear on a collateral financial dispute between Dr. Clifton and a former client. In a declaration attached to GCA's Request, Dr. Clifton states that the documents at issue should be protected to prevent their use in that dispute, and should not be converted to another party's use "by free riding on valuable information on worksharing cross elasticities contained in that study."³

¹ Request for Expedited Relief and Motion of the Greeting Card Association on Behalf of Dr. James Clifton for Protective Order Concerning GCA Production in Response to ANM/GCA-1, October 27, 2006 (GCA Request).

² Dr. Clifton is also represented individually by his own counsel, who has submitted written communications to the Secretary of the Commission on two occasions. See Letter of William C. Davis, III to Secretary Steven Williams, October 4, 2006 (reproduced in GCA Request, Exhibit 1); Letter of William C. Davis, III to Secretary Steven Williams, November 2, 2006 (available in the Commission's public commenter file in Docket No. R2006-1).

³ *Id.*, Attachment A (Declaration of James A. Clifton), at 3.

In order to preserve the status quo, I granted a temporary protective order in Ruling No. 95 without ruling on the merits of the Request.⁴ Prior to Dr. Clifton's appearance in hearings, GCA filed another Request⁵ for expedited relief seeking a ruling barring any oral cross-examination of Dr. Clifton concerning his dealings with the National Association of Presort Mailers (NAPM) and/or the American Bankers Association (ABA) in connection with testimony he prepared that is no longer before the Commission in this docket. In Ruling No. 104,⁶ I noted that no participant had indicated an intent to conduct oral cross-examination on these matters; found the circumstances relating to any such disputes to be irrelevant to issues before the Commission; and granted the relief sought in GCA's Second Request.

ANM and NAPM filed an Answer on November 1, 2006.⁷ These parties argue that the temporary protective order should be vacated on several grounds.

First, they argue that GCA and Dr. Clifton have effectively waived any right to a protective order by failing to seek it on a timely basis, prior to providing the documents in response to the interrogatory. They note that both Commission practice and judicial authority contemplate that a party wishing to shield discovery responses from public disclosure is expected to request such relief from a tribunal before, not after, producing the purportedly sensitive material. They also assert that Dr. Clifton has not identified extenuating circumstances that might excuse the failure to do so. Accordingly, because the "horse is already out of the barn," the parties submit that a protective order should not apply to the discovered materials.⁸

⁴ Presiding Officer's Ruling on Greeting Card Association Request for Protective Order, October 30, 2006.

⁵ Request for Expedited Relief and Motion in Limine of the Greeting Card Association, November 2, 2006 (Second Request).

⁶ Presiding Officer's Ruling on Motion of Greeting Card Association, November 6, 2006.

⁷ Answer of Alliance of Nonprofit Mailers and National Association of Presort Mailers to Motion of Dr. James Clifton for Protective Order and Expedited Relief, November 1, 2006 (Answer).

⁸ *Id.* at 1-3, 12-17.

Next, the parties observe that protective orders are an exception to the general policy that government proceedings should be transparent and open to the public. Even if the request for a protective order were timely, the parties further argue, Dr. Clifton has failed to make the necessary showing that disclosure of the discovered materials will result in a clearly defined and very serious injury.⁹

As ANM and NAPM represent the facts,¹⁰ Dr. Clifton's claims of potential harm to his position in the financial dispute and to the commercial potential of his work product are unfounded. They state that Dr. Clifton's contract with NAPM calls for resolution of any dispute by an arbitrator—not the Commission—and that ANM and NAPM would be entitled to discover the controversial March 2006 report in any subsequent litigation regardless of whether the Commission enters a protective order in this docket. Regarding jeopardy to the potential resale of the cross-elasticity analyses and estimates, the parties question whether Dr. Clifton has standing to assert a commercial interest in work performed for GCA, and claims he has offered no credible evidence that the analysis has any significant commercial value independent of his presentation of it as a professional witness.¹¹

As I noted in Ruling No. 95, the Commission is aware that disagreements can arise in the course of planning and conducting litigation before this agency. All parties involved in the instant controversy recognize that the Commission is not an appropriate forum for appraising—much less resolving—their collateral dispute. However, as I also noted in Ruling No. 95, the Commission is deeply concerned “that its processes not be used solely, or primarily, for the purpose of gaining advantage in a dispute not relating

⁹ *Id.* at 3, 17-18.

¹⁰ ANM and NAPM rely extensively on a Declaration of Joel T. Thomas, Executive Director of the National Association of Presort Mailers, which they filed in two variant forms: a “proprietary” version submitted under the protective conditions temporarily in force by virtue of Ruling No. 95, and a redacted public version. See Alliance of Nonprofit Mailers and National Association of Presort Mailers Notice of Filing of Proprietary Version of Declaration of Joel T. Thomas, November 2, 2006; Declaration of Joel T. Thomas, Redacted Public Version, November 1, 2006.

¹¹ *Id.* at 3-4, 19-25.

to an issue before the Commission for decision.”¹² Unfortunately, the discovery practice referenced above has created this possibility.

Certain materials prepared by Dr. Clifton, including the above-referenced cross-elasticity analyses and estimates, were disclosed by GCA in response to an ANM interrogatory. While ANM/NAPM dispute Dr. Clifton’s ultimate ownership of the study and his standing to assert a proprietary interest, I conclude for the purposes of this proceeding that he has a cognizable interest to assert because the materials are his work product.

GCA did not object or make any derivative assertion of Dr. Clifton’s interest when it provided the materials to ANM. The sequence of events is not altogether clear, but counsel for Dr. Clifton represents that the latter was unaware of the disclosure until after counsel for GCA had prepared a copy of the discovered material.¹³ GCA filed its Request on Dr. Clifton’s behalf four days thereafter. Under these circumstances, it does not appear that Dr. Clifton “slept on” his rights, and I conclude that, notwithstanding the untimeliness of GCA’s Request for a protective order, he did not waive assertion of his proprietary interest in his work product.

As ANM/NAPM note, protective conditions are an exception to the general policy of public disclosure in the discovery process. Where a participant claims that materials responsive to discovery requests are proprietary or commercially sensitive, and therefore should be exempt from public disclosure, the Commission follows the rule that: “Whether, and on what terms, protection is to be afforded is for the agency to determine by balancing the harm of disclosure against the party’s need to prove his case and the public interest in just and accurate adjudication of disputes.”¹⁴

In this instance, Dr. Clifton has made a colorable, if somewhat inchoate, claim that public disclosure of materials responsive to ANM/GCA-1 could jeopardize his

¹² Presiding Officer’s Ruling on Greeting Card Association Request for Protective Order, *supra*, at 2.

¹³ Letter of William C. Davis, III to Secretary Steven Williams, November 2, 2006, para. 2.

¹⁴ PRC Order No. 1025, August 17, 1994, at 13-14. (Footnotes omitted.)

position in a collateral financial dispute and impair the value of his work product. On the other side of the balance, ANM/GCA have not demonstrated that the materials are needed to prosecute their case, or are needed to inform determinations to be made in this proceeding. Further, in any future litigation outside this forum, ANM/GCA acknowledge that they would be entitled to production of the March, 2006 study that is at the center of this controversy because of its relevance to their dispute with Dr. Clifton.¹⁵

Nor does the public interest in adjudicating disputes that are germane to this docket support public disclosure of the materials. On the contrary, inasmuch as susceptibility to public ventilation might stifle the production of analytical efforts that are not ultimately sponsored in a Commission proceeding, the public interest would appear to be disserved.

For these reasons, I conclude that maintenance of the protective conditions imposed temporarily in Ruling No. 95 would best serve the interests of all affected parties, and is justified. Accordingly, I shall direct that they remain in effect for the balance of this proceeding.

RULING

The protective conditions ordered on a temporary basis in Presiding Officer's Ruling No. R2006-1/95, issued October 30, 2006, shall remain in effect for the duration of this proceeding.

George Omas
Presiding Officer

¹⁵ Answer at 4.