

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

COMPLAINT OF CAPITAL ONE SERVICES, INC.

Docket No. C2008-3

**RESPONSE OF THE UNITED STATES POSTAL SERVICE TO P.O. RULING NO.  
C2008-3/7, RULING ON PROCEDURAL REQUESTS RELATED TO THE  
DEPOSITION OF JESSICA DAUER LOWRANCE**  
(September 4, 2008)

The United States Postal Service hereby responds to P.O. Ruling No. C2008-3/7, the Ruling on Procedural Requests Related to the Deposition of Jessica Dauer Lowrance, issued by the Presiding Officer on August 28, 2008. In that pleading, the Presiding Officer invited interested participants to address the request by the American Postal Workers Union, AFL-CIO (“APWU”), for an “OIG Report On Read/Accept Rates Related to the Bank of America NSA.”<sup>1</sup> The Ruling requires that such pleadings must

---

<sup>1</sup> The procedural posture of the Presiding Officer’s invitation appears to be unclear. APWU specifically requested that the Postal Service be ordered to “produce the report on Thursday, August 28, 2008, for use in Ms. Lowrance’s continuing deposition on Friday, August 29, 2008.” Motion of the American Postal Workers Union, AFL-CIO to Compel Production of Documents by USPS to Postpone Deposition of Jessica Dauer Lowrance Until Friday, August 29, 2008, at 9:30 a.m. and to Provide APWU Time to Ask Questions of Ms. Lowrance (hereinafter “APWU Motion”), Docket No. C2008-3, August 28, 2008, at 5. The request was not framed as a general discovery request in itself. By its own terms, the APWU’s request is now moot, as August 28 and 29 are now past and Ms. Lowrance’s deposition has been concluded. Notwithstanding this explicit limitation by the requester, the Presiding Officer appears to have considered the request to be a general discovery matter suitable for ongoing briefing and consideration. The Postal Service respectfully notes that the requested document appears to be already covered by one or more of Capital One’s document requests, to which the Postal Service has objected and on which the Presiding Officer has filed no motion to compel to date. See Document Requests of Capital One Services, Inc. to the United States Postal Service (COS/USPS-1-17), Docket No. C2008-3, August 8, 2008, at 2-4.

be filed with the Commission by September 4, 2008.<sup>2</sup>

**I. The Inspector General's Memorandum Is Not Relevant to the Proceeding**

In its request for the above-referenced document, APWU explains the purported importance, in terms of APWU's position in the case, of "alternative baseline [read/accept rate] data to serve as the basis for a proposed NSA with Cap[ital] One."<sup>3</sup> APWU then refers to a mention in Ms. Lowrance's testimony of an Office of the Inspector General ("OIG") analysis of read/accept rates related to the Bank of America negotiated service agreement ("NSA") and requests the production of that analysis.<sup>4</sup>

The Presiding Officer correctly perceives that the requested document is "at best tangential to testimony being provided by Ms. Lowrance."<sup>5</sup> With its motion, APWU appears to hope that mere association of its general interests with an oblique reference to an unrelated document will render that document "highly relevant" to the asserted interests. In reality, the document apparently at issue – an internal November 6, 2007, memorandum from the OIG to the Chairman of the Board of Governors – neither contains nor describes any more recent read/accept data, or for that matter any more

---

<sup>2</sup> Today's pleading only responds to the Presiding Officer's specific invitation to address the APWU's demand for the OIG Report. In the Postal Service's view, it is not required to address all aspects of APWU's motion, as P.O. Ruling No. C2008-3/7 addressed APWU's motion, and thus, all other items in that motion, relating to an extension of time for the deposition of Ms. Lowrance, are now moot. Therefore, the instant pleading is not a generalized response to P.O. Ruling No. C2008-3/7, or a response to any party's allegations regarding the Postal Service's failure to comply with that, or any other, ruling. The Postal Service's response to those allegations will be addressed in full in the Postal Service's pleadings in opposition to the various motions for sanctions in which those allegations are contained.

<sup>3</sup> APWU Motion at 4-5.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> P.O. Ruling No. C2008-3/7 on Procedural Requests Related to the Deposition of Jessica Dauer Lowrance, Docket No. C2008-3, Aug. 28, 2008, at 2.

comprehensive read/accept data, than are already available to APWU in materials released from protective conditions in Docket No. MC2007-1.<sup>6</sup> Rather than presenting any new substantive information, the memorandum describes, reviews, and analyzes the negotiations and approval process for the Bank of America NSA: subject matter that the Presiding Officer has already ruled to be outside the bounds of relevance to the deposition context within which APWU has presented its request.<sup>7</sup> Contrary to APWU's speculation, the memorandum does not contain any more recent or comprehensive "alternative" baseline data, such that APWU claims would be relevant to its litigation strategy and/or the potential ascertainment of functional equivalency in connection with a new NSA.

## **II. The Memorandum Is Privileged and Protected by Disclosure Statutes Applicable to the Postal Service**

Not only is the OIG memorandum irrelevant to the instant proceedings and/or APWU's purported interest therein, it is also privileged and statutorily protected from disclosure.<sup>8</sup> The memorandum was prepared at the request of the Chairman of the Board of Governors following the Commission's Opinion and Recommended Decision

---

<sup>6</sup> As of the date of the OIG memorandum, the most recent and comprehensive read/accept data available had been released from their protective seal in the proceedings before the Commission. See Opinion and Recommended Decision (Released from Protective Conditions), Docket No. MC2007-1, Oct. 19, 2007, at ¶¶ 1006, 4025. The OIG memorandum contains references to these data and, at most, compares them to earlier, less comprehensive data that has remained under seal. Thus, the most appropriate baseline data in the OIG memorandum would not be "alternative" to data to which APWU already has access.

<sup>7</sup> P.O. Ruling No. C2008-3/8, Concerning Procedural Matters for the Deposition of Jessica Dauer Lowrance, Docket No. C2008-3, Aug. 28, 2008, at 3.

<sup>8</sup> We note that the OIG, which operates its own Freedom of Information Act ("FOIA") response unit, has withheld the document in its entirety from disclosure in response to a FOIA request, pursuant to FOIA Exemptions 2 ("high 2"), 3, 4, and 5, in conjunction with 39 U.S.C. § 410(c)(2) and the deliberative process privilege.

on the Bank of America NSA. The memorandum was intended to assist the Board in deciding how to act on the Commission's Recommended Decision, in accordance with the Governors' extant authority under former 39 U.S.C. § 3625. Thus, the OIG memorandum constitutes "information prepared for use in connection with proceedings under chapter 36 of [Title 39, U.S. Code]" and is protected from public disclosure requirements.<sup>9</sup>

The memorandum is also protected by the deliberative process privilege. The deliberative process privilege is intended to protect the free flow of ideas in the decision-making process of government agencies, as well as the integrity of that process itself, and it covers internal documents that are both "predecisional" and "deliberative."<sup>10</sup> First, agency documents are "predecisional" if they were communicated "antecedent to the adoption of an agency policy;"<sup>11</sup> in this case, the memorandum was predecisional with respect to the Governors' decision that it was designed to inform.<sup>12</sup> Second, internal documents that contain the opinions, suggestions, or recommendations of government employees comprise "deliberative" information within the meaning of the privilege.<sup>13</sup> The OIG memorandum is wholly oriented around the opinions, suggestions, and recommendations of the OIG to the Governors. The presence of factual material in

---

<sup>9</sup> 39 U.S.C. § 410(c)(4). This provision is the same currently as it was before the Postal Accountability and Enhancement Act of 2006 ("PAEA").

<sup>10</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-52 (1975).

<sup>11</sup> Jordan v. U.S. Dept' of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc).

<sup>12</sup> The memorandum is not stripped of its predecisional character by the fact that the Governors subsequently reached a final decision on the matter. See, e.g., Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979); May v. Dep't of the Air Force, 777 F.2d 1012, 1014-15 (5th Cir. 1985); Elec. Privacy Info. Ctr. v. Dep't of Homeland Security, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005).

<sup>13</sup> See, e.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

the memorandum does not diminish this conclusion, since the factual portrayal is intrinsically enmeshed with the OIG's analysis, and the factual review is central to the memorandum's significance in the Postal Service's decision-making process.<sup>14</sup> The OIG memorandum clearly implicates the privilege's underlying policy concern: it was designed to give the Governors the detail and critical self-analysis they needed to make an informed decision, which would not have been possible if the OIG had had to contend with exposing controversial policy positions and rationales. Therefore, the memorandum is protected by the deliberative process privilege, which applies at once in the civil discovery context and as a basis for exemption from disclosure under Exemption 5 of the FOIA.<sup>15</sup>

In addition, the memorandum consists in large part of sensitive commercial information about the Postal Service's pricing and negotiation process, as well as the substance of certain exchanges with private sector entities. This information would not be publicly disclosed by the Postal Service's competitors or other large businesses. Thus, the document is exempt from disclosure requirements under 39 U.S.C. §

---

<sup>14</sup> See, e.g., Mapother v. Dep't of Justice, 3 F.3d 1533, 1538-40 (D.C. Cir. 1993) (holding that majority of factual material in report was deliberative because it "was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action"); Montrose Chem. Corp. v. Train, 491 F.2d 63, 68, 71 (D.C. Cir. 1974) (holding that a selective summary of factual testimony was deliberative where it was compiled to facilitate an agency decision). In this case, the OIG exercised discretion and judgment in extracting and highlighting facts that it felt necessary to support its recommendations to the Governors.

<sup>15</sup> FOIA Exemption 5 permits agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption permits agencies to withhold records that would be privileged in the context of civil discovery, including pursuant to the deliberative process privilege. Sears, Roebuck, 421 U.S. at 149-52. The OIG memorandum cannot reasonably be construed as anything other than an "intra-agency memorandum" subject to FOIA Exemption 5.

410(c)(2). To the extent that this information is derived from confidential information that third parties provided, that information is also exempt from disclosure under FOIA Exemption 4.<sup>16</sup> Because the parties to this case include Bank of America's commercial competitor and a major customer of the Postal Service, the Postal Service would suffer commercial harm in its ability to deal with Bank of America and other prospective NSA partners, including Capital One as a negotiating partner.<sup>17</sup>

### III. Conclusion

The OIG memorandum that APWU requests is more than “at best tangential”; it is completely irrelevant to the matters at hand. Nor does the memorandum even contain any new information that would serve the purposes APWU cites – notwithstanding their *non sequitur* nature – in connection with its request. Even if the document were relevant, it is squarely protected from disclosure by the deliberative process privilege, FOIA Exemptions 3, 4, and 5, and 39 U.S.C. § 410(c)(2) and (4).

For these reasons, the Postal Service respectfully requests the Presiding Officer to deny APWU's demand that the Postal Service produce the memorandum.

---

<sup>16</sup> Release of this information would potentially subject the Postal Service to liability under its Non-Disclosure Agreement with Bank of America.

<sup>17</sup> It should be emphasized that while the commercial harm consideration may be appropriate to objections based on commercial sensitivity, it is inapposite to the concerns that underlie civil discovery privileges. For example, the fundamental purpose of the deliberative process privilege is to ensure the integrity of government decision-makers' discussions, which may or may not implicate the government entity's “commercial interests.” (Notably, the application of this privilege to the Postal Service arises not from its commercial interests, but from its status as an executive branch establishment.) In light of these vital policy interests, an external adjudicator should be loath to cast aside an assertion of deliberative process privilege on the basis of extrinsic factors, just as a valid claim of attorney-client privilege cannot be waived except upon the client's consent.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.  
Chief Counsel, Pricing and Product Support

Elizabeth A. Reed  
Jacob D. Howley

475 L'Enfant Plaza, S.W.  
Washington, D.C. 20260-1137  
(202) 268-3179; Fax -6187  
September 4, 2008