

Before the
POSTAL REGULATORY COMMISSION
Washington, DC 20268-0001

Regulations to Establish Procedure for :
Accordinging Appropriate Confidentiality : Docket No. RM2008-1

INITIAL COMMENTS OF THE GREETING CARD ASSOCIATION

The Greeting Card Association (GCA) submits these comments pursuant to Commission Order No. 96 (August 13, 2008), in order to put before the Commission certain considerations regarding appropriate implementation of the provisions of the Postal Accountability and Enhancement Act (PAEA) which govern the confidentiality of materials obtained from the Postal Service. In particular, GCA focuses on –

- the scope and nature of “likely commercial injury to the Postal Service” [39 U.S.C. § 504(g)(3)(A)] resulting from disclosure of nonpublic information;
- the importance of distinguishing between Postal Service data in the strict sense and confidential business data furnished to the Service by customers to assist in the development of new products, rates, or rate designs;
- the implications of the phrase “financial transparency” in § 504(g)(3)(A);
- the scope and proper interpretation of Congress’s characterization, in that same provision, of the Postal Service as a “government establishment competing in commercial markets.”

We also make two suggestions for relatively minor changes in the language of the proposed rules.

I. Commercial Injury to the Postal Service

GCA suggests that the Commission read the “likely commercial injury” standard of § 504(g)(3)(A) to include more than mere disclosure to the Postal Service’s direct competitors of confidential data that could enable them to divert traffic from the Service. Proposed Rule 3007.25 emphasizes the importance of this “commercial injury” concept in determining whether to permit disclosure.

A major purpose of PAEA was to provide the Service with greater flexibility in designing products and rates to meet the needs of its household, small business, and mass-mailing customers. To use this flexibility effectively, the Service must know these customers’ plans and expectations. For example, how large – in the customer’s best forecast – is the market for a potential new product? Will that market grow? How price-dependent is it thought to be? Will the new product increase total mail volume, or merely cause migration from an existing product? Information like this is not lightly disclosed by any enterprise that has developed it. If the Commission’s confidentiality rules, or its practice under them, make it appear that confidential data, once in the Service’s hands, cannot be reliably protected against public disclosure, companies – which generally face competition, just as the Service does – will be less ready to share them. This in turn will hamper the Service in using the flexibility provided by PAEA, with the result that its products and rates will be less well adapted to their respective markets. GCA submits that this effect, no less than loss of mail volume to the Service’s direct competitors, should be recognized as “commercial injury” for purposes of § 504(g)(3)(A).

II. Private Business Information in the Hands of the Postal Service

One of the bases on which the Postal Service may designate information as nonpublic is 5 U.S.C. § 552(b)(4), which exempts from disclosure under the Freedom of Information Act “trade secrets and commercial or financial information obtained from a person and privileged or confidential [.]” If the Commission contemplates any disclosure of information designated by the Service on this ground¹, it will apply the balancing test described in Order No. 96.

When the material concerned is private-party information in the hands of the Postal Service, the Commission’s exercise of the balancing test should count that fact against unnecessary disclosure. The policies of FOIA’s commercial information exemption and of § 410(c)(2) continue to be relevant even after the Service has initially designated the information as nonpublic. Because such information concerns, primarily, the operating results, plans, or research of Postal Service customers, and not those of a “government establishment competing in commercial markets,” the transparency interest may be insubstantial and is certainly less compelling. The possibility of commercial injury to the Postal Service if its customers cannot be sure that their business information is protected when shared with the Service has already been outlined. It is also worth noting that, in the terminology of the Third Circuit’s *Pansy* and *Arnold* decisions, discussed and apparently adopted at pp. 3-4 of Order No. 96, the “party benefitting from the order of confidentiality” is, in this case, primarily *not* “a public entity or official” but a private-sector business.²

Consequently, GCA urges the Commission to make clear that when deciding whether, and how far, to order disclosure of nonpublic information, it will keep in mind the distinction between (i) Postal Service information in the strict sense

¹ Or on the parallel ground that the information is “of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed[.]” 39 U.S.C. § 410(c)(2).

² The second of the *Arnold* criteria cited by the Commission – whether the information is wanted for a legitimate or an improper purpose – may also be relevant, especially when the data concern a single firm which faces competition in the market for its own products. The Commission’s disclosure process should not become a mechanism for prying into a competitor’s business plans or trade secrets.

and (ii) information provided to the Service by a customer or association of customers, for their mutual benefit.

III. Financial Transparency

The phrase “financial transparency of a government establishment competing in commercial markets” presents at least two significant interpretative questions. The first of these is the proper scope of “financial transparency.” (We deal with the second in the next section.)

Reading § 504(g)(3)(A) as a whole suggests that “financial” should not be construed narrowly. In particular, it should not be taken as meaning that the desired transparency applies only to corporate-finance issues that, in the private sector, might fall mainly within the purview of the Securities and Exchange Commission. Such issues are not the ones on which participants in the “commercial markets” in which the Postal Service competes are likely to focus. Their concerns, more probably, will be with whether the Service’s rates are compensatory or are being cross-subsidized by non-competitive traffic. “Financial,” accordingly, should be read to include (at least) the sorts of cost and other operational data that would respond to these concerns.

IV. The Postal Service as a Government Establishment Competing in Commercial Markets

The first branch of the § 504(g)(3)(A) balancing test – the need for transparency in the case of a government body active in commercial markets – seems clearly a formulation of “pro-disclosure” policy. Its most obvious application is where the information at issue concerns a product or class of products where the Postal Service competes with private firms.³

³ The Commission’s footnote 6, on p. 5 of Order No. 96, suggests, but does not describe, a potential distinction between market dominant and competitive products.

GCA suggests, however, that this by no means implies that the transparency policy applies only to information regarding competitive products.⁴ Any multiproduct firm having market power with respect to some but not all of its product lines may find itself able (or feel compelled) to strengthen its nonmonopoly products competitively either by cross-subsidizing them from its monopoly lines or by unjustly and unreasonably⁵ skewing its rate structure against those monopoly customers, even if the result is not cross-subsidy in the technical sense (implying a below-cost rate for the competitive product). From the standpoint of competitors, this, as the Commission is well aware, is a highly objectionable procedure. It is of course at least equally harmful to the monopoly customer who contributes the subsidy. It seems to follow that, at least in situations where cross-subsidization is a possibility, information regarding, e.g., the cost of service or price sensitivity of an unambiguously monopolized product⁶ should be as freely considered for disclosure in the interest of public-sector transparency as similar information regarding an explicitly competitive product. The parties having an interest in disclosure may be different – that is, they may be customers rather than (or as well as) competitors – but the interest itself is no less compelling.

V. Two Suggestions Concerning Details of the Proposed Rules

A. As proposed, § 3007.23(a) describes the scope of the prohibition on disclosure of nonpublic material “[e]xcept as pursuant to the rules in this part,” in paragraphs (1) and (2). There follows a paragraph (3), outlining a procedure for disclosure of such material to a Commission (or Public Representative) consultant. It is not evident that this provision is meant to be structurally parallel to paragraphs (1) and (2). The structure of § 3007.23 thus might be clearer if paragraph

⁴ Or, perhaps, products in the market dominant category for which there is some private competition, though not enough to prevent the Service from enjoying market power as to them.

⁵ 39 U.S.C. § 3622(b)(8).

⁶ For example, one subject to the Private Express Statutes. See 39 U.S.C. § 3642(b)(2) (products subject to the monopoly may not be transferred to the competitive category).

(3) of subsection (a) were redesignated as subsection (b), and present subsection (b) as subsection (c).

B. Proposed § 3007.24(b) contemplates the filing of answers to requests for access to nonpublic material. The right to file an answer is not limited to the Postal Service, and we infer that (at least) any person with a legitimate interest in the confidentiality of the information may do so. However, proposed § 3007.25(a), in describing the Commission’s implementation of the balancing test, refers to “commercial or other injury identified by the Postal Service.” In practice, the Service may not be the party best able to describe the injury, if the information is private-party data in its custody. This is especially true given the short time which § 3007.24(b) allows for answers. GCA suggests that the relevant phrase in § 3007.25(a) be expanded to read “commercial or other injury identified by the Postal Service or by another party filing an answer which has knowledge of the situation enabling it to do so [.]” This amendment would help the Commission obtain the best factual basis on which to perform the balancing test, while not inviting generalized comment on the question from parties having no particular knowledge of the specific circumstances.

Respectfully submitted

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