

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

REGULATIONS TO ESTABLISH PROCEDURE
FOR ACCORDING APPROPRIATE
CONFIDENTIALITY

Docket No. RM2008-1

INITIAL COMMENTS OF THE UNITED STATES POSTAL SERVICE
(September 25, 2008)

On August 13, 2008, the Postal Regulatory Commission issued a Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality (Order No. 96). The notice solicits public comment regarding proposed rules designed to implement the Commission's authority under title 39, United States Code § 504(g) to regulate access to confidential information provided to it by the Postal Service. The Commission seeks to codify the rules in the form of regulations to be published in title 39, Code of Federal Regulations Part 3007. The United States Postal Service hereby files its Initial Comments in response to the proposed rules.

Statutory Summary

Under the Postal Accountability and Enhancement Act (PAEA), Public Law 109-435, 120 Stat. 3198, the Commission has been entrusted with certain regulatory and oversight responsibilities not previously granted by the Postal Reorganization Act of 1970. To exercise its current responsibilities, the Commission is required to review documents and other matter within the control and custody of the Postal Service and its employees.

At page 5 of Order No. 96, the Commission observes that the PAEA relies on transparency and regulation to achieve postal accountability. Proposed 39 C.F.R. Part 3007 equates transparency with Commission oversight and regulation, supplemented either by *in camera* inspection of confidential postal documents, restricted access to such matter by participants in Commission proceedings under appropriate protective conditions, or public disclosure of confidential postal information. As recognized by PAEA § 504(g)(1), some postal information relevant to the Commission's regulatory responsibilities may be exempted by the Postal Service from mandatory public disclosure under authority of 39 U.S.C. §§ 410(c) and 412, in conjunction with the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Accordingly, PAEA § 504(g)(1) obligates the Postal Service to notify the Commission of such exemption determinations at the time that it provides records to the Commission.

PAEA § 504(g)(2) then authorizes the Commission to safeguard all such postal information from public disclosure, subject to two narrow exceptions identified in § 504(g)(3). The first of these exceptions, articulated in § 504(g)(3)(A), states that the Commission is not prohibited:

from disclosing relevant information in furtherance of its duties . . . , provided that the Commission had adopted regulations . . . that establish a procedure for according appropriate confidentiality to information identified by the Postal Service under paragraph (1). In determining the appropriate degree of confidentiality to be accorded information identified by the Postal Service under paragraph (1), the Commission shall balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.

Secondly, for purposes of its regulatory proceedings, the Commission is

authorized by PAEA § 504(g)(3)(B) to establish procedures -- based on rule 26(c) of the Federal Rules of Civil Procedure -- that provide participants in those proceedings an opportunity to obtain restricted access to such information under appropriate conditions designed to protect against harm that would result from public disclosure.

PAEA section 504(g) recognizes that “financial transparency of a government establishment competing in commercial markets” is achieved primarily through the enhanced regulatory oversight that the Commission is now authorized to conduct. However, such transparency does not automatically require public disclosure of all postal information deemed confidential and provided to the Commission. In some instances, it may require only *in camera* inspection of such information by the Commission or very limited access by individuals participating in Commission proceedings under strict protective conditions. To be clear, § 504(g) was not enacted to establish the Commission as an appellate body to generally review Postal Service final agency decisions under the FOIA to exempt records from mandatory public disclosure.

When the Postal Service provides the Commission with information necessary to permit fulfillment of its regulatory responsibilities, the statute requires the Postal Service to concurrently identify any confidential information and articulate the basis for its confidentiality claim. For the limited purpose of reviewing postal pricing and mail classification notices or service change proposals, or other matters squarely within the scope of the Commission’s regulatory jurisdiction, parties before the Commission may assert a need to

access information provided to it by the Postal Service and designated as confidential. Section 504(g) affirms the Commission's authority to regulate the terms of such access, if any, and to determine whether the discharge of its duties requires that any such information be publicly disclosed.

Although a major objective of the PAEA is increased postal accountability, § 504(g) reflects Congressional sensitivity to the important public interest in protecting Postal Service commercial interests from injury, while granting expanded regulatory responsibilities to the Commission. In this regard, it is noteworthy that the § 504(g)(3)(A) balancing test makes no distinction based on whether the information at issue pertains to "market dominant" or "competitive" postal products, as designated under chapter 36 of 39 U.S.C. Notwithstanding the restrictions on the private carriage of letters imposed by the Private Express Statutes,¹ every class of mail competes in commercial markets to some degree against other alternative message or package delivery services, or electronic communications media. The importance of a proper implementation of this Congressional policy is reinforced by current financial and economic trends that adversely affect the general economy and depress the use of market dominant and competitive mail products alike, as well as technology changes that encourage the use of alternative communications media.

General Overview of Proposed Implementing Regulations

The Postal Service has carefully reviewed the Commission's proposed Part 3007 of title 39, Code of Federal Regulations. In the main, the Postal Service considers that the proposed regulations represent a thoughtful and

¹ 39 U.S.C. §§ 601-606, as amended by the PAEA; 18 U.S.C. §§ 1693-1699.

rational attempt to implement the framework established in 39 U.S.C. § 504(g).

Consistent with the statute, the proposed regulations recognize that the public interest in financial transparency of the Postal Service does not automatically require the Commission to publicly disclose or permit access to all postal commercial, business, operational, or other administrative information obtained for purposes of its regulatory responsibilities. The Commission is authorized by PAEA § 505 to designate an officer to serve in all public proceedings as a representative of the interests of the general public. Under 39 C.F.R. § 3002.14, that Public Representative is empowered to independently participate in Commission proceedings and to examine postal information provided to the Commission under § 504(g)(1). Thus, review of confidential postal information by the designated representative of the general public can obviate the need to automatically require public disclosure or permit restricted direct access to such information by others asserting claims on behalf of the general public.

The Postal Service observes that, in implementing the § 504(g)(3) balancing test, proposed 39 C.F.R. § 3007.25(a) calls for consideration of the nature and extent of any likely commercial *or other* injury identified by the Postal Service when it submits confidential information to the Commission. This is an appropriate reading of the intent of Congress. Otherwise, the Commission might consider itself obliged, in pursuit of financial transparency, to publicly disclose or otherwise permit access to postal information within its custody, solely because it concluded that there was insufficient postal commercial injury at stake to justify

non-disclosure. Such an approach would require disclosure or restricted access, even at the risk of:

- (a) jeopardizing the trade secrets and commercial or financial interests of parties other than the Postal Service;
- (b) undermining national security or law enforcement activities of the Postal Inspection Service, and the USPS Office of Inspector General, and compromising confidential source information;
- (c) adversely affecting ongoing internal audit activity of the USPS Office of the Inspector General, or external audits of the Government Accountability Office;
- (d) revealing information prepared for use in collective bargaining or consultations between the Postal Service and its employee unions or associations;
- (e) violating the privacy of postal customers and employees, or other Individuals;
- (f) chilling the pre-decisional intra-agency deliberative process and attorney work product, and attorney-client communications of the Postal Service;
- (g) compromising postal testing and examination materials;
- (h) enabling circumvention of laws or regulations; or
- (i) compromising the safety and security of the mail, postal facilities, employees and customers.

The Postal Service respects the Commission's obligation to establish procedures through which parties may request restricted access to confidential information provided under § 504(g)(1). In this regard, the Postal Service has reviewed rule 26(c) of the Federal Rules of Civil Procedure pertaining to protective orders, the authorities cited by the Commission in relation to its proposed approach to the use of protective conditions, and examples of the Commission's past application of such conditions to fit different circumstances.

It is critical that protective conditions implemented by the Commission continue to impose very high standards of conduct on individuals to whom restricted access to confidential postal information may be granted. Among many competitors engaged in the delivery of messages and packages, the Postal Service is the sole entity required to routinely provide its commercially sensitive records and data to the Commission for review. Thus, the risk of competitive and economic harm that could result from a breach of the Commission's rules by a wayward individual or entity is borne by the Postal Service and, ultimately its customers. Accordingly, it is important that access restrictions and protective conditions continue to distinguish among individual requesters on the basis of their involvement in any direct competition with either the Postal Service or any non-postal source of commercially sensitive data provided to the Commission by the Postal Service under § 504(g)(1).

In proposed rule 3007.50, the Commission alludes to the Postal Service's ability to pursue "whatever remedies may be available under law" for economic injury caused by a breach of applicable protective conditions. The pursuit of any such remedies would likely require the cooperation of the United States Department of Justice, would compete with its many other pressing prosecutorial priorities, and could be influenced by whether it was likely in a given case that the execution of a favorable judgment could actually result in any meaningful recovery. This independent restraint upon the Postal Service's autonomy in resorting to legal remedies -- while perhaps warranted as a matter of policy -- means that the Postal Service's access to legal remedies may not be equal to

that of its direct and indirect competitors.

The Postal Service trusts that it will be able to rely on the Commission's support in persuading the Department of Justice to give priority to the pursuit of any such action when circumstances warrant. In the mean time, the Postal Service will continue to depend on the Commission's commitment to enforcing the standards of conduct in rule 3001.6(e), the sanctions in rule 3001.6(f), as well as in proposed rule 3007.50 that are intended to deter and punish any such breach.

Suggested Improvements

Notwithstanding these and other virtues, the proposed regulations raise a few serious concerns. The Postal Service considers that the proposed regulations could be improved by a few clarifications and amendments which are described below.

1. Market Dominant and Competitive Products

By operation of chapter 36 of title 39 U.S.C., as amended by the PAEA, different processes and criteria exist for the purpose of regulating postal product classification and price changes, depending on whether those products are designated as market dominant or competitive. Distinctions between market dominant and competitive status are relevant to the Commission's analysis of allegations of "undue or unreasonable" pricing or classification discrimination under 39 U.S.C. § 403(c). Likewise, under § 504(g)(3)(A), the nature and extent of likely commercial injury to the Postal resulting from the public disclosure of confidential product-specific information is influenced, *inter alia*, by the nature

and extent of the competition faced by the particular postal product at issue.

At page 5, n.2, of Order No. 96, the Commission explains that, in applying its proposed rules regarding access to confidential postal information within its custody, “[a]nother factor to be considered is whether the information at issue relates to market dominant or competitive products.” The Postal Service is concerned that this statement could be interpreted as foreshadowing a legal conclusion that § 504(g)(3) provides absolutely no basis for denying a request for public disclosure or restricted access to market dominant product information. Other provisions of the PAEA may call for distinctive treatment of market dominant and competitive products in selected contexts. However, there is no basis for concluding that the § 504(g)(3)(A) balancing test applies only to protect information relating to competitive postal products. Likewise, no particular outcome should be precluded or mandated solely on the basis that the information at issue pertains to a market dominant product. An explicit affirmation of this conclusion by the Commission in conjunction with the publication of its final rule would provide assurance, not only to the Postal Service, but also to market dominant product users whose specific business data may be reflected in information provided to the Commission.

2. Protection of Third-Parties’ Commercial Interests

Some confidential information provided by the Postal Service to the Commission under § 504(g)(1) may include commercially sensitive, privileged, financial or other business data, or trade secrets submitted by a non-postal third-party. That third-party could be a mailer, potential mailer, state government,

foreign post, computer software vendor, postal consultant, a provider of goods and services, or other party with a contractual relationship with the Postal Service.² For the reasons explained below, the Postal Service suggests that proposed rules 3007.24(b) and 32(b) be supplemented by the Commission to include a mechanism that explicitly permits these submitters, whether or not they are participants in Commission proceedings, to address their confidentiality concerns directly to the Commission before it makes any disclosure or access determinations after issuing a notice under proposed rule 3007.23(a)(3) or the filing of a request under proposed rules 3007.24(a) and 3007.32(a).

In anticipation of FOIA requests for access to postal records containing commercial information submitted by third-parties, the Postal Service has implemented 39 C.F.R. § 265.8. Subsection (e) of this regulation permits the submitter of such information to designate the portions it deems to be exempt from public disclosure under 5 U.S.C. § 552(b)(4), and to explain the basis for such assertions to the Postal Service. At the time of such designation, the submitter is directed by 39 C.F.R. § 265.8(e)(2) to provide the Postal Service with the name, address and telephone number of the person or persons to be contacted in the event that the Postal Service receives an FOIA request seeking access to the information deemed by the submitter to be confidential. Under appropriate circumstances, submitters are afforded an opportunity to object to public disclosure by providing the Postal Service a detailed written statement of

² The Commission has recently conducted proceedings in which, not only were some of the terms of an agreement between the Postal Service and another party deemed confidential, but the identity of that non-postal party also was treated as confidential. See Docket No. CP2008-5, Order No. 86 at 2-3 (June 27, 2008).

the grounds for withholding the information under the FOIA. 39 C.F.R. § 265.8(f). The Commission has a similar FOIA policy. See 39 C.F.R. § 3004.8.

With respect to some postal records subject to PAEA § 504(g)(1) that contain confidential information submitted by third-parties, the commercial or other confidential interests and the reasons that the Postal Service and the submitter may have for preserving confidentiality will be virtually identical. However, it is not reasonable to expect there will be virtually perfect overlap in all circumstances, or agreement that all confidentiality concerns be expressed to the Commission through the Postal Service. Accordingly, consistent with the spirit of 39 C.F.R. §§ 265.8 and 3004.8, the Postal Service considers that the Commission's proposed rules should anticipate these latter circumstances and provide a mechanism for these submitters to directly address their concerns to the Commission.

Under proposed rules 3007.23(a)(3), 24(b) and 32(b), the Commission establishes very expedited two- or three-day deadlines for objecting to a Commission consultant access notice, a request by a party seeking access to confidential postal information, or a request for the removal of protective conditions. To ensure that each third-party submitter³ has a reasonable opportunity to meet these expedited response deadlines, each submitter should be informed directly by the Commission of the opportunity to do so and the means by which they may proceed. This could be accommodated by amending proposed rule 3007.20 to direct the Postal Service, at the time that it provides

³ Identified by the Postal Service when it supplies confidential information to the Commission under § 504(g)(1).

confidential information to the Commission, to concurrently inform the Commission, publicly or under seal, of the names, titles and contact information of designated representatives and/or legal counsel of third-party submitters. In conjunction with the operation of proposed rules 3007.23(a)(3), 24(a) and 32(a), these representatives and/or counsel could then be notified by the Commission of the opportunity to address their confidentiality concerns in pleadings or other communications directly to the Commission on the record or, to a degree deemed appropriate by the Commission, under seal.⁴ Accordingly, the Postal Service also suggests that proposed rules 3007.23(a)(3), 24(a) and 24(c) be amended in each instance by changing “the Postal Service” to “the Postal Service or other party with a proprietary interest in the materials”, or words to that effect.

3. Objections to Access Notices and Requests

As indicated above, objections to a notice or request for access to confidential postal information are required to be filed either two or three days after the issuance of the notice or filing of the request. The Postal Service understands that these expedited deadlines for objections are necessitated by the relatively narrow statutory windows for Commission review of Postal Service rate and classification change notices, which are as short as 15 days in some instances.

When deadlines for objection are extraordinarily short, as proposed here, the ability to investigate and make informed judgments about whether to object depends largely upon the availability of information about the individuals seeking

⁴ In some cases, submitters may request that their identities remain confidential.

access to the confidential information at the time of the notice or request. Notices of appearance (39 C.F.R. § 3001.6) or intervention (39 C.F.R. § 3001.20) in Commission proceedings often reveal little more than names, mailing addresses, telephone numbers and e-mail addresses. See 39 C.F.R. § 3001.11(b). It can take even the most vigilant guardians of commercial interests more than a few days to independently determine an otherwise unknown requester's professional, business or economic ties; that requester's affiliations, if any, with postal competitors or competitors of postal customers; or the requester's relationship, if any, to competitors of other entities that may have submitted confidential business information included in records provided by the Postal Service to the Commission under § 504(g)(1).

The exercise of the opportunity to object under very short time constraints would be enhanced if some additional information were required to be provided by the requester at the time of the request,⁵ such as the identity of all persons or entities with whom the requester has an employment, agency, consulting, contractual, academic, or other relevant association, professional affiliation or relationship. A notice or request explaining any association with or involvement in the delivery or communications industries would be useful information to a party pressed to quickly determine whether to file an objection.

4. Provision of Redacted Copies

The Commission proposes in rule 3007.10(a) that the Postal Service provide, where practicable, two paper hard copies of each document and two

⁵ Perhaps, even in a standardized format.

copies in electronic form.⁶ The Postal Service considers this aspect of the proposed rule to be eminently reasonable.⁷ However, proposed rule 3007.10(b) would require the Postal Service also to:

file an electronic public (redacted) copy of the non-public materials pursuant to Commission rule 3001.9. As part of its publicly available electronic filing, the Postal Service must appropriately redact materials that contain both public and non-public information. For example, the Postal Service may not identify a whole page or a whole table as non-public material if the page or table contains both public and non-public information, but must redact only the information it claims to be non-public.

PRC Order No. 96 at 17.

Generally speaking, parties with access to confidential documents under protective conditions would presumably have restricted access to most, if not all of the material in the protected document. Accordingly, the need for the Postal Service simultaneously to make available a parallel redacted version of every such document at the same time is not readily apparent and may generate unnecessary expenditure of postal resources.

Recent experience in Docket No. C2008-3 and past experience in other dockets informs the Postal Service that, under expedited deadlines for the internal review and provision of confidential documents to the Commission that might soon be subject to proposed rule 3007.10, the additional requirement that

⁶ The Postal Service assumes that there can be circumstances where it is practicable to file only paper hard copies or electronic copies, but not both. Spreadsheets in which the necessary cell formulas are embedded and accessible in electronic format -- but not in hard copy -- could be such an example.

⁷ Granted, there are circumstances where confidential postal records may be provided initially to the Commission under § 504(g)(1) or otherwise, subject to redactions protecting such matters as pre-decisional postal management recommendations and Board of Governors deliberations, or privileged attorney-client communications. Such redacted records, presumably, would be accompanied by transmittal documents identifying the nature of and explaining the basis for such redactions.

an electronic public (redacted) version be concurrently filed with the two confidential unredacted copies could be unduly burdensome. The tasks of redacting voluminous documents and reviewing those redactions are labor-intensive. Such tasks often cannot be reasonably delegated to persons not already consumed by other obligations associated with the docket in which expeditious provision of the subject documents may be required.

Moreover, proposed rule 3007.10(b) does not appear to contemplate the circumstance, frequently encountered by agencies responding to FOIA requests, where a paragraph, table or sentence in a document contains both exempt and non-exempt information commingled or presented in such a manner that they are not reasonably segregable. For example, the manner in which certain non-exempt (public) factual matter is recited or summarized in a paragraph could implicitly reveal a privileged, pre-decisional management recommendation or the statement of a legal conclusion included in that same paragraph. The redaction of FOIA-exempt (non-public) matter from a table, spreadsheet, sentence or paragraph also may render the public remainder of that portion of a document a meaningless collection of random words, symbols or sentence fragments, eviscerating any substantive transparency sought to be obtained by the redaction process.

The Postal Service would be less troubled by proposed rule 10(b) if it explicitly allowed for the provision of Adobe Portable Document Format (PDF) versions of documents containing redactions,⁸ rather than requiring that the

⁸ This tool became available in Adobe Acrobat Professional beginning with version 8.

redacted documents be provided in their native formats. As reflected in past Commission practice, the provision of PDF versions of redacted documents has the virtue of providing absolute protection against unauthorized access to redacted information.⁹

The Postal Service is fully confident that the application of redactions to Microsoft Word documents in their native format can be accomplished in a manner that preserves the reader's ability to fully utilize and review the unredacted text, while also protecting the redacted text from unauthorized access. A text searchable PDF also permits full use of such text, although without all the formatting tools available in a native word processing file.

However, the Postal Service does not share the same level of confidence that the same level of utility is obtained by the reader, or that its confidential interests are protected to the same degree, when native format redactions are applied to Microsoft Excel spreadsheet documents. The redaction of confidential data in cells, links and/or formulas in an Excel spreadsheet or workbook may so substantially reduce the utility of the unredacted remains of the document that, by any objective standard, they are of very little substantive value to a reader who also does not have access to the redacted information under protective conditions. In addition, the Postal Service is concerned that the redaction of narrowly targeted confidential cells, columns, rows or formulas may not, on a technical level, provide the desired level of protection necessary in a complicated workbook or data base. And such narrowly crafted redactions might not prevent

⁹ If a redacted PDF file is provided just as an image, its visible text can still be made searchable using the Optical Character Reader capability built into many Adobe products.

a skilled analyst from deducing the confidential inputs that have been redacted.

Accordingly, as an alternative to proposed rule 3007.10(b), the Postal Service suggests that it be obliged to respond to requests for provision of redacted versions (of otherwise unredacted documents) that reasonably and securely segregate public and non-public matter upon formal request by the Commission or a participant in the docket to which the document pertains. Such a rule could specify a number of working days by which the Postal Service would be expected to either provide (a) the redacted document or, (b) if it is voluminous, an estimate of the number of days by which it expects to provide the redacted document, or (c) an explanation for why it should be excused from providing a redacted version. Alternatively, parties may always pursue informal arrangements through postal counsel.

5. Expiration of Protective Conditions

Under proposed rule 3007.33, unless the Commission issues an order shortening or extending protective conditions, they expire 10 years after the Postal Service's filing of the non-public materials to which the conditions apply. This proposed rule is similar to existing Commission rule 3004.8. The 10-year sunset provision in proposed rule 3007.33 is similar to the Postal Service's own policy, in the absence of alternate arrangements, for the treatment of confidential business information submitted to it by third-parties. See 39 C.F.R.

§ 265.8(e)(4).¹⁰

¹⁰ A designation by the submitter of information to the Postal Service that it is exempt from disclosure under 5 U.S.C. § 552(b)(4) shall be deemed to have expired ten years after the date records were submitted unless the submitter requests, and provides reasonable justification for, a designation period of greater duration.

Still, as proposed by the Commission, rule 3007.33(b) does not explicitly afford an opportunity for comment by third-parties who may have submitted to the Postal Service the confidential information provided to the Commission under protective conditions. Accordingly, in conjunction with amendments suggested above, proposed rule 3007.33 could be improved by changing “the Postal Service” to read “the Postal Service or other party with a proprietary interest in the materials subject to the protective conditions”, or words to that effect.

At page 8 of its Order, the Commission solicits comments on whether any specific category of non-public materials should be exempted from the 10-year protective condition sunset provision and, presumably, be afforded permanent protection. Trade secrets, commercially or financially sensitive proprietary materials submitted to the Postal Service by third-parties that are included in postal records provided to the Commission under § 504(g)(1), and identified as such when provided, are a category that could be a candidate for such treatment.

If adopted by the Commission, such an approach could relieve third-party submitters -- many of whom may only be intermittent observers of or participants in the postal regulatory process -- from having to bear the burden and expense of the vigilance necessary to revisit the issue of confidentiality 10 years after the Postal Service’s submission of their information to the Commission. In contrast, the Postal Service can be expected to maintain a constant focus on Commission proceedings, and would be poised to take action seeking to extend any protective conditions applicable to its own commercially sensitive or otherwise privileged information as any protective conditions were set to expire.

In conclusion, the Postal Service trusts that the Commission will find these comments to be constructive.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking

Michael T. Tidwell

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2998; Fax -5402