

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

REGULATIONS TO ESTABLISH PROCEDURE
FOR ACCORDING APPROPRIATE
CONFIDENTIALITY

Docket No. RM2008-1

**REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE
IN RESPONSE TO SECOND NOTICE OF PROPOSED RULEMAKING
(May 11, 2009)**

On March 20, 2009, the Postal Regulatory Commission issued Order No. 194, its Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality. Order No. 194 solicited public comment regarding a second set of 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 United States Postal Service. Five parties filed comments in response to that Order. The Postal Service hereby submits this reply to some of the comments.

Third Party Notice

All commenters, the Postal Service included, applauded the Commission's proposed rules -- 3007.20(c) and 3007.22 -- under which third parties with a proprietary interest in non-public materials can address their concerns directly to the Commission in response to applications for access to such information by others. Proposed rule 3007.20(b) currently requires that, when it files non-public materials with the Commission that may implicate a third party proprietary interest, the Postal Service shall inform that third party of the nature and scope of

the filing with the Commission and of its right to address its confidentiality concerns directly. PRC Order No. 194 at 35-36. Two commenters, Vlassis Direct Mail and Discover Financial Services, propose that the rules be further amended, so that parties applying to the Commission for access to such non-public third party materials bear the burden of directly notifying the affected third party of their application.¹ The Postal Service supports such proposals, and comments to highlight that such a requirement may entail further clarification of the proposed rules.

In order to comply with the rules proposed, for instance, by Vlassis at page 3 of its April 27, 2009, comments, it appears that the non-public data applicant would need to have information identifying the proprietary third party's legal counsel or other representative before submitting an application to the Commission for access.

Presumably, such information could be obtained by the applicant through Postal Service counsel in many cases, since virtually all non-public postal materials containing third party proprietary information provided to the Commission will be filed by postal counsel. The question arises, still, as to whether applicants should be expected to work informally through postal counsel to obtain such third party counsel/representative information in advance of filing an application for access with the Commission, or whether such contact information should be filed by the Postal Service concurrently with its rule 3007.21 application for non-public treatment. Under the latter scenario,

¹ Comments of Vlassis Direct Mail, Inc. On Second Notice of Proposed Rulemaking (April 27, 2009); Comments of Discover Financial Services (April 27, 2008).

unnecessary delay between the filing of the non-public materials by the Postal Service and the filing of applications for access could be minimized. Accordingly, the Commission might consider it to be the better approach.

One final observation on this issue is that there may be unusual circumstances where the identity of the third party with the proprietary interest may, itself, be deemed by the Postal Service to be protected by 39 U.S.C. § 504(g)(3) and submitted to the Commission as non-public, accompanied by appropriate justification. One example could be the identity of a potential customer with whom the Postal Service is negotiating the terms of an agreement that would be subject to a mail classification or price schedule notice being reviewed by the Commission. Both the Postal Service and the potential customer may not want postal competitors to be aware of the customer's interest in shifting volume to the mailstream. In such a case, the Postal Service and the third party might request that the identity of the third party be kept non-public.

Issuance of Orders in Response to Access Applications

At page 5 of its Comments on Second Notice of Proposed Rulemaking to Establish A Procedure for According Appropriate Confidentiality (April 27, 2009), the Public Representative (PR) references the Commission's choice of the word "may" in proposed rules 3007.40(d)(2) and 3007.50(d)(2). The PR expresses concern about the potential uncertainty regarding when access to non-public documents may be available to applicants. The Postal Service is of the view that a consistent expectation on the part of all parties that access is available only by order of the Commission is the most unambiguous solution. Whether or not the

Postal Service or another party files an opposition to application for access, the requester should expect to receive permission from the Commission before obtaining access.

The Public Representative also expresses concern about the potential for uncertainty that could result from the Commission's use of the word "may" in proposed rules 3007.40(d)(2) and 3007.50(d)(2). At first blush, it might seem that such concern could be eliminated by substitution of the word "shall" for the word "may" in the proposed rules. However, that would have the presumably unintended consequence of eliminating any discretion on the part of the Commission to act, *sua sponte*, to expeditiously quash applications for access which, on their face, merit instant rejection, before waiting for a response from the Postal Service or other parties.

The Postal Service and other government agencies routinely come into contact with individuals who explicitly declare themselves unbound by all Federal laws and regulations. Assume, for purposes of argument, that the Commission receives an access application from an individual who explicitly declares his intent to publish the non-public data once he obtains them, notwithstanding the terms of any protective conditions. As presently worded, proposed rules 3007.40(d)(2) and 3007.50(d)(2) indicate that, without hearing from the Postal Service or another interested third party, the Commission *may* issue an order allowing access, implying also that the Commission *may* issue an order denying access. Such discretion should be preserved.

Revival of FOIA Confusion

At page 4 of its April 27, 2009, comments, the Public Representative laments that the Commission “essentially rejected, without discussion” a suggestion offered at pages 8-9 of its initial response to Order No. 96 that:

a cross-reference be placed in Part 3004 of the [Commission’s] Rules pertaining to FOIA requests noting the potential availability of the 5 U.S.C. § 552(b) materials pursuant to protective conditions under Part 3007.

PR Comments on Second Notice of Proposed Rulemaking at 4, n.6. The Public Representative argues that the suggestion “is still relevant, but it is not reiterated here.” *Id.* at 4. That being the case, the Postal Service is obliged to emphasize that its October 10, 2008, Reply Comments at pages 10-13 in opposition to the Public Representative’s suggestion also will not be reiterated here, but remain equally relevant.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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