

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

COMPLAINT OF CAPITAL ONE SERVICES, INC.

Docket No. C2008-3

**OBJECTION OF THE UNITED STATES POSTAL SERVICE
TO DOCUMENT REQUESTS OF CAPITAL ONE SERVICES, INC.,
IN ACCORDANCE WITH PRESIDING OFFICER'S RULING NO. C2008-3/40
(COS/USPS-DR-23-34, 36-38)
(May 11, 2009)**

In accordance with Rules 25 and 27 of the Commission's Rules of Practice and Procedure, the United States Postal Service hereby objects to Document Requests COS/USPS-DR-23 through 34 and 36 through 38, which Capital One Services, Inc. (Capital One) filed on April 20, 2009.¹ The objectionable document requests are attached verbatim, and the reasons for objection are stated below.

¹ On April 30, 2009, the Postal Service filed an objection to these document requests on the basis that the Commission's Order No. 208 rendered the requests moot. Objection of the United States Postal Service to Document Requests of Capital One Services, Inc. (COS/USPS-DR-23-38), Docket No. C2008-3, April 30, 2009. On May 5, 2009, the Presiding Officer clarified that this was not the case and permitted the Postal Service to submit specific objections to Document Requests COS/USPS-DR-23-38 by May 11, 2009. P.O. Ruling No. C2008-3/40, Presiding Officer's Ruling Concerning Postal Service Objection to Document Requests COS/USPS-23 Through 38, May 5, 2009. The Postal Service does not object to Document Request COS/USPS-DR-35 because the documents responsive to that request have already been provided to the

General Objections

The Postal Service objects to all of these document requests, especially Document Requests COS/USPS-DR-27-34 and 36-38, because they are vague, overbroad, duplicative, and unduly burdensome. Almost all of the document requests seek “any documents related to” Capital One interrogatories, including interrogatories that do not themselves refer to any particular documents. Without further specification of the documents that might reasonably be expected to meet Capital One’s actual interest – even as much as “any documents used in preparing” certain interrogatory responses – a literal reading of these document requests would send the Postal Service scrambling to retrieve and review multitudes of documents that arguably touch on any of the diverse and broad subjects raised, implicitly or explicitly, in Capital One’s interrogatories. This considerable effort would distract from the Postal Service’s ability to devote its limited resources to other important, time-sensitive matters in this proceeding, and yet would all too likely prove wasted in light of the small proportion of responsive documents that might be expected to meet Capital One’s actual interest.

These vagueness, overbreadth, and undue burden concerns are accentuated by the duplicative nature of these document requests. Any significant documents possessed by key Postal Service personnel, including documents related to the referenced interrogatories, would have been identified through Capital One and the Postal Service’s jointly established process for searching key Postal Service personnel’s email files residing on postal servers, based on Boolean search terms. The parties agreed to this process as a reasonable way to search the most likely sources of

requester via the Postal Service’s filings under seal of Group 1 documents on May 7

relevant information, rather than prevailing upon the Postal Service to search every haystack for the desired needles. To treat the instant document requests as independently valid would mean the invalidation of the parties' lengthy, reasonable, and cooperative efforts to narrow the scope of discovery. As a result, it would be duplicative and unduly burdensome to require the Postal Service to conduct the very type of far-reaching search that the parties thus far have cooperated toward averting, simply to establish formal compliance with Capital One's vague and overbroad document requests.

To the extent that documents responsive to these requests are included on the privilege logs filed by the Postal Service with the Commission on May 8, 2009,² or any subsequent submission of completed or amended privilege logs pursuant to Order No. 208, the Postal Service incorporates into the objections asserted herein, by reference, the privileges and exemptions identified on those privilege logs.

Document Requests COS/USPS-DR-23-24

The Postal Service objects to Document Requests COS/USPS-DR-23 and 24 on the grounds of relevance, privilege, and commercial sensitivity. These document requests seek to elicit information contained in two reports by the Office of the Inspector General (OIG) to the Postal Service's Board of Governors regarding the Bank of America negotiated service agreement (NSA). The Postal Service has already discussed lack of relevance, statutory exemption under 39 U.S.C. § 410(c)(4), deliberative process privilege, and commercial sensitivity in connection with an OIG

and 11, 2009.

report, and it incorporates herein by reference the arguments presented in its Response to P.O. Ruling C2008-3/7, Ruling on Procedural Requests Relating to the Deposition of Jessica Dauer Lowrance, filed on September 4, 2008.³ The same arguments concerning that document apply with equal force to the other OIG report requested here.

Document Requests COS/USPS-DR-25-26 and 33-34

The Postal Service objects to Document Requests COS/USPS-DR-25, 26, 33, and 34 on the basis of privilege, statutory exemption, and commercial sensitivity. Document Request COS/USPS-DR-25 seeks a presentation prepared for a Postal Service Board of Governors meeting and all related documents, including drafts, emails, and communications. Document Request COS/USPS-DR-26 involves portions of transcripts, recordings, and individual participants' notes from Board of Governors meetings, to the sole extent they relate to the Bank of America NSA, functionally equivalent NSAs, or NSAs in general. Document Request COS/USPS-DR-33 seeks all documents relating to the Interrogatory COS/USPS-74, which asks, in presumably relevant part,⁴ for a description of any tests, criteria, standards, or processes developed to determine whether Bank of America mailpieces satisfy the NSA's requirements.

² Id.

³ See also Objection of the United States Postal Service to Interrogatories of Capital One Services, Inc. (COS/USPS-46, 49, 50, 51, 59(f)-(g), 60(c), 61(b) and (e)-(h), 63(b)-(c), 65, 66, 67, and 76), Docket No. C2008-3, April 30, 2009, at 1-2.

⁴ The remaining portions of this interrogatory ask for confirmation or clarification of specific phrases and a yes-or-no response, with a narrative explanation of a "no" response. It is difficult to understand how the document request could logically be understood in connection with such written discovery, except in connection with the portion of the interrogatory that expressly deals with tests, standards, and so forth.

Document Request COS/USPS-DR-34 requests documents related to Interrogatory COS/USPS-76, which concerns whether Postal Service management considered whether to discontinue offering market dominant NSAs to individual mailers in September 2008.⁵

Any responsive documents would be 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 discussions concerning an impending agency decision. In this case, any materials under consideration by members of the Board of Governors or Postal Service management, as well as earlier drafts and internal communications, would be "predecisional" because they occurred before the adoption of a pertinent course of action: namely, the Governors' decision that was at hand and Postal Service management's decision, if any, on continued offering of the Bank of America NSA or other market dominant NSAs. In addition, the opinions, suggestions, or recommendations of Board members and other government employees comprise "deliberative" information within the meaning of the privilege. The document requests clearly implicate the privilege's underlying policy concern: any written exchange of ideas would have been intended to give the Governors and Postal Service management the detail and analysis they needed to make an informed decision, which would not have been possible if the participants had had to contend with exposing controversial policy positions and rationales. Therefore, the discussions are protected by the deliberative

⁵ See also id. at 2-4.

process privilege, which applies both in the civil discovery context and, with respect to documents, as a basis for exemption from disclosure under Exemption 5 of the FOIA.

In addition, the documents at issue in Document Requests COS/USPS-DR-25 and 26 are protected by 39 U.S.C. § 410(c)(4), which covers “information prepared for use in connection with proceedings under chapter 36 of this title.” Under the version of 39 U.S.C. § 3621 then in effect, such proceedings include the Governors’ establishment of mail classes and rates, as well as, at least by implication, their determination following a recommended decision by the Commission pursuant to former 39 U.S.C. § 3625. Because these document requests specifically seek documents prepared for use in connection with such deliberations by the Board of Governors, they are exempt from disclosure under 39 U.S.C. § 410(c)(4).

Finally, any documents of the type referred to in the document requests contain sensitive commercial information about the Postal Service’s then-current contract negotiation practices and plans, including 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 information is exempt from disclosure requirements under 39 U.S.C. § 410(c)(2). To the extent that the documents contain confidential information that third parties provided in contract negotiations, that information may be protected by non-disclosure agreements (NDAs) and would be exempt from disclosure under 5 U.S.C. § 552(b)(4). 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, if it were to disclose these documents. Thus, the Postal Service objects to Document Requests COS/USPS-DR-

25, 26, 33, and 34 on the grounds of privilege, statutory exemption, and commercial sensitivity.

Document Request COS/USPS-DR-27

The Postal Service objects to Document Request COS/USPS-DR-27 on the grounds of commercial sensitivity. This document request seeks any documents related to all meetings between Virginia Mayes and representatives, attorneys, or consultants for Bank of America from 2006 to the present, in connection with Interrogatory COS/USPS-48. Any such documents consist of sensitive commercial information about the Postal Service's then-current contract negotiation plans, 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 information is exempt from disclosure requirements under 39 U.S.C. § 410(c)(2). To the extent that the documents contain confidential information that third parties provided in contract negotiations, that information may be protected by NDAs and would be exempt from disclosure under 5 U.S.C. § 552(b)(4). 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, if it were to disclose these documents. Thus, the Postal Service objects to Document Request COS/USPS-DR-27 on the grounds of statutory exemption and commercial sensitivity.

Document Requests COS/USPS-DR-30-31

The Postal Service objects to Document Requests COS/USPS-DR-30 and 31 on the grounds of privilege. This document request seeks any documents related to Interrogatory COS/USPS-53 and 54, which inquire about the particulars of all meetings or calls in which a certain memo and a presentation, or drafts thereof, were discussed or reviewed. The responsive documents include confidential internal draft documents and communications exchanged between Postal Service attorneys and/or organizational client personnel, which concern matters within the scope of the former's representation of the latter: to wit, advice about legal and policy considerations attending the presentation of an NSA to the Board of Governors for approval, pursuant to former 39 U.S.C. Chapter 36. Consequently, the documents are protected by the attorney-client privilege. Because the attorneys' drafts and communications concern a matter about which administrative litigation before the Commission was reasonably anticipated, the emails are also protected by the attorney work-product doctrine. Finally, to the extent that the documents contain deliberative information, such as summaries of a meeting's subject matter or initial drafts of the memorandum, this information was exchanged prior to the adoption of a final memorandum or presentation, much less of a final Postal Service determination on the NSA as a whole. This information in the communications and draft documents is therefore subject to the deliberative process privilege. In sum, the Postal Service objects to Document Requests COS/USPS-DR-30 and 31 on the basis of privilege.

Therefore, for the foregoing reasons, the Postal Service respectfully objects to Document Requests COS/USPS-DR-23 through 34 and 36 through 38.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

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

Elizabeth A. Reed
Jacob Howley

475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1137
(202) 268-3179; Fax -6187
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DOCUMENT REQUEST COS/USPS-DR-23

Please provide the Memorandum from the OIG to the Board of Governors, dated November, 2007.

DOCUMENT REQUEST COS/USPS-DR-24

Please provide the Memorandum from the OIG to the Board of Governors, dated December, 2007.

DOCUMENT REQUEST COS/USPS-DR-25

Please provide the presentation provided by Management to the Board of Governors at the December 5, 2006, meeting and all documents, drafts, emails, communications, and supporting material related thereto.

DOCUMENT REQUEST COS/USPS-DR-26

With respect to (1) the meeting of the Board of Governors in which the 2006 Presentation was presented and (2) any subsequent Board of Governors meetings in which the 2006 Presentation was discussed:

(a) Please provide all electronic or hard copy transcripts or recordings, including minutes, audiotapes, videotapes, and other documents (as defined in the Interrogatories of Capital One Services, Inc., filed August 8, 2008), Please redact any portions that do not relate to the Bank of America NSA, to functionally equivalent NSAs, or to NSAs in general.

(b) Please provide all notes or other documents of Postal Service employees who attended said Board of Governors meetings that memorialize impressions, presentations, or discussions at said meetings, relating to the Bank of America NSA or NSAs that may be functionally equivalent to the Bank of America NSA.

DOCUMENT REQUEST COS/USPS-DR-27

Please provide any documents relating to any of the meetings identified in your response to COS/USPS-48.

DOCUMENT REQUEST COS/USPS-DR-28

Please provide all documents that relate to your response to Interrogatory COS/USPS-55.

DOCUMENT REQUEST COS/USPS-DR-29

Please provide all documents that relate to your response to interrogatory COS/USPS-56.

DOCUMENT REQUEST COS/USPS-DR-30

Please provide all documents that relate to your response to Interrogatory COS/USPS-53, including, but not limited to, all drafts and communications.

DOCUMENT REQUEST COS/USPS-DR-31

Please provide all documents that relate to your response Interrogatory COS/USPS-54, including, but not limited to, all drafts and communications.

DOCUMENT REQUEST COS/USPS-DR-32

Please provide all documents support or relate to your response to Interrogatory COS/USPS-68.

DOCUMENT REQUEST COS/USPS-DR-33

Please provide all documents that relate to your response to Interrogatory COS/USPS-74.

DOCUMENT REQUEST COS/USPS-DR-34

Please provide all documents that relate in any way to your response to Interrogatory COS/USPS-76.

DOCUMENT REQUEST COS/USPS-DR-36

Please provide all documents that support or relate to any of your responses to (a) Interrogatories COS/USPS-80, (b) Interrogatory COS/USPS-81, and (c) Interrogatory COS/USPS-82.

DOCUMENT REQUEST COS/USPS-DR-37

Please provide all documents that support or relate to any of your responses to Interrogatory COS/USPS-84.

DOCUMENT REQUEST COS/USPS-DR-38

Please provide all documents that support or relate to any of your responses to Interrogatory COS/USPS-85.