



### **I. Objection That Interrogatory Seeks Pre-Decisional And Attorney-Client Privileged Communications**

The Interrogatory does not ask for any pre-decisional or attorney-client privileged communications and, therefore, the Postal Service's objection on these grounds must be overruled. This interrogatory seeks "the steps taken" by the Postal Service upon remand. It seeks "action taken;" in essence, facts such as: what occurred and when did it occur. For example, with respect to the closing, did the Postal Service provide new notice to affected individuals? Did the Postal Service hold additional public meetings? This interrogatory does not seek any information about the internal decision-making processes<sup>2</sup> of Postal Service employees. It clearly seeks information about the things that were done *after* any decisions were made. Accordingly, because the interrogatory does not seek pre-decisional information, the Postal Service's objection on this ground must be overruled.

Additionally, the interrogatory does not seek any information that could possibly be subject to the attorney-client privilege. Attorney-client privilege bars the disclosure of communications between an attorney and the client to "avoid the risk of inadvertent, indirect disclosure of the client's confidences." *Schlefer v. U.S.*, 702 F.2d 233, 245 (D.C. Cir. 1983). The privilege protects communications from a client to an attorney if the communications are made for the purpose of securing legal advice or services. *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984). In particular and most relevant for the situation at issue in this Motion, the D.C. Circuit has held that "it is clear that when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged." *Brinton v. Department of State*, 636 F.2d 600, 604 (D.C. Cir. 1980). It reasoned that "[t]o allow the contrary rule would permit agencies to insulate

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<sup>2</sup> The Public Representative reserves the right to argue that the deliberate process privilege does not apply with respect to the Postal Service in the context of this proceeding in general or with respect to this interrogatory in particular. The Postal Service has not set forth the required privilege log to allow the Public Representative to make such a determination. Unless such a privilege log is compelled or otherwise provided, the Public Representative will not have the necessary information to make such a determination.

facts [...] by simply routing them through lawyers in the agency and invoking the attorney-client privilege.” *Id.* Courts have also noted that the scope of the attorney-client privilege is limited; it attaches only to legal, not business or other services. See *e.g.*, *U.S. Postal Service v. Phelps Dodge Refining Corp.* 852 F. Supp. 156, 160 (E.D.N.Y., 1994) (“the mere fact that a communication is made directly to an attorney, or an attorney is copied on a memorandum, does not mean that the communication is necessarily privileged” *citing* *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403-04 (8th Cir. 1987)).

As discussed above, this interrogatory seeks information about the action (or inaction) of the Postal Service with respect to the outside world – items that would be compiled in a public administrative record if the remanded case were subsequently appealed. It does not seek any internal documents or information that was communicated by or to attorneys for the purpose of securing legal advice or services. Just because a lawyer was involved in the process does not mean that a fact is transformed into legal advice. The Commission should not allow the Postal Service to “insulate facts [...] by simply routing them through lawyers in the agency and invoking the attorney-client privilege.” *Brinton*, 636 F.2d at 604. Accordingly, because the Interrogatory does not seek information protected by the attorney-client privilege, the Commission must overrule the Postal Service’s objection.

If the Commission does believe that some of this information could possibly be subject to the attorney-client or deliberate process privilege, the Public Representative requests that the Commission remind the Postal Service of its obligation to provide detailed information about the purported privileged information such as a privilege log or *Vaughn* Index and order production of such a log with respect to all privilege claims. See *e.g.*, Docket No. R2000-1, P.O. Ruling R2000-1/28, at 4, April 3, 2000; Docket No. C99-1, P.O. Ruling C99-1/9 at 4. In addition, the Public Representative specifically

requested a privilege log in conformance with Commission precedent and Fed. R. Civ. P. 26(b)(5) as part of the propounded interrogatories.<sup>3</sup>

Federal courts have held that a defendant's failure to produce a privilege log may waive the privilege, result in sanctions, and require production of such documents. See *e.g.*, *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Court*, 408 F.3d 1142, 1149 (9th Cir. 2005) (upholding district court's finding that privilege objections were waived by not providing a privilege log at the time that responses were served); *Breon v. Coca-Cola Bottling Co*, 232 F.R.D. 49 (D.Conn. 2005) (holding that the defendant's failure to produce a privilege log explaining the basis for refusing to produce documents resulted in the privilege claim being waived and rendered the documents discoverable); *Atteberry v. Longmonth United Hospital*, 221 F.R.D. 644, 648-49 (D. Col. 2004) ("The Advisory Committee note to [rule 26(b)(5)] suggests that sanctions and waiver are possible consequences of failing to furnish the log;" "A blanket claim of privilege will not suffice. The failure to produce a privilege log or production of an inadequate privilege log may be deemed a waiver of the privilege asserted"); *In re RFD, Inc.*, 211 B.R. 403, 408 (Bankr. D. Kan. 1997) ("withholding discovery materials without producing a privilege log could subject a party to sanctions or to waiver of a privilege claim."); see also *Williams v. Johanns*, 235 F.R.D. 116, 124 (D.D.C 2006) ("to the extent that plaintiffs are asserting privilege, they must produce a privilege log that meets the demanding requirements of Rule 26(b)(5) and identifies each document withheld from production under a claim of privilege.).

Despite repeated Postal Service objections to many Public Representative interrogatories based on privilege, including this one, no privilege log has been

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<sup>3</sup> See Public Representative First Interrogatories and Requests for Production of Documents to the United States Postal Service (PR/USPS-1-6) at Instruction 2 ("If privilege is claimed with respect to any data, information, or documents requested herein, the party to whom the discovery request is directed should provide a privilege log (see, *e.g.*, Docket No. C99-1, P.O. Ruling C99-1/9 at 4). Specifically, 'the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself

provided. The Public Representative should not be burdened with having to file a motion to compel every time the Postal Service makes a conclusory statement that some information may be subject to privilege.<sup>4</sup> If the Postal Service continues to flaunt its litigation obligations under the Commission Rules of Practice,<sup>5</sup> Commission precedent, and Fed. R. Civ. P. 26(b)(5), the Commission should find it has waived privilege.

## **II. Objection That Interrogatory “Will Not Lead to Admissible Evidence”**

The Postal Service appears to claim that it is in a better position than the Public Representative to determine what issues the Public Representative may raise in the Public Representative’s direct case or in the Public Representative’s briefs to the Commission. While the Public Representative appreciates the Postal Service’s views on what it believes are important issues in this case, prior to obtaining necessary information through the discovery process, the Public Representative does not yet know the positions that the Public Representative may ultimately take with respect to this proceeding. As was contemplated by the Commission in the formation of its discovery rules, the Public Representative seeks to use the discovery process to inform its views on the Postal Service’s proposal and the potential effects of that proposal. This allows the Public Representative to provide the Commission with thorough legal briefs leading to better Commission decisions based on a substantial factual record.

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privileged or protected, will enable other parties to assess the applicability of the privilege or protection.’ Fed. R. Civ. P. 26(b)(5).”)

<sup>4</sup> The entirety of the Postal Service’s privilege objection is as follows: “The interrogatory is also objectionable insofar as it seeks disclosure of records reflecting pre-decisional or attorney-client privileged communications related to the outcome of Docket No. A2006-1 activity.”

<sup>5</sup> See e.g., 39 CFR 3001.26(c) and 3001.27(c) (“A participant claiming privilege shall identify the specific evidentiary privilege being asserted and state with particularity the reasons for its applicability.”).

At the outset, the Public Representative feels compelled to remind the Postal Service that the Commission's rules and federal courts do not recognize an objection to an interrogatory on the basis that it "will not lead to admissible evidence."

Interrogatories are not required to lead to admissible evidence. The standard for discoverability is much broader. Interrogatories only need to be "reasonably calculated to lead to admissible evidence." 39 CFR 3001.25(a); see *also* Fed. R. Civ. P. 26(b)(1) ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."). On that basis alone – the fact that the Postal Service's objection has no support in the law – the Postal Service's objection should be overruled.

The proper standard, reasonably calculated to lead to admissible evidence, is a "very broad rule" that would "even allow[] discovery of material which would be inadmissible at trial but, at the time of discovery, appears reasonably calculated to lead to admissible evidence." *Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd.*, 242 F.R.D. 1, 7 (D.D.C. 2007).

Here, interrogatory PR/USPS-T2-14 is reasonably calculated to lead to the discovery of admissible evidence. It seeks information about the steps taken by the Postal Service upon remand after the Commission made a finding, on appeal, that the Postal Service did not properly close Observatory Finance Station. The Observatory Finance Station closing appeal is the only case dealing with the closing of any branches or stations that has been appealed to the Commission in the past 5 years, and the only case dealing with the closing of a branch or station that has been remanded by the Commission in the past 10 years.

The Postal Service has admitted that the discontinuance study process undertaken as part of the Station and Branch Optimization and Consolidation Initiative (Initiative), the focus of this proceeding, is the same process that it has taken in the past with respect to closing or consolidating all branches and stations. See Response to PR/USPS-T2-1. Because the discontinuance study process is the same under the

Initiative and prior to the Initiative, prior discontinuance study precedent could have an effect on future discontinuance studies taken with respect to the Initiative. In its briefs to be filed at a later stage of this case, the Public Representative may wish to offer suggestions for inclusion in the Commission's advisory opinion in this case on how to improve the discontinuance study process part of the Initiative and whether such actions (with respect to the Initiative) "conform to the policies" of title 39 of the United States Code.

In order to make such suggestions, the Public Representative needs to know what occurs in practice when the Postal Service implements discontinuance studies. Of particular interest to the Public Representative in this interrogatory is how the Postal Service adjusts its discontinuance study procedures when the Commission finds that the Postal Service's closing of a particular branch or station was improper. If there were more appeals of post office closings of branches or stations in the last 5 years that were remanded, the Public Representative would have requested those as well. However, upon undertaking appropriate due diligence, the Public Representative found that Observatory Finance Station Docket No. A2006-1 was the only branch or station closing that was remanded by the Commission in the last 5 years. Accordingly, the Public Representative narrowly tailored this interrogatory to minimize the burden on the Postal Service.

Interrogatory PR/USPS-T2-14 is part of a larger attempt by the Public Representative to determine how the Postal Service's discontinuance process (as part of the Initiative) will work in the future and whether the Commission should offer suggestions on how to alter that process as part of its advisory opinion with respect to the Initiative. A Postal Service's response is particularly important since the Public Representative anticipates many more post office closing appeals to the Commission as a result of the Initiative. Accordingly, the Postal Service's objection on the ground that the Interrogatory "will not lead to admissible evidence" must be overruled.

### **III. Conclusion**

For the reasons stated above, the Commission should overrule the Postal Service's objections and compel the Postal Service to provide a responsive answer to PR/USPS-T2-14.

Respectfully Submitted,

/s/ Robert Sidman

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## **Attachment**

### **PR/USPS-T2-14**

In Docket No. A2006-1, Observatory Finance Station, the Postal Rate Commission remanded for further consideration, the Postal Service's determination to close Observatory Finance Station. See Docket No. A2006-1, Order Denying Postal Service Motion to Dismiss and Remanding for Further Consideration, September 29, 2009. Please describe, in detail, the steps the Postal Service took on remand and the resulting outcome. Please also provide all documents related to Postal Service action taken with respect to the remand of Observatory Finance Station.

### **Postal Service Objection to PR/USPS-T2-14**

This interrogatory seeks information that will not lead to admissible evidence relevant to the issues raised by the request in this docket. The Postal Service has requested an advisory opinion under 39 U.S.C. § 3661 in relation to changes in the nature of postal services that may result from an Initiative to systematically subject a broad category of stations and branches to its discontinuance review process and make decisions regarding whether to continue their operations.

The issues before the Commission in the docket are (a) whether the potential changes in nature of service resulting from this Initiative, in the aggregate, are substantially nationwide in scope and (2) whether the service changes resulting from the pursuit of this Initiative would be consistent with relevant substantive policies of the title 39, United States Code. Rather than pursue information that may lead to a resolution of those issues, this interrogatory seeks to examine the actions of the Postal Service in response to the Docket No. A2006-1 remand by the Commission nearly three years ago of a decision to close a single, isolated Finance Station. The interrogatory seeks no information that has any bearing on the issue of whether the service changes resulting from the Initiative in this docket would conform to relevant substantive policies.

The fact that the Initiative in this docket relates to retail service and is undergoing Commission review does not establish a pretext for inquiring about an individual retail facility decision several years ago. The interrogatory is also objectionable insofar as it seeks disclosure of records reflecting pre-decisional or attorney-client privileged communications related to the outcome of Docket No. A2006-1 activity.