



## BACKGROUND

This discovery dispute arises from GameFly's first set of discovery requests to the Postal Service, served by GameFly on July 31, 2009. On August 14, 2009, the Postal Service filed its first responses to the discovery requests. For a number of the questions, the Postal Service stated that "responsive documents are available for inspection" at Postal Service headquarters "conditional upon the ultimate promulgation of protective conditions in this docket . . . and the filing by a party seeking to review those documents of a certification that they will adhere to those conditions." See Responses Of The USPS To Discovery Requests Of Gamefly, Inc. (August 14, 2009) at 2 and *passim*.

On August 25, 2009, after the Commission issued a protective order and GameFly served the Postal Service with signed certifications under the order, David Levy and Sander Glick, respectively an attorney and economic consultant for GameFly, visited Postal Service headquarters and viewed the materials produced by the Postal Service in a room set aside for this purpose in the Postal Service's law department. The documents available for review included approximately 1,000 pages of 8.5" x 11" documents. Levy and Glick reviewed the entire stack of paper documents, a process that took approximately two to three hours.

Among the paper documents were three memoranda from Postal Service attorneys to Sharon Daniel, Manager, Mailing Standards. The memoranda discussed a proposed Postal Bulletin notice concerning **[BEGIN PROTECTED MATERIAL]**

**[END PROTECTED MATERIAL]** Each of the three memoranda contained hand-written notations by Postal Service attorneys expressing concern that **[BEGIN PROTECTED MATERIAL]**

**[END PROTECTED MATERIAL]**

At no time during or before the August 25 document review did the Postal Service assert any claim of attorney-client privilege with respect to any part of the three memoranda. During the August 25 document review, both Levy and Glick read and discussed the three memoranda.

At the end of the review session, Levy asked Keith Weidner, the Postal Service attorney overseeing the document production, to send a copy to GameFly's counsel of the entire stack of the paper documents that had been made available for review that day. Mr. Weidner agreed to do so.

Two days later, when an envelope containing copies of the documents arrived at the offices of GameFly's counsel, the three memoranda were missing. Instead, the Postal Service had inserted a privilege log claiming that the three memoranda were covered by attorney-client privilege. The text of the privilege log is reproduced at Exhibit A, *infra*.<sup>1</sup>

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<sup>1</sup> GameFly hereby requests that the Commission waive the 14-day period established by Rule 3001.27(d) for motions to compel. Preparation of this motion was delayed by the need to focus on review of the large volume of documents produced by the Postal Service during the last week of August in response to GameFly's July 31 document request. The one-week delay in the filing of the motion to compel should not prejudice the Postal Service, since the period for initial discovery has been extended until October 5 in light of the delay in production of the Postal Service's responses to GameFly's first round of requests. See Presiding Officer's Ruling No. C2009-1/3 (Sept. 4, 2009).

## ARGUMENT

The Postal Service waived any claim of privilege for the three memoranda by allowing GameFly's lawyer and consultant to read them on August 25. The governing law in this case is established by the U.S. Court of Appeals for the D.C. Circuit, the circuit that has exclusive appellate jurisdiction over Commission decisions. 39 U.S.C. §3663. The law in the D.C. Circuit is that even an inadvertent disclosure of privileged documents waives the privilege. See *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007) (holding the privilege waived "even if the disclosure is inadvertent"); *Elkins v. District of Columbia*, 250 F.R.D. 20, 26 (D.D.C. 2008) ("The law in this Circuit is clear—even the inadvertent disclosure of privileged information results in the waiver of the privilege for that information and all documents and communications relating to the same subject matter.").

The purpose of this strict waiver standard is to encourage parties to treat their privileged communications with utmost care, and to avoid collateral litigation over the degree of care actually exercised. As the court explained in *In re Sealed Case*, "[t]o hold, as we do, that an inadvertent disclosure will waive the privilege imposes a self-governing restraint . . . we will not distinguish between various degrees of 'voluntariness' in waivers of the attorney-client privilege." 877 F.2d 976, 980 (D.C. Cir. 1989). Similarly, in *In re Grand Jury*, the court cautioned that it "will grant no greater protection to those who assert the privilege than their own precautions warrant . . . the [attorney-client] privilege is lost even if the disclosure is inadvertent." 475 F.3d at 1305 (D.C. Cir. 2007).<sup>2</sup>

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<sup>2</sup> Not all circuits adhere to this standard. Some circuits allow a court to balance the "reasonableness" of the "precautions taken" against the "extent of the disclosure" and "the interests of justice". See, e.g., *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404,

Moreover, the D.C. Circuit has consistently applied the strict waiver rule to government entities as well as private parties. See, e.g., *Goodrich Corp. v. EPA*, 2009 U.S. Dist. LEXIS 39874 at \* 16 (D.D.C. 2009) (citing *In re Sealed Case* in holding that the EPA waived work product privilege through inadvertent disclosure); *Elkins v. District of Columbia*, 250 F.R.D. 20, 24 (D.D.C. 2008) (applying strict waiver rule to an inadvertent disclosure by the District of Columbia government); *Stonehill v. IRS*, 534 F. Supp.2d 1, 8 (D.D.C. 2008) (explaining that an inadvertent disclosure by the IRS would result in a waiver of the attorney-client privilege); *Elliott v. Fed. Bureau of Prisons*, 521 F. Supp. 2d 41, 57-58 (D.D.C 2007) (holding that the inadvertent placement of a privileged email in plaintiff's medical file by Bureau of Prisons personnel effected a waiver of attorney-client privilege).

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411-14 (D.N.J. 1995). The balancing approach does not apply here, however, because the D.C. Circuit, the court with appellate authority over the Commission, has rejected that approach.

## CONCLUSION

The Postal Service waived any privilege claim for the three documents at issue by permitting GameFly to inspect the documents. Accordingly, GameFly respectfully requests that the Commission direct the Postal Service to produce the documents to GameFly.

Respectfully submitted,

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**Privileged Documents**

Removed from Mailing Standards folder:

1) November 20, 2007 review of proposed Postal Bulletin notice (Automation Letter Rates for Mailpieces Containing Discs) by Michael Tidwell, Attorney, Postal Service Law Department. This document was sent to Sharon Daniel, Manager, Mailing Standards. This document falls within the attorney-client privilege.

(2) June 23, 2008 review of proposed Postal Bulletin notice (Automation Prices for Letter-Sized Mailpieces with Enclosed Discs) by Michael Tidwell, Attorney, Postal Service Law Department. This document was sent to Sharon Daniel, Manager, Mailing Standards. This document falls within the attorney-client privilege.

3) July 3, 2008 review of proposed Postal Bulletin notice (Automation Prices for Letter-Sized Mailpieces with Enclosed Discs) by Scott Reiter, Attorney, Postal Service Law Department. This document was sent to Sharon Daniel, Manager, Mailing Standards. This document falls within the attorney-client privilege.