

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING
DENYING GAMEFLY'S MOTION TO
COMPEL PRODUCTION OF THREE DOCUMENTS
WITHHELD BY THE UNITED STATES POSTAL SERVICE

(Issued October 13, 2009)

On September 21, 2009, GameFly, Inc. (GameFly) filed a motion seeking a ruling to compel the Postal Service to provide three documents that the Postal Service allowed GameFly to inspect.¹ The Postal Service had declined to include them among copies of all other requested, previously inspected documents, and asserted that they were privileged attorney-client communications. GameFly's present Motion to Compel and the Postal Service's response, described below, pertain to whether the privilege may be maintained after an inadvertent disclosure.

On September 28, 2009, the Postal Service filed a response asserting that the Commission should deny GameFly's Motion to Compel.² It primarily urges the Commission to exercise its broad discretion to uphold the privilege asserted by the Postal Service under the administrative law of discovery, despite GameFly's contention that the privilege was clearly waived upon inspection. See Response at 1.

¹ Motion of GameFly, Inc., to Compel Production of Three Documents Withheld by the United States Postal Service, September 21, 2009 (Motion to Compel).

² Response of the United States Postal Service to Motion to Compel of GameFly, Inc., Regarding Documents Withheld as Privileged, September 28, 2009 at 4 (Response).

I. GAMEFLY'S MOTION TO COMPEL

GameFly submits that inadvertent disclosure of privileged documents waives the alleged privilege. *Id.* at 4.³ GameFly also cites case law of district courts that the strict waiver rule has been consistently applied to government entities. *Id.* at 3.

This disputed discovery concerns three memoranda from Postal Service attorneys to a manager of mailing standards, Sharon Daniel. Motion at 2. GameFly's inspection of the documents took place on August 25, 2009.⁴ To further establish unfair discrimination among DVD mailers, GameFly now seeks copies of them, since no claim of attorney-client privilege was asserted before inspection. After inspection, counsel for GameFly asked an attorney for the Postal Service to produce copies of "the entire stack" inspected, including the three documents in question. Motion to Compel at 3. The Postal Service agreed to make a full set of copies available. *Id.*

The Postal Service provided copies of the documents requested, except for the three under the latent privilege claim. *Id.* The privilege log entries furnished instead by the Postal Service indicate that these documents were authored by attorneys of the Postal Service and sent to Ms. Daniel. Each of the three documents concern privileged comments of counsel on certain proposed postal bulletin notices. The materials allegedly bear on distinct treatment between DVD mailers. *Id.* at 3.⁵

³ At the outset, GameFly relies on two cases of the U.S. Court of Appeals for the D.C. Circuit. Noting that the D.C. Circuit has exclusive appellate jurisdiction here, GameFly cites a case brought before a grand jury that explains: "[t]o hold, as we do, that 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." *Id.* at 4, citing *In re Grand Jury*, 474 F.3d 1299, 1305 (D.C. Cir. 2007), see also, *In re Sealed Cases*, 877 F.2d 976, 980 (D.C. Cir. 1989).

⁴ This disclosure stems from a request for production of documents served on July 31, 2009. The Postal Service filed its initial responses to this first set two weeks later. Response of the United States Postal Service to Discovery Requests of GameFly, Inc., (GFL/USPS-1-6,10,13-14,17-20(a-c), 22-28, 30, 34-37, 39, 41-44, 48-51(a)-(b), 52-57, 59-62, 64), August 14, 2009 (Discovery Responses).

⁵ This ruling grants GameFly's request to waive the 14-day period established by Rule 3001.27(d) for motions to compel. See Motion at 3, n.1.

II. THE POSTAL SERVICE'S OPPOSITION

The Postal Service submits that its privilege claim should be sustained in fairness and, in part, because the cases cited by GameFly do not bind the Commission, which implements its own discovery procedures. Response at 1. It denies that the case law on the strict waiver rule controls here, as an agency's discovery regulations govern its more specific caseload. *Id.* at 2. It relies upon several decisions to substantiate its contention that the amount of deference that is commonly accorded to Federal agencies with discovery regulations is substantial. *Id.* It maintains that this latitude extends to rulings on the confidentiality treatment accorded to documents.

The Postal Service asserts that there is a lack of judicial consensus among circuits upon the strict waiver rule, and that the better view favors a more moderate rule. Also, slavish adherence to the strict waiver rule is unfair, particularly when the circumstances do not indicate carelessness or any voluntary relinquishment of the privilege claim. The recent trend in favor of a balancing test is supported by changes to the Federal Rules of Evidence, as described at the notes of rule 502 (Rule 502).⁶ *Id.* at 3.

As to fairness, the Postal Service contrasts the volume of materials it generated for discovery, from both hardcopy and electronic sources, with the efforts by its counsel to otherwise cautiously control the process. It asserts that in the present context, counsel cannot be held to error-free assessments of such high volumes of documents within the tight timeframes established by Commission discovery rules without great cost. It seeks sympathetic consideration for counsel's "immediate efforts to separate" the privileged documents successfully from a thousand other documents after a few

⁶ According to the official notes, subdivision (b) of Rule 502 opts for "the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal ... agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. Federal Rule of Evidence, Rule 502(b), at notes for subsection (b), November 27, 2007. ("This position is in accord with the majority view on whether inadvertent disclosure is a waiver").

hours of inspection. It claims the Postal Service was justified in efforts to “retake custody of those documents,” and to reflect their exclusion from the produced copies through privilege logs. *Id.* at 4. It seeks a ruling that comports with fairness, not inconsistent with applicable law that permits administrative discretion.

III. ANALYSIS AS TO THE WAIVER FOR THREE DOCUMENTS

The Postal Service allowed counsel for GameFly to inspect approximately one thousand pages of documents responsive to discovery requests on August 25, 2009. Inspection was allowed, in part, under a protective order.⁷ The three documents in dispute were provided for inspection, along with the others, under a set of protective conditions that governed such documents not filed with the Commission.⁸ The Commission authorized certain protective conditions to expedite the screening of documents, but precluded these conditions from impairing its confidentiality rules.⁹

As GameFly escalated its request from one for mere inspection to one for the actual production of copies, the Postal Service denied it copies of the three documents in question. GameFly asserts this conduct broke a promise by the Postal Service’s attorney at the end of the inspection process. Counsel for the Postal Service, however, contends its attorney-client privilege may be maintained for these three documents while sharing copies of the other documents, because it properly rectifies the over-inclusion of privileged documents in the stack inspected, and enables the Postal Service to promptly regain the proper confidential treatment.

GameFly relies upon additional case law of the district court to show that the strict waiver rule of the D.C. Circuit plainly extends to cases that concern government

⁷ See PRC Order No. 284, Order Granting, In Part, Joint Motion For Protective Conditions, at 3-5, August 21, 2009.

⁸ See Joint Motion of the United States Postal Service and GameFly, Inc., for Establishment of Protective Conditions, at ¶ 2 (July 22 2009).

⁹ See, PRC Order No. 284 at n.7; see also, PRC Order No. 225, Final Rule Establishing Appropriate Confidentiality Procedures, June 19, 2009; *adopting* 39 U.S.C. 3007.1, *et seq.*

agencies. The Postal Service urges that the strict waiver rule does not unequivocally bind the Commission, since the impending ruling need only comport with its agency-specific regulations and due process.¹⁰ The parties both recognize that there is a split of judicial authority among circuits over the merits of the strict waiver rule. Neither party cites any compelling precedents in which a Federal agency, with its own discovery rules and orders, resolves an issue precisely like the present one.

That question concerns whether a Federal agency presiding over a private complaint case, with its own discovery and confidentiality rules, should deny the privilege asserted by the Postal Service for a few documents which were mistakenly included among many pages subject to inspection under a protective order, even though disclosure was allegedly rectified promptly by providing privilege log data instead of requested copies.

The Commission may govern the resolution of such disputes against the Postal Service, an independent establishment of the executive branch. To make a proper determination, it may exercise its statutory authority to reach discovery rulings, within its reasonable discretion, and under such privilege standards as may be suitable to avert impairment of the efficient management of its cases, consistent with statutes.¹¹

The Postal Service's inclusion of the three documents was inadvertent. It adequately addresses the proper balancing factors: the scope of discovery, the extent of disclosure, the reasonableness of precautions taken, the time taken to rectify the error, and the overriding issue of fairness. Although it was under no judicial compulsion to divulge the three documents, the Postal Service was reasonably attempting to

¹⁰ The Postal Service relies on the recent addition of Federal Rules of Evidence, Rule 502, and the Rule's notes, which explain that for inadvertent disclosures, most Federal courts and agencies favor a balancing approach instead of the strict waiver rule. It asserts that the D.C. Circuit expressly recognizes that deference ordinarily must be accorded to Federal agencies that apply their own discovery rules, even in the sphere of confidentiality. It adds that agencies may apply a standard like Rule 502(b).

¹¹ See, e.g., 39 U.S.C. 3662. This ruling concerns the Commission's jurisprudence in imposing disclosure duties on a government agency consistent with germane statutes and agency-specific rules. See, e.g., 39 CFR 3030.1 *et seq.* Thus, it may elect to apply a proper standard not inconsistent with its special statutory authority.

streamline its cooperative response to inspection requests that elicited a large volume of pages under a protective order.¹² Nothing of record reflects Postal Service's failure to use sufficient safeguards during inspection, or that its actions amounted to an intentional disclosure or inexcusable carelessness. Upon learning of its oversight, the Postal Service took reasonably prompt steps to rectify it.¹³ Specifically, it sought to prevent further disclosure by assiduously limiting the composition of copies produced to the unprivileged pages.

Congress recently adopted new Federal Rule of Evidence, Rule 502, which, as relevant here, provides:

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(b) Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Federal Rules of Evidence, Rule 502(b). By its terms, Rule 502 applies even though it might not if this were a case predicated on claims upon which state law provides the rule of decision.¹⁴ Further, the parties have not indicated that it would be unjust or impracticable to apply Rule 502. Accordingly, this ruling applies the Rule 502 standard.

¹² In this context, the movant confronts the need show the error was due to inexcusable neglect.

¹³ The effects of a waiver, and the concomitant costs of pre-production privilege review can be as great with respect to disclosures to agencies as they are in litigation.

¹⁴ See Federal Rules of Evidence, Rule 501. The statute enacting Rule 502 provides that "[t]he amendments made by this Act shall apply in all proceedings commenced after the date of enactment of this Act and, insofar as is just and practicable, in all proceedings pending on such date of enactment." Pub. L. 110-322, 122 Stat. 3537, § 1(c), September 19, 2008.

There is no suggestion that the disclosure of the three documents from attorneys was anything other than inadvertent. Thus, whether the disclosure resulted in a waiver of the privilege is determined by Rule 502(b), which provides that disclosure does not waive the privilege if: (1) the disclosure was inadvertent; (2) the holder of the privilege took reasonable steps to prevent disclosure; and (3) the holder took reasonable steps to rectify the error after discovering the inadvertent disclosure. At the outset, GameFly's arguments concerning the inadequacy of substituted privilege logs or the Postal Service's false promise are virtually irrelevant. Rule 502(b) sets forth explicit factors for consideration, and those factors relate only to the disclosure of the privileged information itself.

Turning to the Rule 502(b) factors, it appears that each element is reasonably satisfied, and thus the disclosure of the three documents does not operate as a waiver of the privilege. First, there is no indication in the record, and GameFly does not argue, that the disclosure was anything other than inadvertent. It does not appear that the Postal Service's conduct was unreasonable under all the facts, particularly as the quantity of pages inspected are substantial.¹⁵ Privilege holders are not invariably required to incur the often excessive cost to review each document prior to such an inspection meticulously. They do not always need to conduct perfectly error-free privilege designations in advance.¹⁶

Second, it appears that the Postal Service took reasonable steps to prevent disclosure. The materials were inspected under the Commission's customized protective order. But for that order, counsel for the Postal Service probably might have demanded time to conduct a more thorough privilege review of the documents prior to disclosure. The Postal Service took reasonable steps to protect the confidentiality of

¹⁵ In this case roughly 80,000 documents appear to be implicated so far by the discovery requests and responses, even though the vast majority contains spreadsheet or other data.

¹⁶ See Response at 3, n.3 and accompanying text. The inspection session merely permitted an average review of twelve seconds per page.

the documents in this context, given the need for expediency under the law of the case.¹⁷

Finally, under the third Rule 502(b) factor, the Postal Service took prompt action to secure protection of the privileged matter. Its counsel first discovered the inadvertent disclosure before the delivery of the balance of the sheaf of copies. Counsel effectively preserved the privilege objection when the other copies were delivered with privilege log entries. The Postal Service diligently rectified its inadvertent disclosure. The disclosure of the three items did not result in a waiver.

GameFly relies on several recent district court cases that concern government agencies to indicate that the strict waiver rule retains its vitality today in recent civil litigation, and extends beyond grand jury cases regardless of Rule 502. Motion to Compel, at 5. Yet, none meaningfully address the tension between (a) the strict waiver rule, and (b) the Commission's need to develop and apply customized rules and procedures designed to facilitate the exercise of its responsibilities under title 39.¹⁸

GameFly, having stipulated to protective conditions, also plainly recognizes that it remains subject to the Commission's rules of procedure and discovery that may differ from appellate court rules. Extending the ambit of the strict waiver rule to the present context might thwart an array of regulatory policies that otherwise closely coincide with the Federal Rules Evidence, and excessively delay discovery in future Commission proceedings.¹⁹

¹⁷ The Postal Service asserts, without contradiction, that the three documents are the only privileged matters that have been inadvertently disclosed, despite the voluminous discovery that has taken place in this case.

¹⁸ Motion to Compel at 5. The district court cases cited by GameFly are not entirely persuasive here to a Federal regulatory agency that conducts discovery for private civil complaints, filed against governmental entities, under specialized rules and customized orders. See, e.g., *Goodrich Corp. v. EPA*, 593 F.Supp.2d 184 (D.D.C. 2009); *Stonehill v. IRS*, 534 F.Supp.2d 1, 8 (D.D.C. 2008); and *Elliott v. Fed. Bureau of Prisons*, 521 F. Supp. 2d 41, 57-58 (D.D.C 2007).

¹⁹ When inspection is the pragmatic alternative to costly and protracted preparations, unwitting transient disclosures may not be tantamount to a waiver, particularly when corrections are timely made. The Postal Service is a national institution and national waiver standards may not be disregarded.

Thus, as to the alleged privilege at issue, the limited disclosure at inspection due to an oversight was adequately rectified. The privilege may be maintained for the three documents in question.²⁰ Accordingly, this ruling holds that the asserted privilege was jeopardized inadvertently, but was properly rectified in a timely manner that avoided a waiver of the privilege as to the three documents in question. 39 CFR 3007.1, *et. seq.*

RULING

The Motion of GameFly, Inc. to Compel Production of Three Documents Withheld by the United States Postal Service, filed September 21, 2009, is denied.

Dan G. Blair
Presiding Officer

²⁰ Any recurring disclosures, albeit under similar facts, may not result in identical treatment.