

PRESIDING OFFICER'S  
RULING NO. C2009-1/12

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

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING ON MOTION  
TO SHOW CAUSE WHY CERTAIN DOCUMENTS  
SHOULD NOT BE UNSEALED

(Issued November 18, 2009)

I. BACKGROUND

On September 25, 2009, GameFly, Inc. (GameFly) filed a motion for an order to show cause why certain documents and information designated as proprietary by the Postal Service should not be unsealed.<sup>1</sup> This Motion was the subject of a ruling granting an extension of time,<sup>2</sup> and on October 19, 2009, the Postal Service filed its response to GameFly's Motion.<sup>3</sup> On October 26, 2009, GameFly filed a rejoinder to the Postal Service Response.<sup>4</sup>

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<sup>1</sup> Motion of GameFly, Inc., for Order Directing Interested Parties to Show Cause Why Certain Documents and Information Designated as Proprietary by the Postal Service Should Not Be Unsealed, September 25, 2009 (Motion).

<sup>2</sup> See P.O. Ruling C2009-1/7, October 7, 2009.

<sup>3</sup> Opposition of the United States Postal Service to the Motion of GameFly, Inc. to Unseal Certain Documents Produced in Discovery, October 19, 2009 (Response).

<sup>4</sup> Rejoinder of GameFly, Inc., to Oppositions of the United States Postal Service and Blockbuster Inc. to Motion of GameFly, Inc. to Unseal Certain Documents and Information Designated as Proprietary by the Postal Service, October 26, 2009 (Rejoinder). This pleading was specifically authorized by P.O. Ruling C2009-1/7.

## II. SUMMARY

The Motion raises a question of first impression. What is the proper legal standard and criteria applicable to terminate non-public treatment of documents made available in discovery to GameFly under protective conditions? This ruling provides a proposed test for comment and certifies this question to the Commission upon consideration of the contentions and objections of record. Following comments, the matter will culminate in a final decision by the full Commission. It will either accept or modify the provisional test, in view of the comments. This ruling sets out, for reasons explained below, the proposed three-part test.

Any document at issue that contains potentially sensitive information identifiable with a DVD mailer shall be treated separately from documents that do not contain such information. The test is in three parts rather than two, however, because some materials on DVD mailers other than Netflix and Blockbuster appear to be susceptible to treatment under an effective stipulation.

1. If the documents contain information identified with one or more DVD mailers other than Netflix or Blockbuster, then that information will continue to be extended non-public treatment under an effective agreement of the parties.
2. If the document contains information specific to Netflix or Blockbuster, then the Commission will apply the balancing test of Fed. R. Civ. P. 26(c) for private litigants.
3. If the documents contain no specific information concerning one or more DVD mailers, then it will be evaluated under Fed. R. Civ. P. 26(c) for the Postal Service, a public agency, which provides both market dominant and competitive services.

Under both of the legal standards under Fed. R. Civ. P. 26(c), this ruling specifies proposed criteria for continuing to extend non-public treatment solely to information that is highly confidential.

### III. GAMEFLY'S MOTION FOR INTERESTED PARTIES TO SHOW CAUSE

GameFly requests the Commission to “issue an order directing interested parties to show cause why certain information produced by the Postal Service should not be unsealed.” See Motion, at 1, *citing* 39 CFR 3007.31. During discovery, the Postal Service had designated a substantial number of documents as confidential. GameFly filed some of the subject documents under seal as an appendix to the Motion. *Id.* In its Motion, GameFly also seeks to unseal portions of certain pleadings or discovery requests.<sup>5</sup> It notes that 39 CFR 3007.31 governs requests for early termination of non-public status.<sup>6</sup>

GameFly maintains that “[i]n the ordinary course of events, the Postal Service and any other interested parties would have the initial burden of coming forward and identifying the specific materials that they contend should be protected, as well as the legal grounds for this relief.”<sup>7</sup> As the subject documents were produced by the Postal Service to GameFly under a protective order, and GameFly filed them with the Commission, the Postal Service has yet to support the basis of non-public treatment. Asserting that the burden resides on the party seeking protection, GameFly submits that “the fairest course is to require that” the Postal Service “make such a threshold showing now for the subset of documents attached to this motion.” *Id.*<sup>8</sup>

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<sup>5</sup> GameFly seeks to unseal portions of the pleadings that cite or summarize the documents, including (1) the Motion to show cause; (2) sealed portions of pages 10-23 of GameFly's September 3, 2009 response to opposition of the Postal Service's motion to compel; (3) GameFly's fourth discovery requests to the Postal Service (GFL/USPS-103-106); and (4) the sealed portions on page 2 and 3 of GameFly's September 21, 2009 motion to compel. *Id.* at 1-2. (Pleadings under seal at issue.)

<sup>6</sup> This rule states in part that “(a) [a]ny person may make a request to the Commission that non-public materials be publicly disclosed. Each such request shall provide a specific and detailed statement justifying why the non-public materials should be made public, giving specific recognition to any pertinent rationale(s) provided in the application for relief submitted pursuant to Sec. 3007.21 or Sec. 3007.22.”

<sup>7</sup> See Motion at 19, *citing* 39 CFR 3007.20 and 22; Fed. R. Civ. P. 26(c), and *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3<sup>rd</sup> Cir. 1986).

<sup>8</sup> See *id.* at 3, *citing* 39 U.S.C. 504(g)(3)(B), Fed. R. Civ. P. 26(c), and Docket No. RM2008-1, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, August 13, 2008, at 3-4 (relying upon *Arnold v. Penn Dep't of Transp.*, 477 F.3d 105, 108 (3<sup>rd</sup> Cir. 2007)).

GameFly elaborates on the factors that are relevant to determinations under Fed. R. Civ. P. 26(c), and addresses why case law authority extends more protection to trade secrets than to commercial information, which allegedly may be considered confidential by a reasonable business. Motion at 5, *citing Littlejohn v. BIC Corp*, 851 F.2d 673, 685 (3rd Cir. 1988).

GameFly urges that continuing non-public treatment can not be justified without a showing that the present harm from unsealing the material is “significant,” and of a nature that typically warrants protection, like the examples framed within one or more leading legal treatises. *Id.* at 6. It further relies upon the public interest in maintaining the transparency of the performance of public officials and public bodies, and notes that the basis for a confidentiality claim may grow stale, or become inappropriate where the information has been disclosed elsewhere. *Id.* at 7. Under the sealed portion of its Motion, GameFly describes the kinds of information contained in subsets of documents, and then summarizes (in unredacted portions) that a showing of harm is constrained because: (1) DVD mailers are First-Class Mail, a market dominant product; and (2) the information regarding other DVD mailers is bereft of competitive concerns. *Id.* at 12.<sup>9</sup>

These issues are not unlikely to recur. GameFly already filed additional motions to unseal, including one for the unredacted version of its seventh discovery request.<sup>10</sup> See. e.g., Motion to Unseal at 1.

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<sup>9</sup> Compare 39 CFR 3007.33 Standard for decision for early termination of non-public status.

(a) In determining whether to publicly disclose non-public materials filed by the Postal Service, the Commission shall balance the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity competing in commercial markets.

(b) In determining whether to publicly disclose non-public materials in which the Commission determines a third party has a proprietary interest, the Commission shall balance the interests of the parties based on Fed. R. Civ. P. 26(c).

<sup>10</sup> Motion of GameFly, Inc., to Unseal Unredacted Version of Seventh Discovery Requests (GFL/USPS-201-211), October 8, 2009 (Motion to Unseal).

#### IV. BLOCKBUSTER'S OPPOSITION

Blockbuster filed in opposition after receiving notice that its confidential information was implicated and might be disclosed publicly.<sup>11</sup> Blockbuster requests the Commission to protect its information consistent with the applicable legal standard.<sup>12</sup>

Blockbuster indicates that:

In determining whether to publicly disclose non-public materials in which a third party has a proprietary interest, the Commission is required to balance the interests of the parties based on Federal Rule of Civil Procedure 26(c). Rules of Practice, Rule 33(b). This balancing test weighs one party's interest in unsealing the documents against the other party's interest in keeping them confidential.

*Id.* at 2, citing *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1313 (11th Cir. 2001).

Blockbuster submits that its "interest in maintaining the confidentiality of its proprietary information as well as its interest in a continuing business relationship with the Postal Service" plainly outweighs the public interest in disclosure. *Id.* It adds that the restrictions placed on the information have not hindered GameFly's ability to prepare its case effectively. *Id.* It asserts that GameFly's true purpose of allowing the public to assess the Postal Service's defense lacks merit, since under 39 U.S.C. 3662(a) and (c), the Commission decides the merits of GameFly's case. *Id.* at 4.

Blockbuster seeks to maintain the confidentiality of information concerning its postal expenditures, its mail processing and handling, its unique mailpiece design, as well as its plans and goals, so as to avoid the commercial harm that may result from widespread disclosure. *Id.* It does not ordinarily disclose this kind of information to the

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<sup>11</sup> Third Party Blockbuster's Opposition to GameFly's Motion to Unseal Certain Documents, October 19, 2009 (Blockbuster Opposition).

<sup>12</sup> Blockbuster explains that it "deals with the Postal Service as a commercial partner, and the company reasonably expects the Postal Service to maintain the confidentiality of its sensitive business information. If the Postal Service can not do so, then Blockbuster and the Postal Service can not have a full, open and successful business relationship." *Id.* at 3.

public. *Id.* at 5. It contends its expectation of confidentiality is reinforced under analogous criteria of the Freedom of Information Act (FOIA) that protects disclosures of such proprietary commercial information made to a federal agency.<sup>13</sup> It also raises several other reasons why the public opinion justification for public access is inadequate, as discussed further under the Postal Service's contentions below.

Blockbuster describes why the nature of its business relationship with the Postal Service weighs strongly against unsealing, especially in view of how it operates within the statutes governing its video rental industry. Under the Video Privacy Protection Act, 18 U.S.C. 2710, Blockbuster discloses limited customer information to the Postal Service in the "ordinary course of business." *Id.* at 5, *citing* 39 U.S.C. 2710(b)(2)(E). However, if any "personally identifiable information," as defined in section 2710(a)(3)), is disclosed to unauthorized recipients, Blockbuster may become liable to its downstream customers.<sup>14</sup>

Blockbuster also submits that an adverse ruling would unduly chill its exchange of sensitive commercial information with the Postal Service to its detriment, and contrary to the broader public interest and standards of law. It cautions that, like many others, it will become "extremely reluctant to provide this sort of information in the future, if the Postal Service is unable to ensure that it can maintain the confidential nature of these reports." *Id.* at 6. It adds that the D.C. Circuit Court of Appeals has long recognized this kind of "chilling effect" as one heavily weighing to restrict

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<sup>13</sup> Blockbuster particularly relies on the point that "[t]he [FOIA] exemption protects from disclosure 'trade secrets and commercial or financial information obtained from a person and privileged or confidential.'" 5 U.S.C. 552(b)(4). This type of information is categorically protected from disclosure if it was voluntarily submitted to the government and is not the type of information the submitter would customarily disclose to the public. *Id.* at 5, *citing* *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 880 (D.C. Cir. 1992) (*en banc*); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (discussing exemption 4 of FOIA) (*National Parks*).

<sup>14</sup> It claims the liability may include liquidated damages of at least \$2,500, punitive damages, attorneys' fees and other litigation costs, and other relief. *Id.* at 5-6, *citing* 18 U.S.C. 2710(c)(2).

disclosures.<sup>15</sup> Blockbuster urges that any public interest in disclosure does not outweigh the potential harm to Blockbuster of disclosure of sensitive business information, and harm to the business relationship between Blockbuster and the Postal Service. *Id.*

## V. POSTAL SERVICE'S RESPONSE

The Postal Service opposes GameFly's Motion by explaining that "all but a few of the documents that GameFly seeks to make available to the general public should instead only be accessible to parties who agree to adhere to protective conditions." Response at 1. It relies on 39 U.S.C. 504(g)(1) to designate materials as confidential if it determines that the material "contains information which is described in section 410(c) of this title, or exempt under section 552(b) of title 5." *Id.* at 1-2.

It cites the standard for "balancing the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity competing in commercial markets." *Id.* at 2, *citing* 39 CFR 3007.33(a). As for materials implicating third parties with proprietary interests, it recites that a distinct standard for balancing weighs "the need of the requesting party to have access to participate effectively in a Commission proceeding" against the interests of the Postal Service and other interested parties in keeping the materials nonpublic, based on Fed. R. Civ. P. 26(c). *Id.*, *citing* PRC Order No. 225<sup>16</sup> at 16-17; PRC Order No. 194<sup>17</sup> at 27-28.

The Postal Service recognizes that GameFly has placed at issue a sizable sheaf of materials from a larger universe "of materials produced by the Postal Service in

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<sup>15</sup> *Id.* at 6, *citing National Parks*, 498 F.2d at 767 ("Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired.")

<sup>16</sup> Docket No. RM2008-1, Final Rule Establishing Appropriate Confidentiality Procedures, June 19, 2009 (PRC Order No. 225).

<sup>17</sup> Docket No. RM2008-1, Second Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, March 20, 2009 (PRC Order No. 194).

response to GameFly discovery requests.” *Id.* It admonishes against granting this Motion, and opposes including as public information the “discovery requests or other pleadings regarding these documents” by making the information publicly available on the Commission’s website. *Id.* It sees this effort by GameFly as one foretelling of more meritless motions by GameFly to unseal. *Id.*, *citing* Motion at 3, n.2.

The Postal Service recites 14 separate classes of documents and cites 39 U.S.C. 410(c)(2). *Id.* at 2-3. Some classes contain both internal and external materials.<sup>18</sup> It invokes 39 U.S.C. 410(c)(2) in support of:

protecting ‘information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed.’ Courts have held that materials fall within this provision if they are (1) of a commercial nature and (2) of a type not publicly disclosed in good business practice.

*Id.* at 4, *citing* *Carlson v. Postal Service*, 501 F.3d 1123 (9th Cir. 2007). It adds that under this standard it may withhold from public disclosure information of a commercial nature if large businesses would do the same. *Id.*, *citing* *Wickwire Gavin, P.C. v. Postal Service*, 356 F.3d 588, 592 (4th Cir. 2004).

The Postal Service relies upon several points to show that protection is required by the relationships of trust it forms with mailers. Since the Postal Service is expected to operate in a business-like manner under prevailing statutes, its customers should be able to legitimately expect that exchanges with a critical business partner will not be

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<sup>18</sup> It urges that any justification for unconstrained transparency to the general public are not as compelling here as in other types of Commission proceedings. *Id.* at 16.

made public. *Id.* at 5.<sup>19</sup> Its relationships will be impaired if customers find it prudent to avoid sharing all pertinent facts. *Id.*<sup>20</sup> “A service provider does not, as a matter of a good business practice, publicly disclose internal documents or communications that 1) discuss or summarize communications with specific customers, 2) discuss the manner in which it provides a service to a specific customer, or 3) examine ways in which that service can or should be changed.”<sup>21</sup> *Id.* at 6.

Apart from the relationship with mailers, the Postal Service asserts that a complaint alleging special treatment, standing alone, does not create any basis for unsealing confidential information, especially absent a showing that the treatment in question is contrary to title 39. *Id.* at 7, n.1 The Postal Service urges that materials it generated to explore the potential need for rate and classification case support are worthy of protection, even when a decision is ultimately made not to file such a case. *Id.* at 13, *citing* 39 U.S.C. 410(c)(4). Documents that reflect the internal deliberations of the Postal Service are entitled to continuing non-public treatment under the deliberative process privilege.<sup>22</sup>

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<sup>19</sup> The Postal Service cites case law clarifying that voluntary disclosures by a private party to the Postal Service is afforded protection “if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.” *Id.* at 9. It contends that there is no appreciable distinction under section 410(c)(2) in the level of confidentiality justified for market dominant services, in contrast to competitive services. *Id.* at 7-8.

<sup>20</sup> Public disclosures of customer information could hamper the customer's ability to compete effectively, and would vitiate the requisite trust critical to the Postal Service's optimal provision of monopoly services. As such, unsealing is contrary to 5 U.S.C. 552a(b)(4). *Id.* at 8-9. As a trusted service provider, “it is not appropriate to make public the internal processing procedures and instructions that are accorded to a specific customer's mail.” *Id.*

<sup>21</sup> Separately, the Postal Service specifies that certain letters from its Engineering personnel to a specific customer on test results from two-way DVD mailers should at least be redacted as to customer identity and description portions, without which protection would be inadequate. *Id.* at 13-14.

<sup>22</sup> *Id.* at 10 -11, *citing* 5 U.S.C. 552(b)(5), 39 U.S.C. 504, and PRC Order No. 194 at 11. Access to many of the materials should be subject to protective conditions since the deliberative process privilege extends to pre-decisional materials, including ones that constitute the “mental impressions, opinions, recommendations, and subjective analyses by Postal Service employees concerning disc mail, and specific disc mail customers.” *Id.* at 12-13.

Urging the use of protective conditions, the Postal Service submits that those with a legitimate interest may still obtain access. *Id.* at 14. The documents would be available for GameFly to utilize in preparation of its case. *Id.* The Postal Service maintains that its legitimate interest in the confidentiality of these documents reinforces that it is inappropriate for persons to have access to the materials who have “not agreed to protective conditions.” *Id.* at 15.

The Postal Service claims that it is unnecessary for GameFly’s competitive decision-makers to have full access to these specific materials so they can provide strategic direction to its representatives regarding the conduct of GameFly’s case. *Id.* It reasons that GameFly has hired professional counsel and consultants who have full access to these materials, and are sufficient already to represent its interests before the Commission. *Id.*

The Postal Service further urges that in a private case on undue discrimination arising under 39 U.S.C. 403(c), the highly individualized claims are likely to implicate only a few business mailers, and that Postal Service finances should not be broadly disclosed publicly on account of a complaint. It invokes 39 U.S.C. 504(g)(3)(A) to “balance the nature and extent of likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.” *Id.* at 16, *citing* PRC Order No. 194 at 6, n.3. It argues the public interest in unconstrained transparency does not rise to the level required, and that the cases GameFly cites to suggest otherwise are not persuasive. *Id.* The public is already adequately represented by the “Public Representative, who has access to these materials,” under the rules of practice. *Id.* at 15.

## VI. GAMEFLY’S REJOINDER

GameFly’s rejoinder asserts that the proper governing legal standard, under Fed. R. Civ. P. 26(c) and rule 3007.33, requires a showing for sealing documents which has not been met by the Postal Service. Rejoinder at 2. Without that showing, there is no

support, much less any detailed support, to meaningfully permit document-by-document balancing of the purported “likely commercial injury” from disclosure against the public interest in maintaining the financial transparency ordinarily required. *Id.* at 4, *citing* 39 CFR 3007.33(a).<sup>23</sup> Rule 3007.33 and Fed. R. Civ. P. 26(c) impose several specific burdens on a party seeking to block public disclosure of information produced in discovery.

GameFly claims the party seeking to keep information under seal must show “good cause” and that the public disclosure of information would threaten the Postal Service or a third party with material commercial injury, not just embarrassment. Rule 3007.33(a) explicitly imposes this requirement for information filed by the Postal Service, and rule 3007.33(b), by incorporating the good cause standard of Fed. R. Civ. P. 26(c), implicitly imposes the same requirement for information in which a third party claims a proprietary commercial interest. *Id.* at 5.

The requisite showing of likely commercial injury must specifically be made for “each document.” *Id.* at 6. It notes that rule 3007.21(c)(4) requires the “[p]articlar identification of the nature and extent of commercial harm alleged and the likelihood of such harm.” *Id.* GameFly points out that the Presiding Officer specifically directed the Postal Service “to make the showing required by 39 CFR 3007.21 ‘for *each document* it contends must remain sealed.’”<sup>24</sup> (Emphasis added.) The Commission must balance any harm from disclosure against the public interest in disclosure of the information. *Id.* at 7, *citing* rule 3007.33; Fed. R. Civ. P. 26(c).

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<sup>23</sup> The Motion of GameFly, Inc. for Acceptance of Late-Filed Confidential Version of Rejoinder of GameFly, Inc. to Oppositions of the United States Postal Service and Blockbuster Inc. to Motion of GameFly, Inc. to Unseal Certain Documents and Information Designated as Proprietary by the Postal Service Filed On October 26, 2009, October 27, 2009, is granted.

<sup>24</sup> *Id.* at 6, *citing* P.O.Ruling No. C2009-1/7, at 2, n. 6. It adds that the ruling “directed the Postal Service to ‘provide notice to each third party with a proprietary interest in *any of the documents at issue*’ and ‘... that any objections should be filed ... by October 19, 2009, or *they will be deemed to be waived.*’” *Id.* at 7.

GameFly also asserts that the Postal Service advances a “far more restrictive” standard for unsealing material under rule 3007.33, which is contrary to law. *Id.* at 8. It explains that “[a]ccording to the Postal Service, sealed materials may be unsealed only if: (1) no exception to FOIA would cover the material, and (2) public disclosure would be consistent with “good business practice.” *Id.* GameFly asserts that “[t]his FOIA-based theory is the linchpin of the Postal Service’s arguments for continued secrecy.” *Id.* at 9. It further explains why “[t]he Postal Service’s reliance on 39 U.S.C. 410(c)(2), FOIA, and the judicial precedent under FOIA is completely misplaced.” *Id.*

GameFly advances Fed. R. Civ. P. 26 as the applicable standard, and one which offers less protection than FOIA. *Id.* at 10. It maintains that the FOIA exceptions and case law cited by the Postal Service “have nothing whatsoever to say about the balancing test the Commission must apply in resolving this motion.” *Id.* It explains that:

Although 39 U.S.C. § 504(g)(2) bars disclosure in certain contexts of information produced by the Postal Service to the Commission that is covered by 39 §§ 410(c) and 5 U.S.C. § 552(b) (the FOIA exceptions), these restrictions on public disclosure *do not apply to material discovered in complaint cases and other Commission proceedings.* 39 U.S.C. § 504(g)(3)(B). Section 504(g)(3)(B) specifically states that Section 504(g)(2) ‘shall not prevent the Commission from requiring production of information in the course of any discovery procedure established in connection with a proceeding under this title.’ Rather, the ‘appropriate’ level of ‘confidentiality’ to be given information produced in discovery and ‘furnished to any party’ shall be determined according to Commission ‘regulations based on rule 26(c) ....’ 39 U.S.C. § 504(g)(3)(B).

Rejoinder at 10. (Emphasis in original.)

GameFly clarifies that while the Postal Service notes the proper standard, it merely pays it lip service once. Section 504(g)(3)(B) properly channels the standards underlying Fed. R. Civ. P. 26(c) and “operates to provide a mechanism for the

Commission to create greater transparency....” *Id.* at 10-11. GameFly relies upon cited case law to contend that “[i]t is well established that information that is exempt from disclosure to the general public under FOIA may nevertheless be subject to discovery.” *Id.* at 11. GameFly asserts that Fed. R. Civ. P. 26, as applied by the Commission rules, allows the disclosure of far more information than would be available under FOIA. *Id.*

GameFly further contends that the Postal Service and Blockbuster have offered no evidence of commercial injury to any person that would justify continued secrecy. *Id.* at 13. Netflix did not oppose GameFly’s Motion. Netflix “waived any objection to disclosure,” even though it has the “ultimate responsibility for seeking to establish or maintain protection” for its information. *Id.* at 13-14, *citing* PRC Order No. 194 at 20. Netflix’s failure to file an opposition to GameFly’s motion to unseal was not for lack of notice. *Id.* at 14. Netflix’s inaction, GameFly adds, also forecloses any derivative objection by the Postal Service on behalf of Netflix. *Id.*

This line of analysis alone “disposes of the Postal Service’s objections with respect to most of the documents covered by GameFly’s motion,” according to GameFly. *Id.* GameFly elaborates that in “the majority of the documents cited” by the Postal Service in its opposition, the only information that is purportedly sensitive concerns its dealings with Netflix. *See* Appendix A, *infra.* *Id.* at 15.

GameFly also asserts a lack of any cognizable injury. It explains that “[t]he cases applying rule 26(c)...draw a distinction between a private part[y’s] product-specific costs, revenues, customer lists, confidential intellectual property, and other proprietary information whose disclosure could give an unfair competitive advantage to

rival firms,” and more general information that would not do so.<sup>25</sup> *Id.* at 16. It submits that “the former is generally kept under seal; the latter is generally made public.”<sup>26</sup>

GameFly suggests that Blockbuster did not examine or even inspect the Blockbuster-related documents that GameFly proposes to disclose. Instead, Blockbuster relied entirely on “a generalized summary of the documents prepared by the Postal Service.” *Id.* at 21. Blockbuster’s opposition lacks merit, GameFly urges, because “it would be difficult to pinpoint any information” in the document that discusses Blockbuster’s “operational goals,” or “[recent] plans for distribution centers,” as they reference only the design of the Blockbuster DVD mailer. *Id.* at 21-22. GameFly asserts that Blockbuster, like Netflix, rationally sought the best processing possible from the Postal Service. “This information is not competitively sensitive.”<sup>27</sup> *Id.*

GameFly requests that the Commission further reject the argument for continued protection on the basis of the Postal Service’s proprietary interest. *Id.* at 24. It states that “[t]he information in question is not commercially sensitive and does not meet the standard for protection created by rule 3007.33(b) and Fed. R. Civ. P. 26(c).” *Id.* at 24. GameFly denies that (1) disclosure of documents about Netflix and Blockbuster would deter *other* customers from dealing candidly with the Postal Service; and (2) disclosure of documents would chill its future decision-making by disclosing predecisional deliberations.

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<sup>25</sup> It adds that there is a ground to deny the asserted protection, especially when the “information...would ‘describe [the] companies’ exact market conditions’ or allow ‘competitors to target particular geographic areas for special service or marketing efforts.’” *Id.* at 17. (Emphasis in original.) It observes that “Netflix’s requests themselves show only that Netflix was looking out for its self-interest.” *Id.* at 18.

<sup>26</sup> *Id.* at 16, citing *Bay Gas Storage Company, Ltd.*, 109 FERC ¶ 61,348 at 62, 616 (2004).

<sup>27</sup> As to other third parties, GameFly appears more conciliatory in view of the relative burdens on them. GameFly has proposed to redact the names and other information identifying those parties, except for one envelope manufacturer that voluntarily consented to disclosure of documents about it. Accordingly, the Motion does not affect the interests of other mailers. *Id.* at 23. In the interests of resolving this issue, GameFly consents to the further redaction of the “Description” portion of certain two-way DVD test letters from Engineering. *Id.*

GameFly maintains that “the public disclosure of information about these two parties will reveal nothing to other customers about the Commission’s willingness to protect legitimate interests in confidential treatment of third-party information that are actually and properly asserted.” *Id.* at 25. Second, while the Postal Service “may aspire” to operate in a “business-like manner,” the Postal Service “is not an ordinary private business, and its customers do not have the same expectation of secrecy that customers of private businesses may have.” *Id.* at 25. GameFly adds that “[w]hen a common carrier is alleged to have granted undue preferences to a customer, the carrier cannot hide behind its business needs to protect communications with its shippers from disclosure.” *Id.*

GameFly submits that “[w]hen the question is one of undue preferences granted to a customer by a common carrier, the terms of service provided to customers must be publicly available.” Rejoinder at 28. GameFly cites certain decisions of the Federal Energy Regulatory Commission (FERC) where FERC has ruled that “information contained in [reports under the regulation] will not be protected from public disclosure” if it is necessary to determine whether there were instances of discrimination and the exercise of market power. *Id.* at 25-26. It adds that related policy generally favors “disclosure of individual jurisdictional contract information in order to ensure that the ...contracting practices are not unduly discriminatory, and no undue preferences are granted to any customer.” *Id.*<sup>28</sup>

GameFly maintains that “[t]he Postal Service cannot abuse the deliberative process privilege to shield its illegal actions from public view.” *Id.* at 30. It urges that

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<sup>28</sup> GameFly invites a similar ruling here, since “this principle applies even more strongly when the carrier is a governmental agency.” *Id.* at 26. It adds that the Commission has previously explained, for negotiated service agreements, that “[t]he general rule at the Commission has been and remains that requests for protective conditions must meet a high burden. ... Public disclosure also provides transparency, which helps curtail arguments of discrimination and secret dealings. (Emphasis in original.) *Id.*, citing PRC Order No. 1391 at 23.

the deliberative process privilege is inapplicable here.<sup>29</sup> This is true, it explains, even though the Postal Service claims it has a “legitimate interest in full and uninhibited internal discussion regarding its provision of service.” *Id.* at 29.

GameFly concludes by asserting that the “public interest in disclosure outweighs any commercial harm that might result from disclosure of the documents at issue.” *Id.* at 30. GameFly observes, the “Commission proceedings are public, and the presumption is that documents filed in those proceedings are public as well.” *Id.* GameFly emphasizes “the public's right to know...what was the content of the evidence upon which it reached that judgment.” *Id.* at 31. Moreover, it asserts that the Postal Service, as a regulated monopoly, is subject to higher scrutiny than an ordinary commercial entity. *Id.*<sup>30</sup>

## VII. COMMENTS OF THE PUBLIC REPRESENTATIVE

The Public Representative moved to file comments on the Motion on November 3, 2009.<sup>31</sup> The comments assert that “[t]he Commission should direct the

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<sup>29</sup> First, GameFly urges that the deliberative process privilege, when applicable, operates as a bar to discovery of the information at all, not as a ground for allowing discovery, but keeping the information under seal. *Id.* at 29, n.14. It alleges that the privilege has been waived, and notes that “[t]he deliberative process privilege is also an exception to disclosure under FOIA.” *Id.* at 29. As discussed above, the rule 3007.33 standards do not incorporate the FOIA exceptions. “[W]hen there is reason to believe that government misconduct has occurred, the deliberative process privilege disappears.” *Id.* at 29-30, *citing Adair v. Winter*, 451 F. Supp. 2d 202, 209 (D.D.C. 2006).

<sup>30</sup> GameFly notes the Postal Service’s theory that the existence of the Public Representative provides adequate protection to the public, would eliminate any basis for requiring public disclosure of any materials filed in a Commission proceeding, regardless of their subject matter. Rule 3007.33 clearly rejects this position.

<sup>31</sup> See Motion to File Comments of the Public Representative on Motion of GameFly Inc. to Unseal Certain Documents Produced in Discovery, November 3, 2009. The motion to file is granted.

Postal Service to address each individual document” under rule 3007.21.<sup>32</sup> They also suggest exploring “alternative solutions to allow discovery and the filing of GameFly’s direct case to continue with limited interruption in the short term.” *Id.* at 2. To overcome hurdles that arise because GameFly’s counsel “cannot share the discovery documents generated under seal with the operational experts at GameFly under the current protective conditions,” the Public Representative urges that the parties should reach a stipulation that sealed materials can be reviewed by GameFly operational personnel for the purpose of filing initial testimony. *Id.*

The comments further indicate that the “Commission may seek more information concerning which documents will lead to admissible (and relevant) evidence. *Id.* They urge that it should make a clear determination concerning how (a) the vintage of the documents affects non-public treatment; and (b) comparable publicly available information affects non-public treatment. *Id.* They further emphasize that it should assess cumulative effects during the evaluation to unseal. *Id.*

#### VIII. PRESIDING OFFICER’S ANALYSIS

GameFly’s motion seeks an order that requires the Postal Service, or other interested persons, to show cause why the set of documents that GameFly filed, along with certain other pleadings, or portions thereof, should not be unsealed. Motion at 1, *citing* 39 CFR 3007.31. The Commission has explained that rule 31 means that:

... any person may request that non-public status be removed from materials filed with the Commission. The rule gives details of the form and procedure of such a request. A request for early termination of non-public status must specifically address the Postal Service or third party claims in its application for non-public treatment.

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<sup>32</sup> See Comments of the Public Representative on Motion of GameFly Inc. to Unseal Certain Documents Produced in Discovery, November 3, 2009 (Public Representative Comments). This is appropriate because “[t]he wide range of materials, both internal to the Postal Service and with external entities, is not of homogeneous nature or content. One terse statement by the Postal Service does not constitute a basis for non-public treatment for each of the wide variety of documents.” *Id.* at 1.

PRC Order No. 225 at 14.

PRC Order No. 225 describes the exchange of pleadings on such a request, and confirms that “[f]ollowing the receipt of the answers, if any, the Commission will issue an order concerning the appropriate status of the non-public materials.” *Id.* The phrase “non-public materials” is also defined under PRC Order No. 225 and the definition provides, in notable part, that “[n]on-public materials cease to be non-public if the status has expired or been terminated by the Commission pursuant to this part.” 39 CFR 3007.1(b).

Certain additional rules govern the early termination of non-public status by the Commission. Section 3007.33 specifies two standards for early termination of non-public status in certain contexts.<sup>33</sup> Separate tests for terminating non-public treatment may be applied depending upon whether the documents or materials are filed by the Postal Service, or if instead, the documents or materials are ones in which the Commission may determine a third party has a proprietary interest. *Id.*

GameFly’s Motion pertains to documents, with hundreds of pages, designated by the Postal Service as confidential, and provided under a protective order for review by GameFly’s outside counsel. GameFly filed these documents, along with an application for non-public treatment.<sup>34</sup>

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<sup>33</sup> 39 CFR 3007.33 provides that:

(a) In determining whether to publicly disclose non-public materials filed by the Postal Service, the Commission shall balance the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity competing in commercial markets.

(b) In determining whether to publicly disclose non-public materials in which the Commission determines a third party has a proprietary interest, the Commission shall balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).

<sup>34</sup> Application of GameFly, Inc., for Non-Public Treatment of Motion for Show-Cause Order and Accompanying Documents, September 25, 2009, at 1 (“The motion requests, pursuant to Rule 3007.31, that the Commission issue an order directing the Postal Service and interested third parties to show cause when the protection for the documents should not be removed. Until the Commission determines whether to unseal the documents and information, Rule 3007.31(a) requires that they remain under seal.”)

An earlier ruling clarified that “[t]he Postal Service shall at least include, for each document it contends must remain sealed, such sufficient support as is ordinarily required for documents that it files under seal in the first instance, pursuant to 39 CFR 3007.21.” P.O Ruling C2009-1/7 at 2, n.6. The Public Representative observes that the Postal Service can not carry its burden with the type of perfunctory and undeveloped argument it has advanced without complying with rule 21. See Public Representative Comments at 1. It is undisputed that the Postal Service has a duty to support the basis of non-public treatment since that burden resides on the party seeking continuing protection.<sup>35</sup>

Fed. R. Civ. P. 26(c) appears to be the appropriate legal standard for unsealing and for establishing any customized criteria to apply to the issues in the present case. Only information that a party in good faith believes contains or refers to trade secrets or other confidential commercial or technical information to which employees of the producing party have only limited access, and that, if disclosed to a business competitor, would tend to damage the competitive position of the Postal Service or one of its DVD mailers, may be designated as highly confidential, under the proposed sets of criteria below. Other information will be unsealed.

Under the proposed sets of criteria below, a genuine need for confidentiality must be shown by the Postal Service. Only if it can show that the harm caused by its public disclosure outweighs the need of the party seeking public disclosure, does the burden shift to GameFly to show the designation under seal is unjustified. While the treatment of discovery materials governed by this ruling will be without prejudice to any claim that such material is privileged, such a privilege claim may be waived unless it is raised prior to the disclosure of materials for inspection. The application of 39 CFR 3007.33(a) is expressly limited since it appears to concern when to publicly disclose

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<sup>35</sup> The party seeking to maintain the confidentiality of its materials must make a particularized showing of the need for continued secrecy if the documents are to remain under seal. It is not necessary for the Commission to justify its ruling by explaining how each and every document filed under seal is deserving of confidential protection.

non-public materials filed by the Postal Service. This raises the question of first impression as to whether 39 CFR 3007.33(a) may apply at all under the present circumstances.

When a third party has a proprietary interest in a document in question, it appears that 39 CFR 3007.33(b) could be used to govern the proper standard for early termination for a subset of the documents related to third parties. This standard entails balancing the interests of the parties, absent some stipulation of the parties that may be condoned by the Commission. See Fed. R. Civ. P. 26(c).

A. Documents that Concern Specific DVD Mailers Other Than Netflix and Blockbuster

A small portion of the materials may be addressed under an effective stipulation by the parties, and do not appear to be in dispute any longer. Specifically, the parties concur that it is proper to ensure the continuing protection of proprietary information of the tier of DVD mailers (*i.e.*, ones other than Netflix and Blockbuster) less central to the unsettled questions of this case, and of their customers. Therefore, as to these other companies and their customers, no information that may be proprietary or confidential to them may be unsealed or made public lawfully without redacting names, addresses, and any uniquely identifying information, especially personal proprietary information and mailer's customer data or profiles. The parties have resolved to further redact the "[d]escription" information in DVD test letters from Engineering.<sup>36</sup> This shall be achieved by the Postal Service redacting highly confidential information, and only filing the documents for public access in redacted form.

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<sup>36</sup> No information on any customer of any mailer can be made public unless the parties first certify and confirm that the data has been adequately and clearly redacted. They shall certify that these sensitive materials and data have been adequately protected to fully safeguard against the confidential material being publicly revealed, derived indirectly, reassembled, or reverse engineered. Absent an affirmative waiver, any materials that concern DVD mailers other than Netflix or Blockbuster shall at all times be accorded at least as much protection as afforded to the latter named mailers, regardless of any objections.

The parties' positions over other materials are more contentious. For most of the documents, it is necessary to determine whether any information contains legitimate trade secrets or other proprietary information which would warrant their continued confidential designation in view of the protective order issued in this case. To resolve the dispute over continued protection of these materials, it appears appropriate to address the subset of documents that pertain to Blockbuster or Netflix under section B below. The standard that governs the documents that do not pertain to Blockbuster or Netflix, including other documents internally generated or maintained by the Postal Service, is addressed under section C. In each case, the proper analysis entails engaging in a careful fact finding process which balances the competing interests at stake.

**B. Documents Subject to this Motion that Identify Netflix or Blockbuster or Implicate a Proprietary Interest of One of Them**

This ruling shall propose criteria based upon the issues of this case, and such criteria shall be subject to a further round of comments. Following comment, the full Commission shall review this question and may refine the proposed criteria further to permit the parties to divide information eligible for continuing protection from that which is not.

The subset of materials that may implicate the proprietary interests of either Netflix or Blockbuster is governed under the standard of 39 CFR 3007.33(b). When a third party has a proprietary interest that is cognizable by the Commission, 39 CFR 3007.33(b) converges with the familiar standard of Fed. R. Civ. P. 26(c)(1)(G). As Blockbuster correctly contends, this balancing test weighs one party's interest in unsealing the documents against the other party's interest in keeping them confidential. Blockbuster Opposition at 2.

Some of the traditional factors relevant to determinations under Fed. R. Civ. P. 26(c)(1)(G) are discussed in the notes and the case law on the Federal rules.<sup>37</sup> The often-cited committee notes to this key rule, Fed. R. Civ. P. 26(c) indicate that:

[t]he new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed the claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection.<sup>38</sup>

(Footnote added.)

GameFly contends that protection of such “other commercial information” is usually less readily justified than protection of trade secrets. This point also appears to be well taken, but still leaves open the related questions of what qualifies as a trade secret and which kinds of other commercial data still justify protection.<sup>39</sup>

Unlike Fed. R. Civ. P. 26(c), other standards like 39 CFR 3007.33(a) and FOIA conventions are plainly less well-designed to address the requisite balance of interests based on a specific party’s need for the documents in a complaint case. While the public interest in the financial transparency of the Postal Service may be viewed

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<sup>37</sup> See generally *Arnold*, 477 F.3d at 108. Even though “good cause” often varies among cases relying upon Fed. R. Civ. P. 26(c), the better view appears to entail the recognition of a seven-part test as to whether non-public treatment may be justified. See also Motion at 3-4. These seven *Arnold* factors are specified further below. Under Fed. R. Civ. P. 26(c) a “court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ...: (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way....” Some of the earlier case law cites to Fed. R. Civ. P. 26(c)7, the predecessor of the current provision under subpart (G).

<sup>38</sup> Advisory Committee Notes to 1970 Amendments to Fed. R. Civ. P. 26(c), citing *Covey Oil Co. v Continental Oil Co.*, 340 F.2d 993 (10th Cir 1965); *Julius M. Ames Co. v Bostitch, Inc.*, 235 F. Supp. 856 (S.D.N.Y. 1964).”

<sup>39</sup> This ruling provisionally concludes that any material at issue that comprises a trade secret need not be unsealed if the information is truly within the ambit of trade secrets as defined under the Uniform Trade Secret Act. See, e.g., *Catalyst & Chemical Services, Inc. v. Global Ground Support*, 350 F.Supp.2d 1 (D.D.C. 2004).

broadly, it is less clear that it requires consideration as to whether sharing of the information among litigants would promote fairness and efficiency.

Therefore, it appears appropriate to utilize criteria designed to reflect a balance in view of the conventional *Arnold* factors weighed by the federal courts including:

- (1) The interest in privacy of the party seeking protection;
- (2) Whether the information is being sought for a legitimate purpose or an improper purpose;
- (3) The prevention of embarrassment, and whether that embarrassment would be particularly serious;
- (4) Whether the information sought is important to public health and safety;
- (5) Whether sharing of the information among litigants would promote fairness and efficiency;
- (6) Whether the party benefitting from the order of confidentiality is a public entity or official; and
- (7) Whether the case involves issues important to the public.

See Docket No. Docket No. RM2008-1, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, August 13, 2008 at 4.

This first of two sets of criteria being proposed for unsealing in this ruling would govern the subset of materials in which a third party that appears to be uniquely identified whether or not there is a more blatant or indisputable proprietary interest by a third-party. The second set of criteria, under section C below, would govern other materials like the Postal Service's internal reports, operating procedures, records and working papers, etc.

The standard of 39 CFR 3007.33(b) will apply to all information that may be susceptible of implicating the proprietary interest of Netflix or Blockbuster. As such, it is possible to conservatively protect even their most subtle proprietary interests under a

proper balancing test. This approach also obviates any need to provisionally distinguish between hundreds of pages of materials that could implicate their interests and those that may not.<sup>40</sup> The first set of criteria below, which is intended to apply to such materials of Netflix or Blockbuster, is designed to enable the parties to readily identify any such materials that justify continuing protection in view of 39 CFR 3007.33(b) and Fed. R. Civ. P. 26(c). Following further comment, the Commission will consider refining the proposed criteria still further, before directing the parties to apply it.<sup>41</sup>

Turning to the proposed criteria, a proper justification for continuing confidentiality treatment commonly may vary in degree, depending upon (a) the specific mailer concerned, (b) the vintage of the document, and (c) the nature and extent to which commercial information is sensitive competitive data that risks significant harm, if not protected, as described further below.

The proposed criteria will unseal information, unless it is either (a) a trade secret; or (b) proprietary commercial information that was (i) generated after November 8, 2007, and (ii) contains one of the limited kinds of content, described below as “highly confidential.” The limited kinds of content, protected under (ii) include only (a) strategic business plans, not readily ascertainable elsewhere, that would disclose a material competitive advantage to a rival, or (b) information to which employees of the Postal Service have only limited access that is comprised of one or more of the following: company production data; company security matters; customer lists; company financial

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<sup>40</sup> Other materials, addressed under the second of two sets of criteria in the next section, are limited to ones that contain no reference to Netflix, Blockbuster, any other uniquely identifiable private DVD mailer or mailers, or to the data of any DVD mailer’s customer.

<sup>41</sup> In turn, the Postal Service will have to (a) comply with Rule 3007.21 for materials that require continuing protection; (b) file the numbered materials again that warrant protection under seal, and mark them “Highly Confidential—Do Not Post on Web” within a limited time; and (c) file an index for numbered documents that remain in dispute by the parties, if any, if the final criteria leaves the status of any uncertain. It will likely direct GameFly to file the rest of this subset of the documents that are neither under *bona fide* dispute, nor under seal any longer, for public disclosure.

data; projected sales data or goals; proprietary market research, or matters relating to mergers and acquisitions.<sup>42</sup>

Information that is highly confidential must not have been previously disclosed by a mailer or the Postal Service to anyone, except those in the full-time employment of the mailer or Postal Service, those retained by one of them who agreed to maintain the confidentiality, or those subject to protective conditions in this case.

Company financial data, production data, or market research, as these phrases are used above, however, shall only include data not readily ascertainable elsewhere which touch upon the topic of one or more specific mailers' numerical data that arises in connection with its postal service (*i.e.*, postal expenditures, postal service costs, production volumes, financial data, etc.). To be highly confidential, such numerical data also must be expressed as an absolute value, rather than as percentages or other relative quantitative values equivalent thereto. Otherwise, numerical data will be included as qualitative information that is unsealed.

Except for redacting such absolute numerical values, any other information within the rubric of financial data, production data, or market research shall be unsealed, unless it was identified as of a highly confidential nature and was distinctively treated with exceptional care. Accordingly, qualitative information that concerns a specific mailer's risks, losses, loss reduction techniques, breakage rates, theft, payment methods, other business plans, manual culling, manual processing proportion, nonmachinable handling, processing on automated machinery, operational goals, or mailpiece design will be unsealed, unless it was (a) subject to reasonable measures to protect it from disclosure to third parties, and (b) disclosed to the Postal Service under a

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<sup>42</sup> These criteria are comparable to criteria recommended by the Federal Judicial Center (Center), which is the research and education agency of the federal judicial system. The Center provides standard order templates for litigation before federal courts. See, e.g., Manual for Complex Litigation, Fourth, section 40.27. (That confidentiality order form provides that "[o]nly documents containing trade secrets, special formulas, company security matters, customer lists, financial data, projected sales data, production data, matters relating to mergers and acquisitions, and data which touch upon the topic of price may be designated confidential, provided such documents have not previously been disclosed by the producing party to anyone except those in its employment or those retained by it.")

previously signed confidentiality agreement in writing (or a clear legend of confidentiality previously added by the source of the document).<sup>43</sup>

The proposed criteria applicable to materials governed under 39 CFR 3007.33(b), calibrates the degree of protection to the likely prejudice from disclosure of the competitively sensitive document, consistent with the balancing test used in Fed. R. Civ. P. 26(c). At bottom, it is proper to ascertain if competitors of Netflix or Blockbuster who gained access to this information could use it to better position their products in the marketplace while, at the same time, undercutting the position which the DVD mailer in question has established through the investment of both time and money.<sup>44</sup> This proposed criteria will disfavor continued protection, except when appreciable justifications arise, including maintenance of reasonable protection measures.<sup>45</sup>

As stated, highly confidential content includes numbers that reflect absolute quantitative data that pertains to a specific mailer, since that kind of data may be presumed to contain sensitive information, unless or until a presumption of

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<sup>43</sup> The Postal Service, for such documents, must appropriately redact materials that contain both public and non-public information, but must redact only the information that is highly confidential and non-public. See, e.g., 39 CFR 3007.10(b).

<sup>44</sup> Further factors may arise, including whether (1) the material is available from other sources, (2) a timely objection was made of record, and (3) it was disclosed expressly under a prior confidentiality agreement, or its equivalent. When a document contains potentially sensitive information identifiable with a notified DVD mailer, and its public disclosure has not been the subject of an objection, any potential objections may be deemed waived. When an objection has been raised by the Postal Service or another third party as to such disclosure of the document, the objection ordinarily will be either sustained or overruled in due course. Thus, a knowing third party's silence waives an objection only to a document to which there are no other objections. In contrast, if an entity has raised a valid objection, then that objection is not superseded by the silence of another who declined to raise it. No rule requires every interested party to raise every valid objection, and it generally suffices to avert a waiver, for instance, if the Postal Service or another person already raised the objection on the record.

<sup>45</sup> The Postal Service has not persuasively shown that a mailer's expectations, which legitimately warrant protection of information under FOIA standards, necessarily inoculate information equally throughout a judicial complaint proceeding as during a FOIA request. It is uncontroverted that even the most commercially sensitive trade secrets only warrant qualified, rather than absolute, protection by Federal courts in comparable cases.

confidentiality is further rebutted with particularity.<sup>46</sup> Information in documents that is not properly ascribed as highly confidential under the criteria shall be unsealed.

Once the comments on this proposed criteria are filed, a determination will be issued that establishes the criteria to be applied. Thereafter, the parties are directed to meet and confer within seven days to ascertain which information in documents of this subset must remain sealed.<sup>47</sup> The parties will have 21 days from the date final criteria are established to jointly apply that criteria. For any documents that contain information upon which no agreement appears possible in view of the final criteria, the parties are directed to file a joint statement describing areas of impasse by the conclusion of this 21-day period. A presiding officer's ruling will follow.<sup>48</sup>

Accordingly, for this subset of materials, this ruling declines the Postal Service's invitation to resolve the issues on the governing standard for information in this subset of documents under 39 U.S.C. 410(c)(2). The Postal Service's contentions are not persuasive that section 410(c)(2), 39 CFR 3007.33(a), FOIA, FOIA exemptions, or any related alternative standards need to be applied, even as viewed under the related case law and statutory authority that has been cited. The interest in favor of protecting this subset of documents from public disclosure is to be calculated using the standards applied to Fed. R. Civ. P. 26(c) and the tests, as described.

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<sup>46</sup> See, e.g., *Diamond Ventures v. Barreto*, 452 F.3d 892 (D.C.Cir. 2006). GameFly also asserts that "much of the purportedly sensitive information contained in these documents has already been publicly disclosed, either specifically or in general terms." Rejoinder at 18-21. Unless it can show that the absolute numerical data protected has already been disclosed, however, it and others will only attain access to it under appropriate protective conditions.

<sup>47</sup> See Advisory Committee Notes to 1993 Amendments to Fed. R. Civ. P. 26(c),

<sup>48</sup> The statement should reflect a complete recitation of the arguments of all concerned. The Presiding Officer contemplates applying the established test with reference to the joint statement, without further pleadings.

C. For the Remainder of Materials at Issue, Separate Criteria May Apply Under the Rules of Practice

Turning to the remainder of the materials in question, it is appropriate to identify whether any different standards or criteria for unsealing properly apply.<sup>49</sup> If the documents contain no specific information concerning one or more DVD mailers, then it will be evaluated under Fed. R. Civ. P. 26(c) for the Postal Service, a public agency, which provides both market dominant and competitive services. Although the proposed criteria under this customized legal standard depart in certain respects from the proposed criteria in the previous section, they are consistent in several other ways.

Materials can not retain continuing confidentiality status unless they were subject to reasonable measures to protect them from disclosure outside the Postal Service.<sup>50</sup> The proposed criteria will confirm that the information in the remainder of materials will be unsealed unless the information at issue is either (a) a trade secret; or (b) proprietary commercial information that was (i) written or generated by or on behalf of the Postal Service after November 8, 2007, and (ii) contains one of the limited kinds of content, not readily ascertainable elsewhere, described below as “highly confidential.”<sup>51</sup> The limited kinds of content, protected under (ii) include only information to which employees of the Postal Service have only limited access that is comprised of one or more of the following: customer lists; market research; patent applications related to DVD mail or mail piece design; merger or acquisition matters; security matters; or

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<sup>49</sup> The same procedural approach that relies upon a sequenced determination as to the proper standard, the proposed criteria, an interval for further comment by interested parties, and a determination on the applicable criteria shall be followed here as well.

<sup>50</sup> Measures to protect against disclosure outside of the Postal Service’s organization are not sufficiently reasonable unless such measures are also designed to prevent disclosure by current employees, and departing personnel.

<sup>51</sup> See Complaint of GameFly, Inc., April 23, 2009, ¶ 36, *citing* USPS Office of Inspector General, Audit Report No. MS-AR-08-001, Review of Postal Service First-Class Permit Replay Mail (November 8, 2007). Any material that reflects Netflix or Blockbuster information or contains verbatim confidential data therefrom, or otherwise sets forth the substance of either mailer’s confidential information or that of either’s customers, will be treated as information akin to that originating from the mailer to whom it pertains, under section B above.

numerical data that solely concerns a competitive service (*i.e.*, production costs, projected sales, total service volumes, methods of allocating costs, etc.), expressed other than as percentages or relative quantitative values equivalent thereto.

Such information may be designated as highly confidential, however, only if it has not previously been disclosed by the Postal Service to anyone, except those in its full-time employment, those retained by it who agreed to confidentiality terms, or those subject to protective conditions in this case. Information or documents not designated as “highly confidential” shall be unsealed.<sup>52</sup>

The Postal Service advocates a different legal standard based upon 39 CFR 3007.33(a), in view of 39 U.S.C. 410(c)(2), and distinct criteria modeled after good business practices. The invitation to apply this alternative legal standard is declined, and comments should be limited to addressing the criteria proposed under Fed. R. Civ. P. 26(c). While there initially appears to be some appeal in applying 39 CFR 3007.33(a) to documents that do not reach the 39 CFR 3007.33(b) standard, if only for the sake of symmetry, closer scrutiny exposes why doing so would be problematic. First, it would treat the filing of documents by a private party as a proxy for a filing by the Postal Service.<sup>53</sup>

As the Postal Service did not file the documents under seal, however, the alleged basis for assuming that the standard under 39 CFR 3007.33(a), or 39 U.S.C. 504(1)(g)(3)(A), is controlling is neither probable nor clear. The Postal Service’s reliance on a standard under 39 CFR 3007.33(a) and 39 U.S.C. 504(g)(3)(A) could enable it to invoke certain FOIA exemptions, but that approach curtails any weighing of each party’s interests for or against public access to the discovery materials being

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<sup>52</sup> The parties also may be directed, upon resolution of the final criteria, to jointly identify any portions of the pleadings under seal at issue, which must be unsealed consistent with the status of the source information.

<sup>53</sup> The Commission has plainly imposed a duty upon the Postal Service to complete an application for the non-public treatment for such documents as required under 39 CFR 3007.21.

sought for a private complaint case and is unlike Fed. R. Civ. P. 26(c).<sup>54</sup> In explicit contrast, section 504(g)(3)(B), governs in the course of any discovery procedure. It directs that the Commission shall, by regulations under Fed. R. Civ. P. 26(c), “establish procedures for ensuring appropriate confidentiality for information furnished to any party.” 39 U.S.C. 504(g)(3)(B); *see also* 39 U.S.C. 3007.33(b) and 3007.60.

The Postal Service declined to file descriptions of each document marked confidential though required to by an earlier ruling granting it more time.<sup>55</sup> No other meaningful support was provided either until the Postal Service filed its Response in opposition with vague descriptive information on certain classes of documents.<sup>56</sup>

Under these circumstances, the Commission may extend its review of all provisional limitations to public disclosure for consideration under its discovery procedures and other rules, including rule 3007.60. Any test that merely weighs the interests of the Postal Service against (a) the public interest in maintaining the financial transparency of the Postal Service, rather than (b) broader considerations exemplified

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<sup>54</sup> 39 CFR 3007.33(a) appears to track the language in 39 U.S.C. 504(g)(3)(A) on public access requests, but may be treated as though superseded given the adoption of discovery procedures in the present docket, in view of 39 CFR 3030.1, *et. seq.*, and 3007.1 *et seq.* Even if it were prudent to entertain contentions that arise under 39 USC 410(c)(2), at this stage of a complaint case, any rights of secrecy still remain qualified as opposed to absolute. Indeed, the 39 CFR 3007.33(a) standard could appear to similarly require the Postal Service to show some clearly defined and serious harm on a document-by-document basis under rule 21.

The record, therefore, does not adequately favor displacing the standard under Fed. R. Civ. P. 26(c), as no basis for adopting a distinct standard has been soundly supported. Disclosure of materials under any of the 14 classes of documents discussed by the Postal Service has not been shown to pose any serious risk of competitive injury or to violate any other important privacy interest that would not be amply considered under the balancing test under Fed. R. Civ. P. 26(c). *See* Response at 3-4. Departing from the latter also might work an injustice by neglecting either (1) the degree of the requesting party’s need to confer on information likely to lead to admissible evidence with its senior management; or (2) the broader public interest in open judicial proceedings of public character. *Compare Joint Stock Society v. UDV North America, Inc.*, 104 F.Supp.2d 390 (D.Del. 2000) (discussing the benefits of a transparent record supportive of an order.)

<sup>55</sup> *See* P.O. Ruling C2009-1/7 at 2, n.6. (“The Postal Service shall at least include, for each document it contends must remain sealed, such sufficient support as is ordinarily required for documents that it files under seal in the first instance, pursuant to 39 CFR 3007.21.”)

<sup>56</sup> *Compare* Rejoinder at Appendix (under seal).

in the *Arnold* case, appears unduly strained here, if not plainly erroneous.<sup>57</sup> The present Motion and the earlier ruling amply raise the prospect that the protective status might be removed, absent a showing of good cause under Fed. R. Civ. P. 26(c), for this remainder of materials as well. See also 39 CFR 3007.10(b)

Rule 3007.60 provides that “[t]o afford appropriate confidentiality to non-public materials..., the Commission may, based on Fed. R. Civ. P. 26(c): ... (c) [o]rder a specific method for disclosing the non-public materials; ...and (g) [o]rder other relief as appropriate....” 39 CFR 3007.60. In short, 39 CFR 3007.60 clarifies that the Commission may flexibly resolve which standard and which criteria applies on the issue of terminating the non-public treatment of documents filed by a party *other than* the Postal Service. 39 CFR 3007.60 encompasses the balancing test of Fed. R. Civ. P. 26(c), as reflected in PRC Order No. 225.<sup>58</sup>

In effect, GameFly’s Motion requests the removal of the protective conditions. An approach that purports to apply any balancing test that curtails weighing whether

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<sup>57</sup> In some context, were a ruling inclined to construe “financial transparency” broadly, that test could coalesce with the standard under Fed. R. Civ. P. 26(c), but there appears no need to definitively reach that issue here.

<sup>58</sup> In PRC Order No. 225, the Commission explained that its prior deliberations on confidentiality rules required it to broaden the proposed procedures beyond those solely for document filings by the Postal Service. On 39 CFR 3007.60, the explanatory note on PRC Order No 225 reflects, in relevant part:

This rule identifies various limitations on access to non-public materials that may be ordered by the Commission pursuant to 39 U.S.C. 504(g)(3)(B). These limitations, which are generally similar to relief provided by Federal civil courts in discovery disputes under rule 26(c) of the Federal Rules of Civil Procedure include, *inter alia*,...specifying the terms for public disclosure, ordering a specific method of disclosure, restricting to whom the information may be disclosed,..., and such other relief as the Commission deems appropriate.

PRC Order No. 225 at 18. Thus, the standard under Fed. R. Civ. P. 26(c) is expressly recited in the ordering language that establishes 39 CFR 3007.60. In contrast, the balancing test under 39 U.S.C. 504(g)(3)(A) and 39 CFR 3007.33(a) appear to have a narrower purchase. When considering the specific method for disclosure under 39 CFR 3007.60 together with 39 U.S.C. 503, it becomes evident that a presiding officer may exercise discretion to identify the proper standard that governs the outcome of issues, such as those raised here under Fed. R. Civ. P. 26(c).

sharing of the information among litigants would promote fairness and efficiency could lead to appearances that undercut the Commission's neutrality, or worse still, to forum shopping in favor of a judicial court that would ordinarily weigh this factor into the calculus. See 39 CFR 3030.1 *et seq.* This consideration is not entirely new.<sup>59</sup> Thus, under these circumstances, a presiding officer may resolve the present Motion, under rule 3007.60, as discussed below. See 39 CFR 3007.60.<sup>60</sup>

After more comments on the two proposed sets of criteria, and once a determination establishes the resulting sets of criteria to be applied, the parties will be directed to jointly identify which information must remain sealed.<sup>61</sup> For any materials of a status that remains unsettled, the parties are directed to identify the disputed information and file further support. The burden of justifying protection continues to reside with the party substantively asserting it.<sup>62</sup>

Comments by the parties, as well as any interveners or participants, shall be filed within three weeks, following the date of this ruling. Upon finalizing the criteria, a scheduling ruling will provide an additional interval for the resolution of unsealing many materials, and for Gamefly to complete its preparation and file its case-in-chief.

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<sup>59</sup> Rule 3007.60 primarily addresses the Commission's prerogatives following a request for access governed under 39 CFR 3007.40-42. The form of GameFly's Motion and the limited substantiation provided by the Postal Service to justify each document's sealed status, however, permits the Motion to be treated as a request under rule 40, as needed, to end non-public treatment. Rule 3007.60 appears to be more illuminating on the issue than rule 33 here, not only in describing the limits on access to non-public materials, but more vitally here, it explains how these protective limitations on materials filed by GameFly may be removed, absent any showing of good cause by the Postal Service.

<sup>60</sup> Although 39 CFR 3007.60 nominally arises under the header of "[L]imitation on access to non public materials," its provision clarify that it also contemplates the removal or "sunset" of extraneous limitation.

<sup>61</sup> See also n.42, *infra*, at 24. When documents internally generated by the Postal Service appear to reflect postal service analysis of information revealing a proprietary interest of a third party, it may indicate a third kind of information, which is a hybrid of Postal Service and third party information. In such cases confidentiality may be justified under either applicable test.

<sup>62</sup> As these proceedings concern action by the Postal Service, an establishment of the Government, there is even more interest in regulatory transparency than when scrutinizing the alleged misconduct of purely private service providers.

## RULING

1. The Motion of GameFly, Inc. for Order Directing Interested Parties to Show Cause Why Certain Documents and Information Designated as Proprietary by the Postal Service Should Not Be Unsealed, filed September 25, 2009, is granted, in part, and denied, in part, under the legal standards and analysis described in the body of this ruling subject to further proceedings.
2. The decision criteria and specified procedures described in the body of this ruling for determining whether and how documents (or portions thereof) shall be unsealed is certified to the full Commission as it involves an important question of law and subsequent review would be an inadequate remedy.
3. Parties and interested persons may submit comments no later than 21 days from the date of filing of this ruling. The Ruling can be accessed at the Commission's website, [www.prc.gov](http://www.prc.gov).
4. A scheduling ruling that pertains to the date when GameFly must file its direct case will be issued following the determination of the finalized decision criteria. Any modification to the schedule for that purpose will be without prejudice to any party.

Dan G. Blair  
Presiding Officer