

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1

**COMMENTS OF THE UNITED STATES POSTAL SERVICE
IN RESPONSE TO PRESIDING OFFICER'S RULING NO. C2009-1/12
(December 9, 2009)**

On September 25, 2009, GameFly, Inc. filed a motion requesting that the Commission unseal various documents that have been produced by the Postal Service in discovery under protective conditions.¹ After further submissions from the Postal Service, Blockbuster, and GameFly,² the Presiding Officer issued Ruling (POR) No. 12, which proposed a three-category framework for determining appropriate standards by which to unseal information in the relevant documents, pursuant to 39 U.S.C. § 504(g)(3)(B), 39 C.F.R. § 3007.60, and Federal Rule of Civil Procedure 26(c).³ POR No. 12 requested comments on the proposed framework from interested parties within 21 days and certified the matter to the full Commission for consideration. In his subsequent POR No. 13, the Presiding Officer advised that documents subject to three other GameFly motions to unseal would be addressed under the same eventual framework, and so any comments on the POR No. 12 framework should incorporate the

¹ See 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. All citations in this document are to filings in Docket No. C2009-1, unless otherwise noted.

² Third Party Blockbuster's Opposition to GameFly's Motion to Unseal Certain Documents, October 19, 2009; Opposition of the United States Postal Service to the Motion of GameFly, Inc. to Unseal Certain Documents Produced in Discovery (hereinafter "Postal Service Opposition"), October 19, 2009; 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 (hereinafter "GameFly Rejoinder"), October 25, 2009.

³ Presiding Officer's Ruling (No. C2009-1/12) on Motion to Show Cause Why Certain Documents Should Not Be Unsealed, November 18, 2009.

proposed framework's applicability to the documents subject to the motions to unseal at issue in POR No. 13.⁴

With these comments, the Postal Service respectfully requests that the Commission decline the Presiding Officer's interpretation that 39 U.S.C. § 504(g)(3)(B) bears on determinations of public disclosure and not merely, as indicated by its plain language and logic, to production of information between parties in discovery. As for the specific framework that the Presiding Officer proposes for this instance, the Postal Service does not have a specific objection to its guidelines on the basis of commercial sensitivity. However, the Postal Service recommends that the Commission provide an additional criterion for nondisclosure on the basis of the deliberative process privilege, so as to avoid imposing mandatory disclosure on all documents without regard to the contrary public interest.

I. PRODUCTION TO A PARTY UNDER PROTECTIVE CONDITIONS AND PUBLIC DISCLOSURE MAY PROPERLY BE SUBJECT TO DIFFERENT STANDARDS, AS CONTEMPLATED BY 39 U.S.C. § 504(g)(3).

In POR No. 12, the Presiding Officer rejects 39 U.S.C. § 504(g)(3)(A) and rationales for public nondisclosure based on the FOIA or 39 U.S.C. § 410(c) (provisions expressly incorporated in section 504(g)(1)) as having any bearing on documents related to discovery, while interpreting 39 U.S.C. § 504(g)(3)(B) and the balancing test

⁴ Presiding Officer's Ruling (No. C2009-1/13) on Motions to Unseal, December 7, 2009. The underlying motions are Motion of GameFly, Inc., to Unseal Unredacted Version of Seventh Discovery Requests (GFL/USPS-201-211), October 8, 2009; Motion of GameFly, Inc., to Unseal Unredacted Version of Motion to Compel the Postal Service to Answer Discovery Requests (GFL/USPS-84, 85, 99, 100, 109, 117, 122, 151 and 152(d)), October 13, 2009; and Motion of GameFly, Inc., to Unseal Unredacted Version of Eighth Discovery Requests (GFL/USPS-212-213), October 19, 2009. As noted in POR No. 13, the three GameFly motions to unseal certain filed discovery requests, pleadings, or redacted portions thereof primarily pertain to information derived from various documents designated by the Postal Service as confidential. The Postal Service originally provided these source documents, as well as those at issue in POR No. 12, for review by GameFly's outside counsel under a protective order. See PRC Order No. 284, Order Granting, In Part, Joint Motion For Protective Conditions, August 21, 2009.

articulated under Federal Rule of Procedure 26(c) as providing the sole guidance for any dispute over information arising from discovery. The Postal Service respectfully submits that this distinction conflates two separate issues, perhaps due to the uniquely public nature of discovery in Commission proceedings. The distinction also leads to the illogical conclusion that the standards for according confidentiality to Postal Service documents differ based on whether they are originally produced directly to the Commission, or originally produced directly to a party in discovery (who then seeks to make that information public).

In civil litigation, discovery is conducted *between parties*; even a dispute over production may give rise only to *in camera* review, not public disclosure. The purpose of civil discovery is to assist each side in understanding and preparing its case, not to impose a public spotlight on all arguably relevant aspects of a party's business. By contrast, the instant dispute concerns not whether documents are to be *produced* to the propounding party, the Commission, or other interested parties: the Postal Service has already shared all requested documents with GameFly, thereby eliminating the comparability of this context to civil discovery in federal courts. Thus, GameFly's motions clearly do not fall under 39 U.S.C. § 504(g)(3)(B), which concerns whether the Commission may require the "*production of information*" (emphasis added) in response to discovery requests.⁵ Rather, now that the documents have already been produced,

⁵ See also S. Rep. No. 108-318, at 56 (2004); H. Rep. No. 108-672, at 20 (2004) ("The amendment [that would eventually result in 39 U.S.C. § 504(g)(3)(B)] further provides for the possibility of *discovery of such information by private parties* in proceedings under sections 556 and 557 of title 5 and requires the Commission to adopt rules to protect the confidentiality of such information similar to the rules that govern protective orders issued by the federal courts under the Federal Rules of Civil Procedure." (emphasis added)). In discussing this provision, the House Committee report goes further in expressing Congress's intent that the provision should concern inter-party discovery, and encourages the use of protective conditions as a means of protecting the interests of the Postal Service and litigants:

GameFly’s motions seek the public disclosure of those documents.⁶ In other words, GameFly is seeking a Commission determination that it is appropriate to “publicly disclos[e] relevant information in furtherance of its duties under [title 39, United States Code].” “[T]he appropriate degree of confidentiality” for such a task is expressly governed by 39 U.S.C. § 504(g)(3)(A). Because the *public exposure* of internal Postal Service communications is what is at stake, and not the production of those communications in discovery, it is far from “unduly strained” or “plainly erroneous,” in the Presiding Officer’s words, to consider the FOIA exemptions that would typically govern such public disclosures, at least as a preliminary matter to be weighed against the public interest in financial transparency as established by 39 U.S.C. § 504(g)(3)(A).

In sum, a Commission determination on disclosure of Postal Service information to the public at large, as by posting on the Commission’s website, is governed by 39 U.S.C. § 504(g)(3)(A), on terms that weigh the typically applicable exemptions to public disclosure against public transparency interests. A Commission determination on disclosure to a requesting party in discovery is governed by 39 U.S.C. § 504(g)(3)(B),

The Committee recognizes that, in the past, specifically identified commercially sensitive information has been made *available to parties* – including the Postal Service’s competitors – during litigation by using protective conditions. Such conditions would protect the sensitive commercial nature of the information while *allowing the competitors’ agents full access* to the information to make their case. The new subsection 504(g) of title 39 will allow the Postal Service to protect information recognized in past proceedings as sensitive.

H. Rep. No. 108-672, at 20 (emphasis added). Thus, the legislative history of 39 U.S.C. § 504(g)(3)(B) clearly supports its construction as setting out the terms for confidentiality as against a party in discovery, not as against the public at large.

⁶ Crucially, GameFly’s strategic paraphrasing of 39 U.S.C. 504(g)(3)(B) would appear to extend its reach to any “*information produced in discovery*,” so as to attach the statute to that information forevermore, even after the information has been produced and any analogy to civil discovery is exhausted. GameFly Rejoinder at 10. The chief language in the actual statute, however, ties the Commission’s regulations under Federal Rule 26(c) to the act of “*production of information*” in discovery itself. Even the final sentence of 39 U.S.C. § 504(g)(3)(B), which elaborates on the first sentence, relates to “confidentiality for information” only as that information is “furnished to any party.” To the extent some ambiguity might still be argued to reside in that second sentence, as discussed in the text below, proper interpretation of the statute clearly indicates that that provision was not intended to serve as the basis, or at least the sole basis, by which the Commission would determine whether it is appropriate to place Postal Service information on the Commission website.

on terms that follow the Federal Rules of Civil Procedure with respect to inter-party discovery. The instant situation no longer concerns the latter, and so 39 U.S.C. § 504(g)(3)(B) is flatly inapposite. Because GameFly's motions concern the public posting of information filed under seal, they must be evaluated under 39 U.S.C. § 504(g)(3)(A) and due regard given to the FOIA and other statutory bases for nondisclosure.

In the alternative, FOIA exemptions and 39 U.S.C. § 410(c) should not so cavalierly be dismissed, even under 39 U.S.C. § 504(g)(3)(B). To understand paragraph 504(g)(3), one must read it in the full context of 39 U.S.C. § 504(g), and apply that provision so that it is a coherent, rational whole. Subparagraphs 504(g)(3)(A) and (B) function as derogations from paragraph 504(g)(2), which operates in turn within the sphere of information about which the Postal Service has notified the Commission under paragraph 504(g)(1). In other words, before subparagraph 504(g)(3)(B) can come into play at all, the Postal Service must advise the Commission of the bases for nondisclosure of information under the FOIA and/or 39 U.S.C. § 410(c). If Congress had intended the reference to Federal Rule of Civil Procedure 26(c) in 39 U.S.C. § 504(g)(3)(B) to void any consideration of FOIA or 39 U.S.C. § 410(c) standards, then it would not have yoked the former to a provision invoking the latter. Indeed, monolithic reliance on Federal Rule of Civil Procedure 26(c) would be misplaced, because federal courts are not instructed, as the Commission is in 39 U.S.C. § 504(g), to apply such a test in a broader context of a statute that expressly cites FOIA and 39 U.S.C. § 410(c) exemptions. Moreover, to read paragraph 504(g)(1) out of subparagraph 504(g)(3)(B), and thus irrelevant in the discovery context, would produce an absurd result, in that the

amount of information entitled to protection from public disclosure through party-driven discovery under section 504(g)(3)(B) would be potentially narrower than that disclosed in response to Commission requests, which would remain subject to subparagraph 504(g)(3)(A). This would be so notwithstanding the narrower scope of interests at stake in an individual party's complaint and discovery. Thus, even if the principles of 39 U.S.C. § 504(g)(3)(B), and thus Federal Rule of Civil Procedure 26(c), are appropriate to take into account in this public disclosure determination, any weighing of the Postal Service's confidentiality interests should also properly take into account the interests raised in the Postal Service's Opposition with reference to FOIA and 39 U.S.C. § 410(c) principles.

The current protective conditions in no way hinder GameFly's ability to litigate its case fully and fairly. Its legal counsel and other representatives who have accepted the protective conditions have not been denied access to any non-privileged information (or, indeed, to much information which the Postal Service could have potentially sought to withhold as privileged), including all information at issue here.⁷ Nor does such access elude the Commission, its staff, or any interested party that certifies to the Commission's protective conditions. As it stands, the Postal Service respectfully requests that the Commission evaluate POR No. 12 as it applies 39 U.S.C. § 504(g)(3)(B) and Federal Rule of Civil Procedure 26(c) regarding determinations of public disclosure for materials already produced in discovery, to the exclusion of other considerations made relevant under subsection 504(g). The Postal Service requests that the Commission recognize FOIA exemptions and 39 U.S.C. § 410(c) as legitimate

⁷ Indeed, the potential exists that GameFly might prefer protection of its own commercially sensitive information from public disclosure when and if its direct case is subject to civil discovery later in this docket.

bases for non-disclosure, alongside the factors in Federal Rule 26(c), when determining whether to make publicly available information previously produced in discovery.

II. THE PRESIDING OFFICER'S PROPOSED FRAMEWORK IS GENERALLY ACCEPTABLE IN TERMS OF PROTECTING PROPRIETARY COMMERCIAL INFORMATION.

The Postal Service now turns to the specific unsealing framework proposed by the Presiding Officer, in the event that the Commission declines to reconsider the Presiding Officer's underlying statutory interpretation or finds it not to have a material impact on the proposal's contours. Notwithstanding the Presiding Officer's refusal to grant any weight to arguments couched formally in terms of Freedom of Information Act (FOIA) Exemption 4 or 39 U.S.C. § 410(c)(2), the Presiding Officer's proposed framework continues to raise concerns as to the commercial interests expressed in the Postal Service's Opposition.⁸ The framework would expose to public scrutiny a fair amount of customer information beyond what customers reasonably expected when the information was shared. It is difficult to imagine, for instance, that Postal Service customers have a lower expectation of confidentiality when sharing data expressed in percentages rather than absolute numbers, or information shared before, as opposed to after, an arbitrary date such as November 8, 2007. Accordingly, the Postal Service is quite wary of the potential chilling effect that the proposed scope of public disclosure could have on its relations with customers.

Nevertheless, in the interest of constructive furtherance of the pending litigation, should that be necessary, the Postal Service does not propose any specific changes to the Presiding Officer's proposed framework, to the extent that it seeks to determine the extent of public availability for information based on commercial sensitivity. The Postal

⁸ See Postal Service Opposition at 5-8, 10.

Service emphasizes, however, that this acceptance is limited to the particular circumstances of this case, and should not be understood as concurrence as to any such framework in another context or proceeding. Indeed, considering the relative newness of both the complaint process, revamped as a result of the Postal Accountability and Enhancement Act of 2006 (PAEA), and the confidentiality procedures promulgated under the likewise revamped 39 U.S.C. § 504(g), the Commission should also recognize that this framework is a work in progress and may be of limited utility in future scenarios.

III. THE CRITERIA SHOULD PROTECT LEGITIMATE PUBLIC INTERESTS IN PUBLIC NONDISCLOSURE PURSUANT TO THE COMMON-LAW DELIBERATIVE PROCESS PRIVILEGE.

Whether the Commission proceeds on the basis of 39 U.S.C. § 504(g)(3)(B) or (A), the Postal Service respectfully proposes that the Commission extend recognition to a venerable and legitimate basis for limiting information access to those bound to comply with protective conditions. Although it is sometimes conflated with FOIA Exemption 5, which incorporates it in the FOIA context, courts have historically recognized the government's legitimate interest in limiting access to predecisional and deliberative internal communications, including in civil discovery.⁹ The privilege has been traced to the executive privilege articulated in early American cases and even to the crown privilege in English common law.¹⁰ In one frequently-cited example of the

⁹ Indeed, FOIA Exemption 5 incorporates the deliberative process privilege *because*, like the attorney-client privilege and the attorney work product doctrine, it covers records that “would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). Thus, while the extensive discussion of the privilege in FOIA case law is illustrative, and the citations at page 11 the Postal Service's Opposition were intended as such, the privilege fundamentally sounds in the common law of civil procedure.

¹⁰ Russell L. Weaver and James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 283 & fn. 24, 284 & fn.36 (1989) (discussing judicial opinions, the Field Code, Attorney General opinions, and statutes from 1790 to 1960); see also 1 MCCORMICK ON EVIDENCE § 108 (6th ed. 2009) (“At the time of the

pre-FOIA deliberative process privilege, the United States Court of Claims declined to compel the General Services Administration to divulge a document to the opposing party in litigation, reasoning that public policy disfavored the airing of “intra-office advice on policy . . . that every head of an agency or department must rely upon for aid in determining a course of action or as a summary of an assistant’s research.”¹¹

Presaging one public policy argument articulated in later FOIA case law, the court opined that

[f]ree and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen.¹²

Thus, while government transparency may generally be in the public interest, disclosure can also work contrary to the public interest where it would hinder the free, frank internal discussion necessary for sound decision-making and governance.¹³

Another recognized interest behind the privilege is the need to protect against public confusion that could result from disclosure of reasons, rationales, and documents that did not coalesce into the governmental entity’s actual, eventual decision.¹⁴ For

enactment of the original federal FOIA in 1966, there was clearly some protection extended by the courts to sensitive government information which did not constitute a military or diplomatic secret. Thus, a qualified common law privilege protected some aspects of government agency policy deliberations[.]”).

¹¹ *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 945 (Ct. Cl. 1958).

¹² *Id.* at 945-46.

¹³ See also *Nat’l Labor Rels. Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1976) (citing pre-FOIA cases that “uniformly rest the privilege on the policy of protecting the decision making processes of government agencies . . . and focus on documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated” (internal quotation marks and citations omitted)).

¹⁴ See, e.g., *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (“[In addition to encouraging internal discussion, the deliberative process privilege] protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had

example, a document implicated in interrogatory GFL/USPS-202 is a draft Standard Operating Procedure that was discussed internally but never adopted. If this document, or documents of a similar nature, were to be disclosed as a result of the Commission's eventual framework for unsealing, the Postal Service believes that the document's public appearance would create a substantial risk that it could be taken out of context and misunderstood as reflecting adopted Postal Service policy, when the reverse is in fact correct. As courts have recognized, "officials should be judged by what they decided, not for matters they considered before making up their minds."¹⁵

The Postal Service respectfully submits that the Commission's focus on Federal Rule 26(c) should not blind it to the presence of other bases for withholding materials in civil discovery, or to the palpable and legitimate public interests that may be at stake beyond the Postal Service's or its customers' more parochial commercial interests. Thus, the Postal Service recommends that the Commission add a third criterion by which information falling within the Presiding Officer's second and third categories may remain subject to protective conditions: *information that is predecisional and deliberative in nature, such that public disclosure would be counter to public policy interests.*

Although many, if not most, of the documents at issue here could be argued to fall within the deliberative process privilege in some way, the Postal Service would observe the following conditions for purposes of this litigation. First, the deliberative process privilege typically does not apply to factual information, as distinct from opinions and other deliberative content, except where the former is inextricably intertwined with the latter. Second, in the process that the Presiding Officer has set forth, the Postal

actually been settled upon."). Although *Russell* arose in the context of the FOIA, the explanation of policy rationales for the privilege obviously applies just as well outside of the FOIA context.

¹⁵ *Id.* (citing *Jordan v. Dep't of Justice*, 591 F.2d 753 (D.C. Cir. 1978)).

Service will meet and confer with GameFly to apply the criteria in a constructive manner, and any impasse will be submitted to the Commission for an ultimate determination as to public disclosure. Finally, the Postal Service fully intends to take a good-faith and particularized approach to asserting claims of deliberative process privilege against public disclosure, with a liberal approach toward waiver except where information presents a sincere risk of compromising one of the public interests underlying the privilege.

The two criticisms GameFly asserts are inapposite.¹⁶ First, it should be noted that in the interest of cooperatively enabling GameFly and other participants to develop their understanding of the case, the Postal Service has made controlled disclosures to those parties under protective conditions; despite GameFly's contention at page 29 of its Rejoinder, this limited, collaborative disclosure should not translate into unfettered public broadcasting for all such documents. Were that the case, then the public interests underlying the privilege might have led the Postal Service to resist any production of a larger scope of documents to GameFly, thereby chilling the parties' ability to cooperate on discovery and GameFly's ability to develop its case.¹⁷ The production of potentially privileged documents to a litigant under protective conditions, in a spirit of cooperation, should not be equated with unfettered public disclosure, such that both are considered to be an equivalent waiver of the privilege; a contrary rule would simply lead to a more contentious discovery process.

¹⁶ GameFly Rejoinder at 29-30.

¹⁷ In essence, GameFly seeks to have it both ways: it favors a second application of civil discovery standards like Federal Rule 26(c) in determining public disclosure after *inter partes* production, yet claims that a civil discovery privilege may not be asserted against public disclosure once the documents were produced, under appropriately protective conditions, *inter partes*. It should be stressed that the public interests underlying the deliberative process privilege – particularly the prevention of public confusion – are all the more palpable in the context of a generalized, uncontrolled public disclosure.

Second, GameFly's attempt to raise the specter of government misconduct to dispel the privilege is circular and overbroad. By definition, a complaint against the Postal Service is alleging some form of government misconduct. This should not merit the wholesale disregard for the legitimate public interests behind public nondisclosure of predecisional, deliberative documents, including those that do not necessarily conform to GameFly's theory of misconduct. As articulated by the U.S. District Court for the District of Columbia, the government misconduct exception to the privilege does not apply where the proponent of the exception simply "relies on unverified allegations it made in its complaint."¹⁸ Should the Commission accept the Postal Service's proposal not to rule out the applicability of the deliberative process privilege, then perhaps the opportunity might arise for GameFly to present such particularized arguments for the exception in the event of a specific impasse. At this juncture, however, the presence of the exception does not warrant the total disregard for the possibility of legitimate assertion of the privilege.

IV. CONCLUSION

In sum, the Postal Service respectfully requests that the Commission reconsider the Presiding Officer's interpretation that 39 U.S.C. § 504(g)(3)(B) extends beyond the actual production of information in discovery and into the public disclosure sphere more properly governed by 39 U.S.C. § 504(g)(3)(A). In any case, the Postal Service accepts, for purposes of this aspect of the instant proceeding, the Presiding Officer's proposed framework for determining the basis for continued protective conditions on documents implicated by GameFly's motions. However, the Postal Service proposes that the Commission incorporate the longstanding civil discovery privilege for agency

¹⁸ Tri-State Hosp. Supply Corp. v. United States, 226 F.R.D. 118, 135 (D.D.C. 2005).

deliberations in order to protect the legitimate public interests underlying the privilege with respect to certain documents.

Respectfully submitted,

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