

ORDER NO. 381

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

Before Commissioners:

Ruth Y. Goldway, Chairman;  
Tony L. Hammond, Vice Chairman;  
Mark Acton;  
Dan G. Blair; and  
Nanci E. Langley

Complaint of GameFly, Inc.

Docket No. C2009-1

ORDER AFFIRMING  
PRESIDING OFFICER'S RULING C2009-1/12

(Issued January 7, 2010)

I. INTRODUCTION

P.O. Ruling C2009-1/12 (Ruling 12) establishes a three-part test to resolve GameFly's earlier motion to show cause why certain documents designated confidential and filed should not be unsealed.<sup>1</sup> That ruling also certifies the question over the proper final criteria for the full Commission's determination, following comments.<sup>2</sup> While this order substantially affirms the proposed criteria, it also clarifies the proper interpretation,

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<sup>1</sup> 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 (Motion).

<sup>2</sup> Ruling 12, at 3, n.5, *citing* Motion.

application, and effects of the final criteria in view of the issues presented by the comments.

The proposed three-part test set out in Ruling 12 was formulated in accordance with Fed. R. Civ. P. 26(c). The Presiding Officer stated that:

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.

*Id.* at 19. Under the sets of criteria developed in that ruling, a genuine need for confidentiality must be shown. *Id.* Moreover, 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 Presiding Officer recognized that this controversy is the first time that interpretation of the Commission's new rules on treatment of confidential information is required. By allowing further comments, he also provided the Postal Service and interested private entities with a second chance to elaborate on any justification for continuing protection. This step also permits full Commission consideration, in view of the legal standards of 39 U.S.C. 504(g)(3) and Rule 26(c), of any deficiencies in the proposed criteria.

## II. COMMENTS

### A. Comments of the Postal Service

The Postal Service claims that the ruling improperly extends 39 U.S.C. 504(g)(3)(B) beyond the production of information strictly between parties in discovery to determinations of public disclosure. It raises no specific objections to the criteria on the basis of commercial sensitivity, but requests that the proposed criteria permit continuing protection on the basis of deliberative process privilege.<sup>3</sup>

The Postal Service's comments: (a) urge that 39 U.S.C. 504(g)(3)(A) applies more closely to the motion on public disclosure than 39 U.S.C. 504(g)(3)(B); (b) accept the criteria, if limited to this case, for ascertaining what remains highly confidential as formulated in Ruling 12;<sup>4</sup> and (c) supports extending the proposed criteria to permit claims of the deliberative process privilege for intra-agency deliberations.

The Postal Service questions the basis for favoring a balancing test of Fed. R. Civ. P. rule 26(c) pursuant to 39 U.S.C. 504(g)(3)(B), in place of the test set forth in 39 U.S.C. 504(g)(3)(A), particularly when it would yield a result contrary to rationales for public nondisclosure based on the Freedom of Information Act (FOIA) or 39 U.S.C. 410(c) provisions included in 39 U.S.C. 504(g)(1). *Id.* It also goes to some lengths to differentiate (a) public disclosure, and (b) discovery between parties, and contends the former resides outside the scope of 39 U.S.C. 504(g)(3)(B) that concerns "production of information" for discovery requests. It traces its interpretation of the statutory scheme to the legislative history. *Id.* at 3-4, n.5, *citing* S. Rep. No. 108-318, at 56 (2004); H. Rep. No. 108-672, at 20 (2004). It reasons that reliance upon 39 U.S.C. 504(g)(3)(B) is misplaced since the instant situation no longer concerns inter-party

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<sup>3</sup> Comments of the United States Postal Service in Response to Presiding Officer's Ruling 12, December 9, 2009, (Postal Service Comments) at 2.

<sup>4</sup> To describe the limited information presently under seal worthy of continuing protection, the ruling and this order use the phrase "highly confidential", rather than merely "confidential," as all disputed documents bear the label of confidential.

discovery. It contends that public disclosure should be governed instead under 39 U.S.C. 504(g)(3)(A), on terms that “weigh typically applicable exemptions to public disclosure against public transparency interests.” *Id.* at 4.

Alternatively, the Postal Service relies on the structure of 39 U.S.C. 504(g) to revive FOIA exemptions and 39 U.S.C. 410(c) here. *Id.* at 5. It adds that Congress could not have intended to foreclose consideration of FOIA exemptions or standards of 39 U.S.C. 410(c) under this structure, and that the Commission’s mandate departs in this respect from the procedures of the Federal courts. *Id.* Emphasizing that the materials have already been produced in discovery, it requests the order recognize FOIA exemptions and 39 U.S.C. 410(c) as legitimate bases for non-disclosure to the public, alongside Fed. R. Civ. P. rule 26(c). *Id.* at 6-7.

Turning to the proposed criteria, the Postal Service submits that the framework could damage its commercial interests particularly because it would “expose to public scrutiny a fair amount of customer information beyond what customers reasonably expected when the information is shared.” *Id.* at 7. It maintains that it is unlikely that its 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.” *Id.*

Despite the “potential chilling effect,” 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.” *Id.* It explains that while it takes this posture in this case, “in the interest of constructive furtherance of pending litigation,” this does not signify its concurrence in applying the framework in another proceeding. *Id.* at 7-8.

Additionally, the Postal Service urges that the criteria should protect legitimate public interests in public nondisclosure pursuant to the common-law deliberative process privilege. *Id.* at 8. It clarifies that the origins of the deliberative process

privilege are traceable to common law, and shows that the privilege is not solely the product of FOIA statutes, even though the common law privilege for pre-decisional information was further codified as FOIA Exemption 5. *Id.* at 8-9. It cites pre-FOIA case law that cautions that public disclosure can also work contrary to the public interest where it would hinder the free and frank internal discussion necessary for sound decision making and governance. It suggests the privilege would exempt from disclosure a wide range of materials that did not support the Postal Service's actual, eventual decision. *Id.* at 9-10, *citing* as an example GFL/USPS-202. Consistent with Fed. R. Civ. P. 26(c), the Postal Service requests the Commission to protect information that is pre-decisional and deliberative in nature, since public disclosure would be counter to public policy interests. *Id.* at 10.<sup>5</sup>

#### B. Comments of GameFly

GameFly contends that the proposed criteria are generally consistent with the appropriate balance of private and public interests in this case; however, it submits that the Commission should draw appropriate inferences from the failure by those with the duty to make the requisite showing that unsealing of particular documents would result in material commercial injury.<sup>6</sup> It asserts that since neither the Postal Service nor Blockbuster has complied with duties to make such a particularized showing, any objections to public unsealing have been waived, and the sealed information about the Postal Service, Netflix, and Blockbuster "should be unsealed forthwith." *Id.* at 2.

GameFly first substantiates that the standard and criteria set forth in Ruling 12 properly apply Fed. R. Civ. P. rule 26(c), instead of other standards that include FOIA or 39 U.S.C. 410(c)(2), but raises one significant omission. They "fail to establish appropriate remedies or sanctions when a participant or third party that seeks to keep

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<sup>5</sup> The Postal Service would limit the reach of the privilege in that it does not typically apply to factual information unless it is inextricably intertwined with deliberative content. *Id.* at 10-11.

<sup>6</sup> Comments of GameFly, Inc., in Response to Presiding Officer's Ruling No. C2009-1/12, December 9, 2009, at 1 (GameFly Comments).

information under seal flouts a specific directive by the Commission to make the required showing of commercial or competitive injury.” GameFly Comments at 3 and 7.

GameFly clarifies that while it believes Fed. R. Civ. P. rule 26(c) supplies the relevant standard of decision, the Commission’s determination should take into account further considerations. As to the test on DVD mailers other than Netflix and Blockbuster, GameFly “consents to continued protection for the information,” yet requests that it be allowed to disclose material with the consent of the third party whose information is at issue. *Id.* at 3. As to the test for evaluating documents that concern Netflix or Blockbuster, GameFly concurs with the proposed criteria while reminding that commercial information other than a trade secret is not likely to warrant protection without further regard to six special factors often applied by courts.<sup>7</sup>

GameFly suggests one aspect of the proposed criteria for the second group of documents needs to be clarified. It would exclude Postal Service’s costs from the materials eligible for protection under the category of “[c]ompany financial data, production data, or market research.” *Id.* at 5. GameFly explains that the services at issue are market dominant, the rates are uniform and public, and that they merely disclose the Postal Service’s costs of serving individual DVD rental companies. As such they would not inflict any harm on anyone. *Id.* at 6. GameFly supports the proposed criteria for the remainder of the documents that include the Postal Service’s internal records. It states that the proper definition of “highly confidential” ensures that “only competitively sensitive information will be protected.” *Id.* at 6-7.

Apart from the standard and criteria, GameFly claims that Ruling 12 falls short by failing to grant the relief GameFly sought since the Postal Service flouts a specific

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<sup>7</sup> *Id.* at 4. At the same time, GameFly supports the definition of “highly confidential” information, as it accords with precedents limiting the range of information that is eligible for protection. *Id.* at 5. It also concurs that such commercial information may be tested by its vintage, or the degree of its staleness, vis-à-vis current harm truly threatened, as proposed. *Id.* at 5, citing *United States v. IBM*, 67 F.R.D. 39, 49 (S.D.N.Y. 1975) and *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d. 157, 167 (3d Cir. 1993).

directive to make the required showing of injury. *Id.* at 7. It recounts the point that the Postal Service was obliged to show commercial injury specifically for each document that it wishes to keep under seal. *Id.*

GameFly adds that this “failure of proof cannot be excused on the theory that the obligation to make a document-by-document showing of commercial injury was unknown or not established.” *Id.* at 9. It concludes that the party opposing unsealing has a duty to show commercial or competitive injury. *Id.* at 9-10. Moreover, GameFly submits that the more rigorous sanctions may be imposed when the defaulting party is the government, but that Ruling 12 “effectively gives the Postal Service, Netflix and Blockbuster an unmerited regulatory mulligan.” *Id.* at 11.

Because that ruling did not reach the remedy of public disclosure by default, GameFly foresees additional discovery proceedings that will unavoidably delay the entire case unfairly to the Postal Service’s benefit. GameFly urges that without further delay, the Commission should find that the objections to unsealing have been waived.<sup>8</sup>

### C. Comments of the Public Representative

The Public Representative also generally endorses the Presiding Officer’s tests for determining what material should be unsealed.<sup>9</sup> He also raises specific areas of concern where caution may be necessary. *Id.* at 1.

After citing the categories of documents, the Public Representative observes that the first set of documents, concerning DVD mailers other than Netflix and Blockbuster, will have the strongest protection applied, as it has already been subject to an agreement between the parties on the proper redacted form. *Id.* at 2. He also observes

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<sup>8</sup> GameFly also seeks to have the final criteria established by the Commission applied to all documents currently filed under seal. *Id.* at 12. P.O. Ruling C2009-1/13, issued on December 7, 2009, properly provided for the standard to be applied to all pending motions.

<sup>9</sup> Comments of the Public Representative on Presiding Officer's Ruling C2009-1/12, December 9, 2009, at 4.

with general approval the proposed standard for the category of documents that concern Netflix and Blockbuster. Yet, he also points out that criteria for the remaining category are “the least clear cut of the group.” *Id.* at 2.

The Public Representative, after noting that “the proposed standards are adequate,” observes that “[a]t the heart of discrimination cases is the documentary evidence of decisions made and not made.” He explains that the merits on the Postal Service’s behavior will turn on the “evidentiary record.” *Id.* at 3. He urges that “[f]or documents that concern the Postal Service alone, Fed. R. Civ. P. 26(c) should be used to unseal evidence that will build the evidentiary record while not harming the Postal Service’s competitive position.” *Id.* (noting also that the products at issue are market dominant ones).

The Public Representative suggests that the “Commission may want to divide certain documents into sections before applying the separate tests”, for documents with both Group 2 and Group 3 characteristics. He adds that “[d]ocuments where the Postal Service comments on Netflix or Blockbuster material may contain material confidential under group 2 but not group 3, and vice versa. *Id.*

#### D. Comments of United Parcel Service

United Parcel Service (UPS) also filed a set of comments.<sup>10</sup> UPS notes that the proposed criteria for Postal Service materials that do not contain any third party information “refer to data concerning competitive products, including costs, revenues, volumes, and cost allocation methodology.” *Id.* at 1. It observes that the Commission has not yet addressed the extent to which competitive product information may be withheld from the public. It contends that this order should forbear from any premature disposition of such an important issue, in a case that that has no close relation to competitive products. *Id.* In view of other dockets, UPS cites the need to brief the

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<sup>10</sup> Comments of United Parcel Service in Response to Presiding Officer's Ruling on Motion to Show Cause Why Certain Documents Should Not Be Unsealed, December 9, 2009.

question more fully in view of other dockets. *Id.* at 2. It urges that any order should carefully refrain from predisposing the question “regarding the public or non-public nature of competitive product data.” *Id.*

E. Comments of Netflix

On December 17, 2009, Netflix, Inc (Netflix) filed comments.<sup>11</sup> Netflix explains its concerns as follows:

GameFly implies that Netflix is a ‘putative’ beneficiary of continued secrecy in this proceeding ..., when GameFly knows full well that Netflix has never opposed the unsealing of any materials in this proceeding, and has never argued that their publication would result in injury to Netflix. GameFly refers to the ‘objections of the Postal Service, Blockbuster and Netflix to public unsealing of the documents as identified in GameFly’s September 25 Motion....’ *Id.* at 2. Netflix has never filed any objection to unsealing documents, [and] has never requested that documents be sealed....

Netflix Comments at 1. Netflix further clarifies that: “[i]t is not within Netflix’s power to compel the Postal Service to divulge information in its files; and Netflix certainly has not caused these nondisclosures.” *Id.* at 2. It raises several points to indicate that GameFly’s comments are inaccurate or misleading.

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<sup>11</sup> Response of Netflix to Comments of GameFly, Inc, in Response to Presiding Officer’s Ruling No. C2009-1/12, December 17, 2009 (Netflix Comments). The schedule did not provide for responsive comments, however no party has objected and the Commission will consider Netflix’s views. *Compare* Reply of GameFly, Inc., to “Response” of Netflix to GameFly Comments on Presiding Officer’s Ruling No. C2009-1/12, December 23, 2009. This order also grants the Motion of GameFly, Inc., for Leave to File Reply to “Response” of Netflix to GameFly Comments on Presiding Officer’s Ruling No. C2009-1/12, December 23, 2009.

F. Other Comments Filed by MMA Vault, Mr. Branda, and Butler Mailing Services

An informal statement was filed by counsel on behalf of John A. Branda.<sup>12</sup> As a party to another suit against the Postal Service, Mr. Branda urges that the public interest would be served if the Commission made public all the information that can legitimately be made public, to obviate “relitigating discovery of documents and information that should be made public for all.” *Id.*

MMA Vault, Inc. filed comments that describe its business model as “similar to that of Netflix and GameFly, except that we focus on mixed martial arts videos”<sup>13</sup> It supports the “broadest possible public unsealing” of document, subject to continuing confidential treatment of only truly commercially sensitive information that would risk competitive injury. *Id.*

Similarly, Butler Mailing Services Inc. (BMS) filed comments that concern techniques used to reduce the high rate of DVD breakage arising from automated letter processing, and conveys its support for unsealing to the maximum extent possible.<sup>14</sup> BMS asserts that over-designating information as confidential prevents small

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<sup>12</sup> Comments of John A. Branda, December 9, 2009. Mr. Branda is a plaintiff seeking recourse against the Postal Service for wrongful termination in the courts of Washington state.<sup>12</sup> The employment case concerns a set of circumstances that may stem from facts related to the alleged special relationship between the Postal Service and Netflix. He submits that “[w]hether the Postal Service has a secret policy of preferential treatment for Netflix is likely to be a central issue” in that suit.

<sup>13</sup> Comments of MMA Vault Inc. in Response to P.O. Ruling C2009-1/12, December 9, 2009, at 1 (MMA Vault Comments). As with other DVD rental mailers, it shares an interest in the complaint, expends resources to reduce the high rate of DVD breakage arising from automated letter processing, and conveys its frustration with favoritism received by Netflix, including manual culling and processing of DVD mailed at First-Class letter rates without a non-machinable surcharge. *Id.* at 1.

<sup>14</sup> Comments from Butler Mailing Services in Response to P.O. Ruling C2009-1/12, December 10, 2009 (BMS Comments). The accompanying motion to accept late filing is granted. See Motion for Late Acceptance of Comments from Butler Services, December 10, 2009.

businesses from reviewing what special treatment the Postal Service is providing selected companies in the disk mail industry. *Id.* at 2.<sup>15</sup>

### III. COMMISSION ANALYSIS

Following GameFly's Motion, the Presiding Officer's ruling established a three-part test for evaluating what materials should remain subject to protective conditions. That ruling indicated that the information would be evaluated under separate criteria depending upon whether it contains: (a) potentially sensitive information about mailers other than Netflix and Blockbuster; (b) potentially sensitive information about Netflix or Blockbuster, or both; or (c) other potentially sensitive information such as certain highly sensitive Postal Service documents.

The Commission hereby affirms the legal standard applied in Ruling 12, and affirms the three-part criteria subject to certain minor clarifications stated below.<sup>16</sup>

#### A. The Legal Standard Adopted in Ruling 12 is Affirmed

The Postal Service challenges the statutory basis for invoking Fed. R. Civ. P. rule 26(c) as the proper legal standard. The Postal Service indicates that "[s]ubparagraphs 504(g)(3)(A) and (B) functions 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)." Postal Service Comments at 5.

The Postal Service legislative interpretation arguments are not persuasive. Subsection 504(g)(3)(A) by its specific terms applies to the information filed by the

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<sup>15</sup> BMS asserts that undue secrecy impedes it from verifying (1) whether the Postal Service is discriminating against small companies, (2) whether there is any valid justification, and (3) whether the discrimination could be remedied. *Id.* Elsewhere, BMS urges that a "reduction in DVD breakage rates would make the disc mail a more attractive medium of communication by mail" and "that in turn would increase the volume and revenue for the Postal Service." *Id.* at 2-3.

<sup>16</sup> The reasoning underlying the order is the same as that expressed in the ruling, except as noted below. See *generally* P.O. Ruling 12 at 2 and 16-32.

Postal Service with the Commission. Subsection 504(g)(3)(B) concerns requests for information during the discovery stage of adversarial cases. Furthermore, subpart 504(g)(3)(A) addresses public disclosures prior to development of appropriate Commission rules on the treatment of confidential information. The Commission has established such rules, at 39 U.S.C. 3007.1, *et seq.* Thus, the proper standard for determining access to documents in the discovery phase of a complaint case is more aptly resolved under the broader balancing test in 39 U.S.C. 504(g)(3)(B), and Fed. R. Civ. P. rule 26(c).

The Postal Service overlooks that section 504(g)(1) presupposes conditions that do not arise here in a strict sense. It presumes that the Postal Service “shall, at the time of providing such matter to the Commission, notify the Commission in writing, of its determination.” 39 U.S.C. 504(g)(1). The Postal Service neither provided such matter to the Commission directly nor notified the Commission of the basis for its determination at the time the materials were filed. Indeed, it refrained from asserting any basis for its designations of confidentiality at all, under section 410(c), until GameFly filed its Motion to show cause.

In short, the narrower balancing test of 504(g)(3)(A) was effectively designed to be provisional and has now been superseded at least for discovery in complaint cases before the Commission.

Indeed, by June 19, 2009, the Commission had adopted regulations that establish a procedure for according appropriate confidentiality to information identified by the Postal Service or by third parties as confidential. See Order No. 225 at 1. Those rules plainly envision requests for access to documents previously identified as confidential during discovery. See 39 CFR 3007.40. Such requests may be properly made by a litigating party on behalf of itself or the public for the removal of protective conditions. See *also* 39 CFR 3007.60.

This controversy arises from a request of a complainant, GameFly, for authority to show purportedly confidential documents to its principal officers so that they can participate in preparing direct evidence. In Ruling 12, the presiding officer explained that “any balancing test that curtails weighing whether sharing of the information among litigants would promote fairness and efficiency could lead to appearances that undercut the Commission’s neutrality....” Ruling 12 at 31-32. The Commission agrees with the Presiding Officer.

The ruling reasons that “[t]he 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 sought for a private complaint case and is unlike Fed. R. Civ. P. 26(c).”<sup>17</sup>

The Postal Service offered these same arguments in Docket No. RM2008-1 to argue proposed Commission rules did not provide sufficient protection for documents the Postal Service views as commercially sensitive. The Commission carefully reviewed these contentions, and rejected them in Order No. 225, finding that:

39 U.S.C. 504(g)(1) provides that the Postal Service may determine “that any document or other matter it provides to the Postal Regulatory Commission” is exempt from public disclosure under 39 U.S.C. 410(c) or 5 U.S.C. 552(b). Under 39 U.S.C. 504(g)(3)(A), the Commission may not publicly disclose materials claimed to be nonpublic by the Postal Service unless it “has adopted regulations under

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<sup>17</sup> P.O. Ruling C2009-1/12 at 29-30, n.54 (“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”).

section 553 of title 5, that establish a procedure for according appropriate confidentiality....”

Order No. 225 at 4. Similarly, 39 U.S.C. 504(g)(3)(B) allows the Commission to develop procedures to require production of materials initially claimed to be confidential. The standards set out in Ruling 12 properly apply section 504(g)(3)(B) in this complaint case. They separately weigh all factors for and against the removal of conditions protecting information depending on whether the materials relate to either the Postal Service or to a party or parties other than the Postal Service.

The Postal Service asserts that “[t]he 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 disclosure public).” Postal Service’s Comments at 3. However, the crux of the distinction is that here the information is sought by GameFly for its use in a complaint case. The Commission is not considering making regularly filed information public simply to provide normal levels of transparency.

All considerations support the applicability of the standards of Fed. R. Civ. P. rule 26(c) to parties in litigation. The Postal Service contends that the expectations of its customers will be dashed. See Postal Service Comments at 7 and 8-9. But Ruling 12 preserves the confidentiality of highly confidential third-party data. See *also* Netflix Comments.

## B. The Deliberative Process Privilege

The Postal Service submits that “the presiding officer’s proposed framework is generally acceptable in terms of protecting proprietary commercial information.”<sup>18</sup> It questions if the proposed set of criteria for the third set of documents, those that do not concern any DVD mailer, is complete. Specifically, it contends that unsealing would be premature “when many, if not most of the documents at issue here could be argued to fall within the deliberative process privilege in some way...” Postal Service Comments at 10.

Ruling 12 states at 19 that:

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.

However, no information is privileged without an additional showing that disclosure would be contrary to the public interest. The deliberative process privilege claim must be made in a timely manner with clear support that the information is both pre-decisional and deliberative.<sup>19</sup> Only those portions of a pre-decisional document that

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<sup>18</sup> Postal Service Comments at 7. As it is aware that future determinations may be implicated, it adds that it does not concur to such a framework in another context or proceeding. *Id.* at 8. This order hereby concludes instead, however, that the final criteria should be the starting point for evaluating the specific factual situation in subsequent controversies.

<sup>19</sup> The basic policy underlying the privilege is to prevent chilling the flow of candid communications from subordinate to supervisor or from peer to peer. The Postal Service’s correspondence with an outside party and ‘external memoranda’ would not fall within the ambit of the deliberative process privilege. *Levy v. U.S. Postal Service*, 567 F.Supp.2d 162, 166-67 (D.D.C. 2008) (noting that the purpose of the privilege “is to prevent injury to the quality of agency decisions.”).

reflect the give and take of the deliberative process may be withheld. *See Public Citizen, Inc. v. Office of Management and Budget*, 569 F.3d 434, 444 (D.C. Cir. 2009) *citing Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1195 (D.C. Cir.1991).<sup>20</sup>

In the instant case, the defense against allegations of unfair discrimination is unusual in that the Postal Service relies on the contention that its decision-making, in substantial part, was left or delegated to personnel in the field. Most theories of liability and defenses presume a top-down decision structure, and the body of law on the deliberative process privilege has developed primarily in top-down contexts. *See, e.g.*, Postal Service Comments at 9, n.11, and accompanying text.

If anything, this professed delegation of authority raises the bar still further for the Postal Service to satisfy the ordinary burdens on a party claiming the privilege, and to meet each of the requirements recently specified by the Circuit Court of Appeals for the District of Columbia, which are included by reference. *See Public Citizen, Inc.* 569 F.3d at 434, 442-44. These requirements include a four-part showing that:

- (a) It is clearly pre-decisional since it was generated before the affirmative adoption of different specific agency policy;
- (b) It is deliberative because it clearly reflects the give-and-take of consultative process;
- (c) It is clear that none of the deliberations referenced in the information at issue in the document is the subject of any alleged misconduct that serves as a basis of this unfair discrimination suit; and
- (d) Such allegedly privileged content is non-factual, unless it is factual material inextricably intertwined with non-factual information.

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<sup>20</sup> It is not necessarily true that inter-party disclosures necessarily waive every privilege when such disclosure comports within the strict terms of a protective order. *See, e.g., Allnet v. Federal Communications Commission*, 800 F.Supp. 984 (D.D.C. 1984); *see also* Fed. R. Civ. P. rule 26(b)(5)(B).

GameFly asserts in its rejoinder to the Post Service Response,<sup>21</sup> that “when there is reason to believe that government misconduct has occurred, the deliberative process privilege disappears.” *Id.* at 29, citing *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 135 (D.D.C. 2005) (*Tri-State*) (citing *In re Subpoena Duces Tecum Served on Office of the Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998)).<sup>22</sup>

Ruling 12 provided 21 days for the parties to resolve differences in light of this order, and raise any remaining issues to the presiding officer. Ruling 12 at 27. Procedurally, no privilege claim may be raised to the presiding officer without: (i) the previously directed compliance with 39 CFR 3007.21(c) on a document-specific basis; (ii) a complete privilege log that identifies the subsequent decision at issue; and (iii) verification that the document is concurrently or was previously submitted to the Commission to permit *in camera* inspection under 39 CFR 30001.31(a). Stale claims of privilege delayed for tactical purposes may be viewed with disfavor.<sup>23</sup>

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<sup>21</sup> See 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, at 29 (Rejoinder).

<sup>22</sup> The Postal Service relies on the same district court case to urge that the “government misconduct exception to the privilege does not apply where the “proponent of the exception simply ‘relies on unverified allegations in made in the complaint.’” Postal Service Comments at 12. The Commission will not resolve this issue on the basis of the limited arguments received to date.

<sup>23</sup> The Postal Service previously sought protection for privileged materials inadvertently produced for inspection, urging that: “[a]s the Commentary to the Federal Rules of Evidence note, ‘[m]ost courts find waiver only if the disclosing party acted carelessly in disclosing the communication or information,’ and did not ‘promptly [take] reasonable steps to rectify the mistake.’” Explanatory Note (Revised 11/28/2007) to FRE 502, Attorney-Client Privilege and Work Product; Limitations on Waiver, at Subdivision (b). Response of the United States Postal Service to Motion to Compel of GameFly, Inc. Regarding Documents Withheld As Privileged, September 28, 2009, at 3. See *also* P.O. Ruling C2009-1/8, October 13, 2009. The Postal Service notably has now had several months to comply with discovery, and privilege claims not raised for materials previously addressed by any presiding officer’s ruling or Commission order to compel in this case are deemed waived.

### C. Postal Service Costs

GameFly largely concurs that the three-part test is in accordance with applicable law, particularly in view of Fed. R. Civ. P. rule 26(c), with rather limited qualifications. Its primary concern appears with respect to the second group of documents that concern Netflix of Blockbuster. Initially, GameFly recites with approval the Presiding Officer's test to limit the information eligible for continuing protection. GameFly Comments at 4, citing Ruling 12 at 24-25 (“(a) trade secrets; or (b) proprietary commercial information....”).<sup>24</sup> As to this part of the test, however, GameFly urges that materials on customer-specific “postal service costs” should be ineligible for protection as “[c]ompany financial data, production data, or market research.” *Id.* at 5-6.

GameFly notes that First-Class Mail is a market dominant product and correctly claims that “there is no reason why disclosure of the Postal Service’s costs of serving individual DVD rental companies would inflict any competitive injury on any DVD rental company (or the Postal Service itself).” GameFly Comments at 6. This order clarifies that mailers’ costs of preparing mailpieces for entry into the mailstream should remain protected, but the Postal Service’s costs are not sensitive and not protected. Apart from this clarification, the proposed set of criteria for the second group of documents is affirmed.

GameFly broadly contends that “the Commission should draw appropriate inferences from the failure of the three main putative beneficiaries of continued secrecy—the Postal Service, Netflix and Blockbuster—to make the requisite showing that unsealing of particular documents would result in material injury.” GameFly Comments at 1. GameFly explains that the Postal Service was directed to satisfy an

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<sup>24</sup> Under the criteria proposed for the second group of documents, the ruling’s language extends protection for certain recent proprietary commercial information that may include “company production data, company financial data, and proprietary market research.” *Id.* As these phrases are used, the ruling explains that such data “shall only include data not readily ascertainable elsewhere which touch upon the topic of one or more specific mailer’s numerical data that arises in connection with its postal service (*i.e.*...postal service costs....)” *Id.* at 25.

explicit burden to make a particularized showing of material commercial injury to support each document it claims as confidential, but that if failed to do so, thus, waiving its objections. *Id.* at 2. By the Postal Service's default, it adds, "the sealed information about those entities should be unsealed forthwith." *Id.*

GameFly recounts the Postal Service was to make a required showing as to the commercial injury specifically for each document, under 39 CFR 3007.21(c). *Id.* at 8, *citing* P.O. Ruling C2009-1/7 at 2, n.6. It details the extent of supporting materials that the Postal Service failed to provide, and charges the Postal Service misused a time extension of 17 days. *Id.* Upon describing the Postal Service's failure of proof, GameFly points out that "[i]n adversarial litigation, failing to make a showing when directed by the tribunal warrants a finding of waiver." *Id.* at 9-10 (noting authority that "[w]ithout enforcement, the rules are worthless.").

The Commission recognizes that Ruling 12, by allowing further comment, effectively presented the Postal Service with a second chance to provide the requisite support for claims of continuing protection for the documents in question. It is also true that civil litigation courts properly overrule objections lacking merit or effectively waived during discovery. While courts have refined over decades their processes for confidentiality claims and for the removal of conditions of non-public treatment during discovery in adversarial litigation, some of these issues are ones of first impression in complaint cases before the Commission under the new confidentiality rules and prevailing statutes.

By establishing the final criteria, the Commission provides a framework for resuming case management and completing discovery. Only if the Postal Service carries its burden under Fed. R. Civ. P. rule 26(c) will this Commission bar GameFly's officers from access to information.<sup>25</sup> Here, the fair preparation of litigation plainly requires a different balance of public interest from recent rate and classification cases, and that balance merely goes beyond the financial transparency of the Postal Service. The proper balance extends to the fair and efficient opportunity of litigants to prepare their cases with the informed consultation of their executives, absent a showing a good cause.<sup>26</sup>

#### D. Other Clarifications

The Comments of UPS caution that the final criteria must refrain from resolving the proper public or non-public treatment of data on the Postal Service competitive products in Commission proceedings. UPS Comments at 2. The risk of an unduly broad holding arising from endorsing the governing criteria is adequately reduced, as the present three-part test solely concerns a complaint case alleging misconduct regarding First-Class Mail, a market dominant product.

The Public Representative aptly summarized the underlying spirit of other comments when he indicated that "this case must not be decided behind closed doors." Yet, none of the comments make any case for disclosing "information whose release could cause genuine competitive injury." See *generally* MMA Vault Comments at 2. The final criteria comports with the recognition that the needs of litigants may stand on somewhat different footing from those of the public generally, but that a party seeking to

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<sup>25</sup> Stripped to its essentials, the position of the Postal Service is that outside counsel for GameFly must be made the agent of his client's opponents, charged with the duty of making certain that GameFly can prepare its case solely from evidence of its opponent's choosing. Absent grounds far more compelling than the arguments of the Postal Service, fundamental procedural safeguards ensure that litigants, including corporate officers of a complainant, are indisputably entitled to the fruits of discovery, except for properly privileged materials or highly sensitive commercial confidential information.

<sup>26</sup> GameFly has a strong interest in ensuring that its outside counsel is free to seek the informed consultation of GameFly's business personnel and officers.

continue protection of materials as confidential has a burden to justify treatment that departs from the rule that public proceedings should be conducted and decided under the light of public scrutiny.

E. The Parties Shall Apply the Final Criteria in Good Faith Within 21 Days to Resolve the Proper Treatment of the Documents in Question

GameFly also raises the prospect of expediting scheduling in its comments. Given the exceedingly large volume of documents exchanged and the considerable number of pages already filed with the Commission to date, which could continue to grow until the discovery interval ends, it appears it would be improvident to alter the timeframe specified by Ruling 12 for the parties to apply the final criteria.

*It is ordered:*

- 1, The tests set forth in P.O. Ruling C2009-1/12 for evaluating pending GameFly, Inc. motions to free certain specified materials accessed during discovery from protective conditions are affirmed, as clarified by this order.
2. Within 21 days, all privilege claims related to documents subject to pending GameFly motions to unseal shall be discussed by GameFly and the Postal Service and be resolved, or if resolution is impossible, presented with appropriate support to the presiding officer.

By the Commission.

Shoshana Grove  
Secretary