

PUBLIC (REDACTED) VERSION

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

COMPLAINT OF GAMEFLY, INC.)
)
) Docket No. C2009-1

**REPLY OF GAMEFLY, INC., TO
RESPONSE OF THE UNITED STATES POSTAL SERVICE
TO ORDER NO. 381
(February 9, 2010)**

GameFly, Inc. (“GameFly”) respectfully submits this reply to the USPS Response To Presiding Officer’s Order [sic] No. 381 (filed January 28, 2010), and the expanded privilege log filed by the Postal Service on the same date. Once again, the Postal Service has failed to meet the burden of proof established in Presiding Officer’s Ruling No. C2009-1/12 and Order No. 381 for keeping particular documents under seal.

This reply is organized in terms of the two general grounds asserted by the Postal Service for treating individual documents as confidential:

- (1) The proprietary interests of (a) third parties other than Netflix or Blockbuster, (b) Netflix, (c) Blockbuster, and (d) the Postal Service as a commercial participant.
- (2) The deliberative process privilege.

Within each of these categories, we summarize the Commission’s standards, and then apply them to the specific documents for which the Postal Service claims protection.

I. CONFIDENTIALITY CLAIMS BASED ON PROPRIETARY INTERESTS

A. The Governing Legal Standards

The Commission affirmed in Order No. 381 that the Postal Service would bear the burden of justifying continued sealing of the documents, for this “treatment . . . departs from the rule that public proceedings should be conducted and decided under the light of public scrutiny.” Order No. 381 at 20-21. “Only if the Postal Service carries its burden under Fed. R. Civ. P. rule 26(c) will the Commission bar GameFly’s officers from access to information.” Order No. 381 at 20. The Commission emphasized that the Postal Service could not satisfy this burden with only generalized claims of privilege, and that the showings required by Rule 3007.21(c) must be made on a “document-specific basis.” *Id.* at 17. This is a crucial aspect of Order No. 381, because the showing required by Rule 3007.21(c) includes, *inter alia*:

- “A description of the materials claimed to be non-public in a manner that . . . would allow a person to thoroughly evaluate the basis for the claim that they are non-public.”
- “Particular identification of the nature and extent of commercial harm alleged and the likelihood of such harm.”
- “At least one specific hypothetical, illustrative example of each alleged harm.”

- “The extent of protection from public disclosure deemed to be necessary.”
- “The length of time deemed necessary for the non-public materials to be protected from public disclosure with justification thereof.”

39 C.F.R. § 3007.21(c)(3)-(7).

A party that seeks to keep a document sealed on the ground that it contains trade secrets must show that the information is “truly within the ambit of trade secrets as defined under the Uniform Trade Secret Act.” POR 12 at 22 n. 39. The factors generally considered relevant to this showing are: “(1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) measures taken to guard the information's secrecy; (4) the value of the information to the business or to its competitors; (5) the amount of time, money, and effort expended in development of the information; and (6) the ease or difficulty of duplicating or properly acquiring the information.” 6-26 MOORE'S FEDERAL PRACTICE – CIVIL § 26.105.

A party that seeks to keep a document sealed on the ground that it contains other “proprietary commercial information,” the party must show that the information

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 data; projected sales data or goals; proprietary market research, or matters relating to mergers and acquisitions.

POR-12 at 21-25 (citing 39 C.F.R. § 3007.33(b) and Fed. R. Civ. P. 26(c)(1)(G), *affirmed*, Order No. 381 at 11-14. Company financial data, production data or market research shall not be protected if readily available elsewhere or expressed in percentages or relative quantitative values rather than absolute values. POR-12 at 25. Beyond the redaction of 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 previously signed confidentiality agreement in writing (or a clear legend of confidentiality previously added by the source of the document).

POR 12 at 25-26 (footnote omitted).

Finally, the existence of information that warrants continued protection does not justify continued sealing of the entire document, but only "only the information that is highly confidential and nonpublic." POR 12 at 26 n. 43; *accord*, 39 C.F.R. § 3007.10(b) ("the Postal Service may not identify a whole page or a whole table as non-public material if the page or table contains both public and non-public information, but must redact only the information it claims to be non-public.").

The Postal Service's January 28 Response departs from these legal standards in several critical ways. First, the Postal Service relies on a general standard of confidentiality that both the Presiding Officer and the Commission considered and rejected in POR 12 and Order No. 381:

The materials designated as non-public consist of commercial information concerning postal operations and finances of the Postal Service and third parties that under good business practice would not be publicly disclosed. Based on its longstanding and deep familiarity with postal and communications business and markets generally, and its knowledge of many firms, including competitors, mailers, and suppliers, *the Postal Service does not believe that any commercial enterprise would voluntarily publish this information. In the Postal Service's view, this information would be exempt from mandatory disclosure pursuant to 39 U.S.C. § 410(c)(2) and 5 U.S.C. § 552(b)(3) and (4).*

USPS Response, *passim* (numbered paragraph 1 for each entry) (emphasis added).

This is a far laxer standard than adopted in POR 12 and Order No. 381. As noted above, the test adopted by the Commission is not whether a “commercial enterprise would voluntarily publish [the] information”—but whether the information is either (1) a trade secret or (2) information that was “identified as of a highly confidential nature” and “distinctively treated with exceptional care,” and whose disclosure would inflict material competitive injury on the creator or owner of the confidential information. In adopting this standard, the Commission specifically considered and rejected the laxer standards that the Postal Service seeks to resuscitate here, including the standards of 39 U.S.C. § 410(c)(2) and 5 U.S.C. § 552(b)(3) and (4). POR 12 at 22-23, 27 (declining to adopt standards based on 39 U.S.C. § 410(c)(2), the FOIA exemptions, or other alternative

standards proposed by the Postal Service), *aff'd*, Order No. 381 at 3-5 (summarizing USPS position); *id.* at 11-14 (rejecting USPS position).

Second, the Postal Service argues for a period of secrecy that is far too long. In POR 12 and Order No. 381, the Commission adopted a conclusive presumption that information may be protected on grounds of commercial sensitivity only if the information was created after November 8, 2007—approximately three years before the issuance of POR 12. POR 12 at 24, *aff'd*, Order No. 381 at 11-12. The Postal Service asserts, however, that the appropriate secrecy period is ten years—*after the information was filed with the Commission*. USPS Response, *passim* (numbered paragraph 7 of each entry). This is an extravagantly long period. Not only is a ten-year period triple the period prescribed by the Commission in this docket, but most of the documents at issue were created years before being filed with the Commission. Under the Postal Service's standard, for example, a document created in 2002, and filed with the Commission in discovery in 2009, would remain secret until 2019—*17 years after the document was created*.

The Postal Service has offered no showing that any document created before November 8, 2007, retains any continuing proprietary value. Instead, the Postal Service relies on 39 U.S.C. § 3007.30, which provides that

Ten years after the date of filing with the Commission, non-public materials shall lose non-public status unless the Commission or its authorized representative enters an order extending the duration of that status.

Rule 3007.30, however, is a general housekeeping rule under which all non-public documents filed with the Commission—whether in litigation or in periodic compliance filings are automatically made public, without consideration of their contents, unless the Commission intervenes otherwise. Rule 3007.30 clearly was not meant to trump Rules 3007.31 through 3007.33, which authorize the Commission to terminate the protected status of documents “early”—i.e., sooner than the end of the litigation or the general unsealing date prescribed by the default provision of 3007.30. The Commission’s adoption of a conclusive cut-off period of three years in this case, an adversarial proceeding in which both GameFly and the public have strong interests in limiting the duration of secrecy, was a reasonable exercise of the Commission’s discretion. It is also the law of the case.

Finally, the Postal Service has ignored the Commission’s directive that, when a document contains protected information, the redaction should be limited to that information, not to the entire table or page in which the information appears. The Postal Service’s January 28 Response appears to assume that the existence of a single piece of confidential information requires sealing the entire document.

B. Analysis Of Specific Documents

The Postal Service has not come close to making the specific showings described above. Instead, it has contented itself with the “most hackneyed defense interposed to requests for public disclosure”: a parade of boilerplate claims “that some nebulous ‘competitive disadvantage’ will inure upon

disclosure.” *Southern California Edison Co. and San Diego Gas and Elec. Co.*, 49 FERC (CCH) ¶ 63,029, 65,127 (1989).

1. Documents with allegedly confidential information about third parties other than Netflix or Blockbuster

In its January 28 Response, the Postal Service claims confidentiality for the following documents on the ground that they contain trade secrets or other proprietary information about one or more mail owners or envelope manufacturers *other than* Netflix or Blockbuster: GFL33, 189, 210-218, 373-374, 428, 505-506, 511, 685-704, 732-738, 765-773, 805, 844-845, 1180, 7278-7279, 7285-7286, 7287, 7292-7293, 7294-7295, 74289-74297. (Page citations are to the Bates-numbered copies of the documents produced by GameFly.)

GameFly has repeatedly made clear that it consents to redaction of the names and other identifying information concerning these entities. See GameFly Rejoinder (October 26, 2009) at 23-24; Notice of GameFly (January 28, 2010) at 6-7; *id.*, Attachment C. Hence, the issue before the Commission is whether to redact just this identifying information (as GameFly proposes) or the entirety of each document (as the Postal Service appears to propose). As noted above, the public and private interests served by keeping proceedings open warrant limiting redactions to “only the information that is highly confidential and nonpublic.” POR 12 at 26 n. 43; *accord*, 39 C.F.R. § 3007.10(b).

This conclusion is buttressed by the failure of the Postal Service to identify, with the specificity required by POR 12 and Order No. 381, any competitive injury that would result from making public the remainder of these

documents. In any event, the remaining information on the documents appears commercially innocuous on its face:

General response: Most of documents at issue were created before November 8, 2007, the cutoff established by the Commission.

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2. Documents with allegedly confidential information about Netflix

In its January 28 Response, the Postal Service claims confidentiality for the following documents on the ground that they contain trade secrets or other proprietary information about Netflix: GFL1, 3-4, 6-9, 22-23, 30, 33, 72, 125-127, 189, 210-218, 275-278, 428, 458, 462, 464-473, 474-477, 495-496, 505-506, 509-510, 511, 523-524, 732-738, 765-773, 805, 869, 920, 921-938, 1020-1063, 1117-1118, 1119-1120, 1121-1122, 1158-1159, 1334-1348, 1349-1387, 1480, 2422-2423, 74224, 74289-74297, 74298, 74299-74302, 77696-77698.

Netflix, however, has vigorously insisted that it “has never opposed the unsealing of any materials in the proceeding, and has never argued that their

publication would result in injury to Netflix.” See Response of Netflix to Comments of GameFly, Inc. (filed December 17, 2009) at 1 (quoted in Order No. 381 at 9). Netflix is a large and sophisticated mailer, and is represented by experienced postal counsel who received several months ago a complete set of the documents that GameFly seeks here to unseal. Given Netflix’s unambiguous disclaimer of competitive injury, the Postal Service’s vicarious claim of injury on behalf of Netflix merits no credence whatsoever.

3. Documents with allegedly confidential information about Blockbuster

In its January 28 Response, the Postal Service claims confidentiality for the following documents on the ground that they contain trade secrets or other proprietary information about Blockbuster: GFL189, 210-218, 311, 315-316, 317, 327-329, 337-340, 347-349, 505-506, 732-738, 765-773, 805, 921-938, 1020-1063, 1349-1387, 74224, 74289-74297, 74298, 74299-74302. The Postal Service’s generalized claims of injury do not come close establishing that the references to Blockbuster constitute trade secrets or protectable information under POR 12 and Order No. 381.

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4. Documents with allegedly confidential information about the Postal Service's own commercial interests

In its January 28 Response and Privilege Log, the Postal Service claims that essentially every document on its privilege list should be remain sealed because the document contains competitively sensitive information about the Postal Service itself. The breadth of these claims is matched only by the paucity of the support offered for them. For most of the claims, the Postal Service's support is limited to boilerplate such as:

Public disclosure of this document would reveal Postal Service procedures and pricing considerations for processing DVD mail. It would also reveal internal deliberations for improving its operations.

Empty generalities of this kind do not begin to demonstrate that any of the information at issue is "truly within the ambit of trade secrets as defined under the Uniform Trade Secret Act," POR 12 at 22 n. 39, or contains other "proprietary commercial information," POR-12 at 21-25 (citing 39 C.F.R. § 3007.33(b) and Fed. R. Civ. P. 26(c)(1)(G), *affirmed*, Order No. 381 at 11-14; *see generally* pp. 3-4, *supra*).

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**II. CONFIDENTIALITY CLAIMS BASED ON THE DELIBERATIVE
PROCESS PRIVILEGE**

In Order No. 381, the Commission established very specific hurdles for any claim of deliberative process privilege:

- (1) The supposedly privileged information must be predecisional, in the sense that it was generated before the affirmative adoption of different specific agency policy.
- (2) The information must be deliberative, in the sense that it “clearly reflects the give-and-take of consultative process.” Moreover, deliberations voluntarily disclosed to an outside party would fall outside “the ambit of the deliberative process privilege.”
- (3) “It is clear that none of the deliberations reference 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.”
- (4) “Such allegedly privileged content is non-factual, unless it is factual material inextricably intertwined with non-factual information.”
- (5) The burden of establishing a deliberative process privilege is even greater in this case because the privilege assumes “top-down” decision making, but the Postal Service has defended its conduct on the theory that “its decision-making, in substantial part, was left or delegated to personnel in the field.”
- (6) Finally, the Postal Service must satisfy the above standards “in a timely manner with clear support that the information is both pre-decisional and deliberative.”

Order No. 381 at 15-19.

In its January 28 Response, the Postal Service asserts that virtually every document on its privilege list is protected by the deliberative process privilege. The Postal Service, however, has not come close to satisfying the proof requirements of Order No. 381. Much of the information that the Postal Service seeks to keep secret consists of factual observations, not deliberative communications. Many of the supposedly deliberative communications at issue appear to be independent expressions of view rather than part of a collaborative decision-making process. The purported “subsequent decisions” that supposedly followed the deliberations—identified by the Postal Service as **[BEGIN PROTECTED MATERIAL]**

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In *Rein v. United States PTO*, 553 F.3d 353, 368-369 (4th Cir. 2009), the Court of Appeals held that claims of deliberative process privilege based solely on summary descriptions of documents as “predecisional and deliberative” and “represent[ing] the give and take of internal Agency deliberation” lacked the “specificity and particularity required for a proper determination of whether they are exempt from disclosure” under the deliberative process privilege. The confidentiality log and analysis offered by the Postal Service in its December 28 Response are as cryptic and uninformative as the confidentiality log found insufficient in *Rein*. The same outcome is warranted here.

Finally, as explained in GameFly's January 28 Notice, the deliberative process privilege is inapplicable for an even more fundamental reason. The posture of the Postal Service vis-à-vis the handling of return DVD mailers for Netflix, Blockbuster and GameFly has been that of a market participant, not a disinterested agency or tribunal. Processing DVD mailers generates revenue for the Postal Service, and causes it to incur costs. **[BEGIN PROTECTED MATERIAL]**

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Likewise, the justifications that the Postal Service has advanced to the Commission in defense of the Postal Service's disparate treatment of its customers have been couched in terms of the Postal Service's commercial self-interest, not the disinterested posture of a neutral. In this context, the deliberative process privilege is simply inapplicable.

As GameFly noted in its January 28 Notice, the deliberative process privilege does not apply at all when a claim of discrimination or undue preference has placed the agency's intent directly at issue. *Id.* at 12-15 (discussing *In re: Subpoena Duces Tecum Served on the OCC*, 144 F.3d 1422, 1424 (D.C. Cir. 1998), *reh'g granted*, 156 F.3d 1279 (D.C. Cir. 1998)); *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 135 (D.D.C. 2005); *Adair v. Winter*, 451 F. Supp. 2d 202, 209 (D.D.C. 2006) ("When there is any reason to believe that government misconduct has occurred . . . the deliberative-process privilege

disappears altogether.”); *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) (“[T]he privilege disappears altogether when there is any reason to believe government misconduct occurred.”).

As the court explained, the deliberative process privilege "was fashioned in cases where the governmental decisionmaking process is collateral to the plaintiff's suit. . . . If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield. For instance, it seems rather obvious to us that the privilege has no place in a Title VII [discrimination] action or in a constitutional claim for discrimination." *Subpoena Duces Tecum*, 144 F.3d. at 1424. "The central purpose of the privilege is to foster government decisionmaking by protecting it from the chill of potential disclosure. If Congress creates a cause of action that deliberatively exposes government decisionmaking to light, the privilege's *raison d'être* evaporates." *Id.* (citation omitted).

CONCLUSION

For the reasons stated above and in GameFly's previous pleadings, the Commission should unseal the subject documents and information.

Respectfully submitted,

David M. Levy
Matthew D. Field
Alexandra Megaris
VENABLE LLP
575 7th Street, N.W.
Washington, DC 20004
(202) 344-4800

Counsel for GameFly, Inc.

February 9, 2010