

PRESIDING OFFICER'S  
RULING NO. C2009-1/17

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

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING ON POSTAL SERVICE  
CLAIMS OF CONFIDENTIALITY AND PRIVILEGE

(Issued April 15, 2010)

I. INTRODUCTION

GameFly, Inc. (GameFly) filed a complaint on April 23, 2009 alleging unfair discrimination and inequitable conduct by the United States Postal Service.<sup>1</sup> During discovery, the Postal Service allowed GameFly's counsel to review a large number of documents under protective conditions. On September 25, 2009, GameFly sought removal of the protective conditions so that it could show relevant documents to subject matter experts and its corporate officers.<sup>2</sup> The Postal Service opposed the request.<sup>3</sup> To

---

<sup>1</sup> Complaint of GameFly, Inc, April 23, 2009 (Complaint).

<sup>2</sup> See, e.g., 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 (GameFly Motion to Show Cause).

<sup>3</sup> Opposition of the United States Postal Service to the Motion of GameFly, Inc. to Unseal Certain Documents Produced in Discovery, October 19, 2009. An opposition was also filed by Blockbuster Inc. Third Party Blockbuster's Opposition to GameFly's Motion to Unseal Certain Documents, October 19, 2009. In addition, the Presiding Officer subsequently accepted the Comments of the Public Representative on Motion of GameFly Inc. to Unseal Certain Documents Produced in Discovery, November 3, 2009.

resolve this controversy, the Presiding Officer established a three-part test for determining which documents should be accorded continued confidential treatment because they contained commercially sensitive or trade secret information.<sup>4</sup> The three-part test required the Postal Service to make a showing of “good cause” in the same manner as required by Fed. R. Civ. P. 26(c). P.O. Ruling C2009-1/12 at 20-32. The Presiding Officer’s ruling was expressly made without prejudice to claims of privilege not previously waived. *Id.* at 19. Finally, the Presiding Officer’s ruling was certified to the full Commission for review. *Id.* at 33.

In Order No. 381, the Commission affirmed P.O. Ruling C2009-1/12 and clarified how the standards for continuing non-public treatment were to be applied.<sup>5</sup> In that same order, the Commission gave GameFly and the Postal Service 21 days to resolve all privilege claims. *Id.* at 21. The Commission ruled further that if a negotiated resolution proved to be unattainable, appropriate support for the privilege claims would have to be provided to the Presiding Officer. *Id.*

Unfortunately, the parties have been unable to resolve the question of continuing non-public treatment on most of these materials. This inability to reach agreement prompted GameFly and the Postal Service to make a number of filings. On January 28, 2010, GameFly filed a notice of the impasse that had been reached and a request that the Commission resolve the outstanding privilege issues.<sup>6</sup> On that same day, the Postal Service filed a response to P.O. Ruling C2009-1/12, as affirmed by Order

---

<sup>4</sup> Presiding Officer’s Ruling on Motion to Show Cause Why Certain Documents Should Not Be Unsealed, November 18, 2009 (P.O. Ruling C2009-1/12).

<sup>5</sup> Order Affirming Presiding Officer’s Ruling C2009-1/12, January 7, 2010 (Order No. 381).

<sup>6</sup> Notice of GameFly, Inc., Concerning Unresolved Privilege Issues, January 28, 2010 (GameFly Notice). The GameFly Notice was accompanied by the Application of GameFly, Inc. for Non-Public Treatment of Notice of Unresolved Privilege Issues, January 28, 2010. (GameFly Application). The GameFly Application contained unredacted copies of the GameFly Notice. While directed to the Commission, the request for resolution of privilege issues is properly before the Presiding Officer for decision. The instant order disposes of those issues.

No. 381<sup>7</sup> and an application for non-public treatment of materials.<sup>8</sup> Thereafter, on February 9, 2010, GameFly moved to strike the Postal Service Response, or, in the alternative, for leave to reply to that response.<sup>9</sup> Concurrently, GameFly filed its proposed reply to the Postal Service Response.<sup>10</sup> As a result, hundreds of pages of documents remain in dispute.

Each party claims that the other party frustrated the negotiation process. The present ruling does not attempt to identify the party responsible for the impasse; rather it examines and rules upon the confidentiality and privilege claims for each document at issue. The determinations presented in this Ruling are the result of a careful and systematic application of the standards applicable to claims of confidentiality and deliberative process privilege as confirmed and clarified by Order No. 381. The determinations have been informed by the recent pleadings submitted by the parties and by information and arguments previously presented.<sup>11</sup>

This Ruling is comprised of five sections and is accompanied by an appendix that presents document-specific rulings. Section I describes the procedural background to the present Ruling. Section II sets forth preliminary procedural rulings and summarizes the determinations pertaining to the disputed documents. Section III discusses the

---

<sup>7</sup> The United States Postal Service Response to Presiding Officer's Order No. 381, January 28, 2010 (Postal Service Response). Attached to the Postal Service Response was a privilege log.

<sup>8</sup> Application of the United States Postal Service for Non-Public Treatment of Materials, January 28, 2010 (Application).

<sup>9</sup> Motion of GameFly, Inc. to Strike Responses of United States Postal Service to Order No. 381 Or, in the Alternative, for Leave to File Reply, February 9, 2010 (GameFly Motion). The Postal Service replied in opposition to the GameFly Motion. Reply of the United States Postal Service in Opposition to Motion of GameFly, Inc., to Strike Responses of United States Postal Service to Order No. 381 Or, in the Alternative, for Leave to File Reply, February 17, 2010 (Postal Service Reply).

<sup>10</sup> Reply of GameFly, Inc., to Response of the United States Postal Service to Order No. 381, February 9, 2010 (redacted). (GameFly Reply).

<sup>11</sup> On April 12, GameFly filed redacted and non-redacted versions of the Testimony of Sander Glick for GameFly, Inc. along with an Application of GameFly, Inc. for Non-Public Treatment of two documents.

contentions presented by the parties in their filings. Section IV provides the Presiding Officer's analysis and conclusions as supplemented by further document-specific analyses and determinations contained in the Appendix.<sup>12</sup> Section V discusses the procedures to be followed in unsealing disputed materials.

---

<sup>12</sup> The Appendix is to be treated as non-public until it is unsealed.

## II. SUMMARY OF THE DETERMINATIONS

As a preliminary matter, this Ruling grants GameFly's request for leave to file a reply to the Postal Service Response to Order No. 381, but rejects GameFly's motion to strike. Neither the facts presented here nor the cases cited by GameFly in support of its motion justify that extreme remedy.<sup>13</sup> This Ruling further grants the Postal Service's request for leave to file a reply.<sup>14</sup> Both parties had ample time to research and prepare their legal and factual arguments. All relevant issues have been raised and argued.

For the reasons set forth in the body of this Ruling and the Appendix (issued concurrently under seal), this Ruling grants, in part, and denies, in part, the Postal Service's Application for Non-Public Treatment of Materials. As set forth in the Appendix, only a limited number of specifically identified excerpts of some of the documents identified in the Postal Service's privilege log are eligible for continued non-public treatment. In addition, as noted in the Appendix, this Ruling accepts GameFly's consent to the redactions proposed by the Postal Service to certain disputed documents. See GameFly Notice at 5-6, Attachment C.

---

<sup>13</sup> Relief that grants a motion to strike is usually disfavored as too drastic, except in the most flagrant cases. See *Siems v. City of Minneapolis*, 560 F.3d 824,826 (8th Cir. 2009)(upholding dismissal of complaint with prejudice where complainant violated every part of the court's order, even after time extensions and warnings); *Garden City Boxing Club v. Godinez*, 2009 WL 914632 at \*4 (D.Nev. 2009)(*Pro se* defendant has not participated in good faith or otherwise in the discovery and the pre-trial process and she has no intention of even attempting to comply with her discovery and other pre-trial obligations); *Cowan v. Rocky Mountain Steel Mills*, 2008 WL 2998164 at \*3 (D. Colo. 2008) (*Pro se* plaintiff was explicitly directed to confer with defendant and to participate in creation of a scheduling order, but had utterly failed to meet this obligation and was warned of dismissal); and *Jones v. Smith*, 99 F.R.D. 4, 10 (M.D. Pa. 1983)(*pro se* plaintiff, an attorney, substantially delayed the discovery process and the effective administration of justice).

<sup>14</sup> For good cause, the Motion of the United States Postal Service for Late Acceptance of Its Reply in Opposition to Motion of GameFly, Inc., to Strike Responses of United States Postal Service to Order No. 381 or, in the Alternative, for Leave to File Reply, February 17, 2010, is granted.

Under this Ruling, GameFly will be required to redact information that is subject to continuing non-public treatment.<sup>15</sup> It will be required to serve that material on the Postal Service, which will have an opportunity to object to the exclusion of any material that it believes, under the terms of this Ruling, were adjudged to be non-public. The Ruling also includes procedural safeguards to ensure that no disputed materials are made public prematurely. See ruling paragraphs 3 and 5.

In making these findings, the Presiding Officer would emphasize that the burden for justifying non-public treatment is on the proponent of confidentiality. In this case, the Postal Service has failed to present the particularized showing traditionally required in judicial and administrative proceedings. While the Presiding Officer could have relied upon this failure to deny continued confidential treatment, he has, instead, undertaken a thorough review of each disputed document. This approach was deemed appropriate given the fact that rules governing the treatment of non-public materials filed with the Commission were adopted shortly after this proceeding was initiated. Nevertheless, the extent of the review was burdensome and caused considerable delay in issuing the instant Ruling. The parties to this, and future, proceedings should not expect the Presiding Officer to shoulder the burden of justifying claims of confidentiality or privilege.

---

<sup>15</sup> GameFly will be required to redact the names, title, and identifying characteristics (*i.e.*, address, telephone number, etc.) of individual employees of each party, organization, or enterprise or to designate an encoded pseudonym in its place prior to unsealing or publication. See Appendix, notes 1 and 2.

### III. THE PARTIES' CONTENTIONS

#### A. The Postal Service Response to Order No. 381 and its Application

In its response to Order No. 381, the Postal Service submits that it has provided “information requested for documents containing sensitive confidential information and documents protected by the deliberative process privilege as requested by the Commission and set forth in 39 CFR 3007.21(c).” *Id.* at 2. A privilege log, filed under seal, was attached to the Postal Service Response.<sup>16</sup> The privilege log identifies which documents the Postal Service believes should remain non-public due to the deliberative process privilege, as a trade secret, or as confidential commercial information. The Postal Service’s Application supporting non-public treatment lists factors required by Rule 3007.21(c),<sup>17</sup> and indicates the Postal Service’s continuing reliance upon 39 U.S.C. § 410(c)(2) and 5 U.S.C. § 552(b)(3) and (4). *See, e.g.*, Application at 4, and *passim*.

#### B. GameFly Opposes the Postal Service Response and Privilege Log

*GameFly Notice.* The GameFly Notice, which mainly concerns unresolved deliberative process privilege and protection issues, indicates that the parties have “failed to reach agreement over which...documents should remain under seal, and [that] resolution of this dispute...will require further intervention by the Presiding Officer.” GameFly Notice at 1. After asserting that Order No. 381 required the Postal Service’s compliance with rule 3007.21(c) on a “document-specific basis” and that the Postal Service had already missed “multiple opportunities” to make particularized showings

---

<sup>16</sup> See Attachment and “Postal Service Privilege Log–C2009-1” (privilege log). The privilege log or table purportedly ascribes the deliberative process privilege to nearly all of the more than 300 pages listed.

<sup>17</sup> The Postal Service’s Application recites the factors set forth in 39 CFR 3007.21(c) and indicates that they are applied in its Response.

ordered earlier, GameFly observes that “the Postal Service has treated Order No. 381 with the same disregard as the Commission’s previous rulings on the subject.” *Id.* at 4. GameFly states that a week before its response was due, the Postal Service sent counsel for GameFly a document listing more than 300 pages that should remain protected, but made no attempt to identify the particular information on these pages that the Postal Service claimed to be sensitive. *Id.* at 4-5. Nor, GameFly adds, did “the document make any of the showings required by Order No. 381.” *Id.* at 5. Further requests for clarification have merely resulted in the association of the broad nature of the confidentiality claim for each document. *Id.*

The GameFly Notice takes the position that the Postal Service’s generalized claims of confidentiality do not justify continued non-public treatment of the documents at issue. It addresses four general categories of grounds raised by the Postal Service for non-public treatment separately, namely: (1) “Third Party Confidential Information”; (2) “Blockbuster Confidential Information”; (3) “Trade Secret”; and (4) “Deliberative Process Privilege.” *Id.* at 6. It lists the documents’ page ranges for each category being invoked.

With respect to the first category (Third Party Confidential Information), GameFly refers to its Attachment C as reflecting language, which it has agreed may be redacted, but maintains that the remainder of each page should remain public. With respect to the second category (Blockbuster and Netflix Confidential Information), GameFly submits the Postal Service has failed to show that the materials concerning Blockbuster on Netflix warrant protection as proprietary commercial information qualified under the standards of P.O. Ruling C2009-1/12, as affirmed. *Id.* at 6-8. With regard to the third category (Trade Secrets), GameFly urges that no showing has been made concerning any of the factors that are traditionally considered for trade secrets, and that there is no information on the subject pages that “even colorably qualifies as a trade secret.” *Id.* at 9. Finally, with respect to the fourth category (Deliberative Process Privilege), GameFly contends that the Postal Service neither (i) satisfies the evidentiary burdens for showing the deliberative process privilege under Order No. 381 and rule 3007.21(c),

nor (ii) surmounts the objection that the deliberative process privilege is inapplicable where the Postal Service's intent or wrongful conduct is directly at issue. *Id.* at 10.

GameFly explains that its cause of action under 39 U.S.C. § 403(c), and the Postal Service's defense that "disparate treatment of GameFly and Netflix arose from motives that were entirely legitimate, has placed the Postal Service's intent directly at issue."<sup>18</sup> *Id.* at 12-13. It urges that "[i]n this circumstance, the deliberative process privilege is simply inapplicable."<sup>19</sup> *Id.*

*GameFly Reply.* The GameFly Reply, filed concurrently with its Motion, argues that the Postal Service bears the burden of supporting its claims of deliberative process privilege and that it has not satisfied that burden.<sup>20</sup> The Reply identifies the legal standard applicable to the Postal Service's confidentiality claims under each category and the elements of the Postal Service's required showing for the four distinct kinds of

---

<sup>18</sup> GameFly goes to some length to refute the Postal Service's argument that GameFly merely relies on unverified complaint allegations to advance the government misconduct exception to the deliberative process privilege. GameFly cites prior pleadings that reveal certain stipulations, internal documents, and email messages that tend to corroborate some of its allegations. *Id.* at 13, n.4.

<sup>19</sup> GameFly cites additional case law on discrimination to contend that the "exception to the deliberative process privilege does not require a finding of misconduct" by the public agency. *Id.* at 13, citing *In re Subpoena Duces Tecum Served on the OCC*, 145 F.3d 1422, (D.C. Cir. 1998), *reh'g granted*, 156 F.3d 1279 (D.C. Cir. 1998) (*In re Subpoena Duces Tecum and In re Subpoena Duces Tecum II*). *Id.* at 13-14. It also urges that this case explained that this privilege was "fashioned in cases where the governmental decision-making process is collateral to the plaintiff's suit", not cases directed at the government's intent, where "it makes no sense to permit the government to use the privilege as a shield." *Id.* at 14. GameFly submits that either the deliberative process privilege claims should be denied under these preliminary points, or it should have a chance to address the issue of whether the privilege applies at all. *Id.* at 14-15.

<sup>20</sup> GameFly Reply at 2. "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.'" *Id.*, citing 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." *Id.*, citing 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.*, citing Order No. 381 at 17. GameFly asserts that this is a crucial aspect of Order No. 381, and that the Postal Service has not satisfied the showing required by rule 3007.21(c). *Id.* at 2-4.

claims of confidentiality. It addresses the document-specific requirements under 39 CFR 3007.21(c), the prevailing criteria for trade secret protection, the limits of proprietary commercial information under the law of the case, and the need to segregate public and non-public information within an allegedly privileged document. GameFly Reply at 2-4. GameFly asserts that the Postal Service Response departs from these standards in several ways and is therefore deficient.<sup>21</sup>

GameFly examines the identified documents within each category and explains why each of the bases for continuing non-public treatment or for recognizing a deliberative process privilege lacks merit. GameFly's Reply argues that while the "Postal Service asserts that virtually every document on its privilege list is protected by the deliberative process privilege" it "has not come close to satisfying the proof requirements of Order No. 381." *Id.* at 21. It cites the following requirements:

- (1) The supposedly privileged information must be pre decisional, 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 must be "clear that none of the deliberations reference[d] 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."

---

<sup>21</sup> While pointing out that the Postal Service has satisfied none of these enumerated standards to carry its burden, GameFly also points out that the Postal Service continues to rely on the rejected statutory basis for confidentiality under FOIA rules that was expressly superseded under previous rulings for this complaint case. GameFly explains that the Postal Service not only incorrectly seeks to resuscitate here the standards of 39 U.S.C. § 410(c)(2) and 5 U.S.C. § 552(b)(3) and (4), but also purports to adhere to an unduly protracted duration of protection for its confidential treatment claims. GameFly Reply at 5-6. GameFly adds that "[t]he Postal Service has offered no showing that any document created before November 8, 2007, retains any continuing proprietary value." *Id.* at 6.

- (4) “Allegedly privileged content must be 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 above standards must be satisfied “in a timely manner with clear support that the information is both pre-decisional and deliberative.”

*Id.* at 20, citing Order No. 381 at 15-19.

GameFly’s Reply opposes extending protection under the deliberative process privilege because the claims lack specificity, the Postal Service placed its intent at issue, and it is a market participant. *Id.* at 6-9. GameFly also asserts that Postal Service’s objections to protect information of Netflix are specious, since Netflix directly and unequivocally disavowed the need for such confidential treatment. *Id.* at 12.

#### IV. ANALYSIS

Order No. 381 set forth the tests for determining whether information should be accorded non-public treatment either because it is confidential commercial or trade secret information, or because it is covered by the deliberative process privilege. This Ruling applies the tests approved by Order No. 381 to the information in the documents that remain at issue. In the sections that follow, the Presiding Officer summarizes the manner in which the tests of Order No. 381 have been applied. Document-specific determinations are set forth in the Appendix.

##### A. Confidential Commercial Information and Trade Secrets

The Presiding Officer has previously ruled that the Postal Service's claims for continuing protection of commercial information or trade secrets as "highly confidential information" are to be evaluated under a test that differentiates between three categories of documents.

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

P.O. Ruling C2009-1/12 at 2. P.O. Ruling C2009-1/12 was affirmed by Order No. 381.<sup>22</sup>

Commercial confidentiality or trade secrets must be sufficiently substantiated.<sup>23</sup> Claims for confidential treatment “shall at least include, for each document the Postal Service contends must remain sealed, such sufficient support as is ordinarily required for documents that it files under seal in the first instance, pursuant to 39 CFR 3007.21.”<sup>24</sup> The showing required by 39 CFR 3007.21(c)(3) must include “[a] description of the materials claimed to be non-public in a manner that, without revealing the materials at issue, would allow a person to thoroughly evaluate the basis for the claim that they are non-public.” Responses that do not rise to this level of clarity will not ordinarily suffice.

For the present ruling, all documents in dispute have been reviewed during *in camera* inspection. As explained below and in the Appendix, hereto, the Presiding Officer finds that most of the information that the Postal Service seeks to protect from public disclosure fails to qualify as either trade secrets or as confidential commercial information.

---

<sup>22</sup> Order No. 381 at 11 n.16, citing P.O. Ruling C2009-1/12 at 2 and 16-32. The order incidentally clarified that mailers’ costs of preparing mailpieces for entry into the mailstream should remain protected, but that the Postal Service’s costs are not protected.

<sup>23</sup> Many of the documents concern Netflix and Blockbuster. Information will only remain under seal if it is “either (a) a trade secret; or (b) proprietary commercial information that was (i) generated after November 8, 2007, and (ii) contains one of the limited kinds of content, described below as ‘highly confidential.’ See National Conf. of Commissioners on Uniform State Laws, Uniform Trade Secrets Act with 1985 Amendments. Approved by ABA, February 11, 1986, as reproduced at [http://www.wipo.int/clea/docs\\_new/pdf/en/us/us034en.pdf](http://www.wipo.int/clea/docs_new/pdf/en/us/us034en.pdf) (National Conf. of Commissioners). 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.” (footnote omitted). See P.O. Ruling C2009-1/12 at 24-25.

<sup>24</sup> P.O. Ruling C2009-1/12 at 30 n.55, and accompanying text, citing P.O. Ruling C2009-1/7, Granting Motion of the United States Postal Service for Extension of Time in Which to Reply to the Motion of GameFly, Inc. to Unseal Certain Documents Produced in Discovery, October 7, 2009 at 2, n.6.

### 1. None of the Information Qualifies for Protection as Trade Secrets

The Postal Service claims trade secret protection for a number of full documents. These claims, however, lack adequate support. The applicable definition of trade secret excludes all devices, specifications, or processes that are generally known or readily ascertainable.<sup>25</sup>

The Postal Service has failed to provide sufficient descriptions of the alleged trade secrets and has failed to demonstrate that the information that it seeks to protect is not generally known to, or readily ascertainable by, others. Moreover, there is no description of reasonable measures taken to protect any trade secret information from disclosure, including, for example, precautions that either limit circulation among certain employees or preclude access by terminated employees. Finally, the Postal Service has failed to show any likely actual harm or loss of valuable information to rivals or anyone else that might result from public disclosure of those complete documents.

Because of the failure to provide adequate support for its trade secret claim, the Presiding Officer finds that continuing protection of any information on trade secret grounds is denied.

### 2. Complete Documents May Not Remain Sealed On The Grounds That They Contain Confidential Commercial Information.

The Postal Service seeks to exempt a number of complete documents from public disclosure claiming that these documents contain confidential commercial

---

<sup>25</sup> The term "trade secret" is defined to mean:

"...information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

See National Conf. of Commissioners, *supra*.

information. However, as the Presiding Officer has previously ruled, the Postal Service “may not identify a whole page or whole table as non-public materials if the page or table contains both public and non-public information, but must redact only the information it claims to be non-public.” 39 CFR 3007.10(b). See P.O. Ruling C2009-1/12 at 26 n.43, and 31. The Postal Service has failed to address, much less demonstrated, why entire documents should remain non-public.

3. For Each Category of Documents, Select Portions of Information Within a Document May Be Protected

Under the three-part test affirmed by Order No. 381, the burden is on the Postal Service to “redact materials that contain both public and non-public information.” The salient division between public and non-public is usually performed by using the graphical redaction (blackout) method for all redacted materials. 39 CFR 3007.10(c). This approach, as codified, is consistent with federal practice to segregate protected and unprotected materials generally. Order No. 381 was based upon requiring the Postal Service to adhere to these obligations. While the Postal Service claims that certain documents contain confidential commercial information, it has failed to redact those portions, and only those portions, that qualify for confidential treatment.

a. The Commercial Information of Third Parties Other than Blockbuster and Netflix

P.O. Ruling C2009-1/12 and Order No. 381 afford considerable protection to the confidential information of third-parties other than Netflix or Blockbuster. See, e.g., Order No. 381 at 15. It is usually possible to consider content of a document either as material that identifies the third-party or material that is more substantive. The parties do not dispute that the names of other third parties are generally extraneous to preparing their cases. Consistent with the desire to protect the confidential commercial information of such other third parties, this Ruling seeks to address further issues beyond consensual redactions.

For the materials being unsealed in whole or part, this Ruling directs GameFly to consistently redact identifying information of each third-party enterprise,<sup>26</sup> other than the two largest DVD movie mailers, to ensure anonymity.<sup>27</sup> None of the full documents in dispute within this category appears to warrant blanket protection for all content. Full documents that reflect substantive information on the practices or interests that pertain to one or more of these other third parties will not be protected categorically, as they also reflect germane Postal Service practices, policies, or operations.

Aside from precautionary measures to anonymize and depersonalize disputed documents within this category, either under stipulation or by directive of this Ruling, an open issue is whether certain portions of the substantive information appear to be confidential. Even partial protection of the substantive information under this ground for information on such an “other third-party” appears to be justified rather infrequently. Some exceptions are carved out for protection in the Appendix, but these are usually consistent with the parties’ consensual arrangements.<sup>28</sup>

Other occasions may arise when limited substantive protection is justified in view of a plausible risk of commercial harm.<sup>29</sup> In short, GameFly will be directed to redact such substantive materials specified in the Appendix, when they contain confidential business information, even though the identity of the interested third party has been shielded. To this end, substantive portions not expressly redacted either as indicated in

---

<sup>26</sup> Also, to continue to ensure an elevated level of protection, the names of other third parties, the names and titles of the employees, as well as other individual identifying information, must be redacted, whether or not expressly subject to GameFly’s assent.

<sup>27</sup> If an “other third party” has waived confidentiality in writing then such redaction is not required.

<sup>28</sup> For certain excerpts, the ordered protection goes little further than that already stipulated, if any. See, e.g., 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 23 (GameFly Rejoinder). (“GameFly will consent to the redactions of the ‘Description’ portion of the letters [from Engineering on tests on the customers’ DVD mailers]”).

<sup>29</sup> See, e.g., Appendix determinations on GFL0000373-74, GFL0007278-79, GFL0007285-86, GFL0007292-93, and GFL0007294-95 (as to partial substantive redactions).

the Appendix, or by consent of the parties, will be governed by the presumption in favor of public disclosure.

b. Documents that Concern Netflix or Blockbuster.

As with each of the other categories of documents, consensual redactions are condoned in this category as well.<sup>30</sup> The protection is more limited here since the treatment of Netflix and Blockbuster constitute the benchmark for the allegedly unfair discrimination and the factors that favor transparency during litigation are stronger. The materials in the disputed documents that concern Netflix or Blockbuster, that did not constitute trade secrets, were eligible for continuing non-public treatment only if they were dated after November 8, 2007 and contained information that qualifies as confidential information.<sup>31</sup> Within the four disputed documents that were generated so recently, there is little material that could be separated as non-public from the remainder of these materials.<sup>32</sup> In one instance, the Appendix requires that a non-public table of data that bears on asserted distinctions between processing Netflix and Blockbuster mailpieces be redacted, because the data was reproduced from another source document, and the parties had consented to the redactions in the source document.<sup>33</sup> Otherwise, these materials generally did not qualify as confidential information, as

---

<sup>30</sup> See, e.g., Appendix, citing document with Bate Stamp numbers GFL0000545-0547.

<sup>31</sup> Documents dated on or before November 8, 2007 are ineligible for protection under the commercial confidential information objection for staleness, unless warranting protection separately as a trade secret. See P.O. Ruling C2009-1/12, at 24-25, see also *id.* at 28, n.51 citing USPS Office of Inspector General, Audit Report No. MS-AR-08-001, Review of Postal Service First-Class Permit Replay Mail (November 8, 2007).

<sup>32</sup> Those four documents are (a) GFL0000545-547, (b) GFL0001334-48, (c) GFL0001349-87, and (d) GFL0007285-26. See Application at 56, 83, 88-89, and 98.

<sup>33</sup> See Appendix at reference to GFL 0001360.

described in P.O. Ruling C2009-1/12, and no extraordinary showing of real harm was supported.<sup>34</sup>

c. Documents that Concern the Postal Service, But Not Any Identifiable Third-Party DVD Mailers

For the other category of the documents, which was accorded a less stringent degree of protection, the remaining issue is whether any of these documents contain information that genuinely warrants partial protection as confidential information, particularly as to pricing or processing practices. The Postal Service frequently resorted to characterizing the nature and extent of commercial harm to its alleged innovative practices in the following terms: “Public disclosure of this document would reveal Postal Service research and confidential information related to its development of a DVD mailpiece. It is likely that this disclosure would discourage the Postal Service from committing resources to this type of research and development.” See, e.g., Application at 44, citing GFL0000462. In other cases the type of research and development was too vague to discern. In more limited contexts, the Postal Service sought to support claims of harm in terms of dilution of its alleged intellectual property rights, but again the rationalization failed to support any rights with the requisite specificity as to the subject matter of the professed innovation, and it was unclear what passages if any had previously been consistently accorded protection measures internally. See, e.g., Application at 5, citing GFL0000003-004.

Most of the documents concerned one or more specified DVD mailers, and those materials have been addressed elsewhere. For the remaining documents, the proper

---

<sup>34</sup> Despite the foregoing, there is another instance in which the Appendix requires continuing protection beyond consensual redactions for certain information. This exceptional treatment protects materials in Appendix B to the Inspector General’s report, safeguarded initially under pre-litigation standards, that might qualify, among other things, as reflecting inputs that may enable one to extrapolate a DVD mailer’s current sensitive company production data, albeit unlikely. See generally Appendix, citing GFL 0000685–0704 (and redacting GFL 0000701).

conclusion is that partial protection is not adequately supported on the ground of confidential commercial information or trade secrets. See P.O. Ruling C2009-1/12 at 28-29. The Appendix provides a more nuanced treatment of the individual documents separately, under Fed. R. Civ. P. 26(c).

#### B. Deliberative Process Privilege

The specific requirements for claiming the deliberative process privilege are well-established.<sup>35</sup> Ordinarily a claim of deliberative process privilege must satisfy a four-part test. Specifically, information will not qualify for the deliberative process privilege, unless:

- (1) It was generated before the affirmative adoption of different specific agency policy;
- (2) It reflects the give-and-take of consultative process;
- (3) None of the deliberations referenced in the “information at issue in the document is the subject...that serves as a basis” of this unfair discrimination suit; and
- (4) Such allegedly privileged content is non-factual, or else it is factual material inextricably intertwined with non-factual information.

See Order No. 381 at 16.

---

<sup>35</sup> Order No. 381 at 16, citing *Public Citizen, Inc. v. Office of Management and Budget*, 569 F.3d 434, 442-44 (D.C. Cir. 2009). Since the issuance of Order No. 381, the United States Court of Appeals for the District of Columbia Circuit has reiterated the requirement that material must be both pre-decisional and deliberative in order to be privileged. *Public Citizen, Inc. v. Office of Management and Budget*, 2010 WL 820479 (D.C. Cir. March 10, 2010).

In addition to these requirements, it is commonly vital to ascertain how protecting the information at issue will advance the purpose of the deliberative process privilege.<sup>36</sup>

For each of the deliberative process privilege claims that the Postal Service has now filed, a threshold question is whether the Postal Service has satisfied the required four-part test. If so, “the critical question [becomes] whether ‘disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion and thereby undermine the agency's ability to perform its functions.’”<sup>37</sup> This, in effect, requires a specific showing of the role of each document in the deliberative process, in a way that reflects the “give and take” for weighing alternative policies.<sup>38</sup>

Three months after initially raising the deliberative process privilege, the Postal Service submitted its Application which addressed specific documents under rule 3007.21.<sup>39</sup> In many cases, the Application fails to provide the requisite support needed to meet the four-part test of deliberative process privilege in Order No. 381.

*Test 1.* To be considered pre-decisional, the material must precede, in temporal sequence, the decision to which it relates. To approve protection of a document as pre-

---

<sup>36</sup> Under applicable law, the goal of the deliberative process privilege is to prevent injury to the quality of agency decisions. The deliberative process privilege itself serves to insure that frank discussion of policy matters will be uninhibited by the debilitating effects of publicity, and it protects against both (a) premature disclosure of proposed policies before they have been finally formulated or adopted, and (b) confusing the issues and misleading the public by the dissemination of documents suggesting reasons for a course of action which was not, in fact, the ultimate one. Thus, the deliberative process privilege focuses on protecting advisory opinions, recommendations, and deliberations comprising part of an identifiable process by which governmental decisions are formulated for policies.

<sup>37</sup> *Eugene Burger Mgmt. Corp. v. U.S. Dep't of Housing and Urban Dev.*, 192 F.R.D. 1, 5 (D.D.C.1999). Moreover, there are instances when deliberative language that is untethered to any actual risk of revealing a deliberative process may not justify treatment as privileged.

<sup>38</sup> The Postal Service has not provided an organization chart and has (generally) not identified missing authors or recipients. In many cases, its support does not clarify uncertain dates, even though the materials plainly span over a half-dozen years. The documents typically offer only snapshots of imprecise contexts, and often without alternative policies.

<sup>39</sup> The support that the Postal Service produced had been required since P.O. Ruling C2009-1/7 in October of 2009, long before these claims of deliberative process privilege were specified for any document.

decisional in the first prong of the test, the record must enable one to pinpoint an agency decision or policy to which the document contributed. Documents which are privileged are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting an agency position that is only a personal position. The Postal Service fails to identify the decision or policy under consideration that many of these documents relate to.

*Test 2.* Generally, material is considered deliberative if it reflects the give-and-take of the consultative process. It is incumbent upon the agency to establish what deliberative process is involved, and the role played by the documents in issue in the course of that process. Documents that do not provide advice to a superior, suggest the disposition of a policy, or discuss the relative pros and cons of a specific approach, but rather explain an agency's existing policy or regulations are not deliberative.<sup>40</sup> The Appendix delineates when certain excerpts of a limited number of documents may warrant protection in light of specific contexts.

Under the first two tests, the claim of deliberative process privilege also “must be made in a timely manner with clear support that the information is both pre-decisional and deliberative.”<sup>41</sup> For the documents at issue, the Postal Service’s Application addresses the requisite factors under rule 3007.21(c) in only very broad and general terms. The Postal Service includes a vague caption for the nature of the subsequent

---

<sup>40</sup> Documents that evaluate the relative strengths and weaknesses of alternative views are not protected (despite appearing, at first to qualify as deliberative) if they constitute an agency's statement of the law. This is because the government's opinion about what is not the law and why it is not the law is as much a statement of government policy as its opinion about what the law is. Hence, a document that reflects a view eventually rejected by a field employee may still represent the opinion of the agency, in which circumstance the public can only be enlightened by knowing what the agency believes the law to be.

<sup>41</sup> Order No. 381 at 15. The Postal Service has had notice of the documents at issue for months, and had ample opportunity to review them for deliberative process privilege claims even before P.O. Ruling 2009-1/7 was issued in October, 2009. Yet, it did not seek to withdraw these allegedly privileged documents from production or ever suggest that their inclusion was inadvertent. See *also* Fed. R. Evid. 502.

decision in the log. It often leaves the direction of hierarchical flow unidentified. These descriptions omit the role of the document. Thus, for the majority of the content at issue, the Postal Service's support is deficient.

*Test 3.* The third test requires a showing that none of the deliberations referenced in the information at issue in the document is a basis of this unfair discrimination suit. The actual content and tenor of the language of the Postal Service's Application often reinforces a conclusion to the opposite effect.<sup>42</sup> The Postal Service typically avers that "(4) [commercial harm] 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." Application at 48, citing GFL0000495-096.

The actual degree by which the Postal Service's procedures and pricing practices may or may not prove unfair discrimination or undue preference vis-à-vis rival DVD mailers is squarely at issue. The vast majority of the disputed information that the Postal Service claims to be privileged is clearly not collateral to the contentions central to the cause of action raised under the applicable statute, but rather bears closely upon the effect and purpose of certain preferences, and whether they were unreasonable or unreasonably maintained as alleged.

---

<sup>42</sup> Moreover, where the information at issue pertains to the alleged disparities in treatment, operations, and processing practices among DVD mailers, the agency may bear a heavier burden to invoke this particular privilege, because the Postal Service claims the decisions were not made centrally. See, e.g., P.O. Ruling C-2009-1/12 at 25. "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.)" (footnote omitted).

On the other hand, GameFly's reliance upon the misconduct exception to eviscerate the deliberative process privilege across the board appears misplaced.<sup>43</sup> The better view appears to be that the deliberative process privilege generally may remain intact, even if the motive of the government is relevant to some inquiry in the case, as long the government's subjective motivation is not the very essence of a claim.<sup>44</sup>

*Test 4.* The party invoking the deliberative process privilege is usually only entitled to withhold the truly deliberative and pre-decisional portions of the document; that is, purely factual information can be unsealed if it is segregable. However, under point (d) of the four-part test, the Postal Service has made no serious effort to identify or seek protection of only the information that is confidential and non-public because it is non-factual.

When the Postal Service claims the deliberative process privilege it also must provide analysis that segregates unprivileged from privileged materials, as required under applicable law. It did not do so.<sup>45</sup> Although *in camera* inspection is no substitute for proper support of a claim of deliberative process privilege, such inspection may in unusual cases fill some of the gaps left by deficient support. See Appendix.

---

<sup>43</sup> The deliberative process privilege is not denied whenever someone seeking the information at issue establishes that there was disagreement within the governmental entity at some point in the decision-making process.

<sup>44</sup> GameFly's case does not require a showing of willful practices. While some courts may read the deliberative process privilege more narrowly to require even more disclosure, as for instance where an affirmative defense pivots upon an alleged unintended mistake, it is unnecessary to reach the issue on the absolute bounds of the exception. See *generally* Appendix.

<sup>45</sup> Given the novelty of the issues arising under the new rules of confidentiality, this Ruling adopts a cautious approach by treating non-factual information as having been properly pre-identified by the Postal Service, distinctly from factual information. In the future, this kind of deficiency may prove fatal to overly broad claims of deliberative process privilege.

1. There is Inadequate Support to Treat Any Full Document as Privileged

The Postal Service makes no additional attempt to satisfy the four-part test for any specific document or page at issue, much less all 313 pages, other than to provide them for *in camera* inspection. Every document contains segregable facts. Its recitations of potential commercial harm and the likelihood of such harm, typically consist of language that is unduly vague or conclusory.<sup>46</sup>

2. Limited Portions of Some Documents are Privileged

Legitimate policies underlie the deliberative process privilege, when properly viewed as a narrow exception to public disclosure. To be sure, a limited number of excerpts are privileged as claimed. It appears untenable in this case to sweep into the public domain certain passages which would have qualified as privileged but for technical omissions of support. This is particularly true, when the role of the non-factual material in the consultative process is already clear. Therefore, this Ruling will not ignore the clear role of the materials at issue within an actual deliberative process once it has been lodged for *in camera* inspection, even when the requested extrinsic support should have been stronger technically.

In most instances, however, certain defects in the Postal Service's professed support create gaps that are too difficult to bridge *sua sponte* upon mere inspection.<sup>47</sup> The Postal Service has relied on attempts to satisfy rule 3007.21 for specific documents in lieu of meeting its burdens to satisfy the four-part test by fully completing a valid

---

<sup>46</sup> Internal policy decisions on prices and classifications notably tend to be more centralized compared to decisions on processing practices and return mail treatment, according to the Postal Service's contention. If this were correct, then greater concern over chilling expression to supervising executives may be expected to arise over rates and classification changes, than over processing and treatment of DVD mailpieces. Under the Postal Service's scenario, the opinions of field employees on pricing policy would be more likely to be chilled by rejection and later disclosure, than opinions on local processing practices that routinely became de facto practices under field manager discretion.

<sup>47</sup> See also Fed. R. Civ. P. 26(b)(5), Advisory Committee Notes (2006 Amendment).

deliberative process privilege log, as expressly required by the Commission in Order No. 381.<sup>48</sup> The Application, as necessary as it is, looks insufficient now.<sup>49</sup>

To determine whether a document is recommendatory in nature, courts often consider the following traits: language; tone; circulation stream; apparent purpose; relative hierarchical positions of the drafter and recipients; depth and extent of subsequent adherence or reference to, or citation of, the document; and whether the agency has ever used the document to train personnel, treated it as precedential, or described it as having been “amended” or “rescinded”, for example. Typically, only a few of these factors are apparent on the face of any document in question, and many aspects are unknown, except to the Postal Service.

In conclusion, only a very small fraction of the content claimed to be privileged is actually privileged. For this fraction of the material, the deliberative process privilege actually does extend to information because the content reflects genuine pre-decisional deliberations involving recommendations or opinions. As to this limited volume of non-factual expression, individual employee’s opinions were plainly rejected or declined in the final analyses on a number of occasions, but such open communications may not be unduly chilled. Materials that are neither privileged nor protected will be unsealed.

---

<sup>48</sup> “Procedurally, no [deliberative process 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).” Order No. 381 at 17.

<sup>49</sup> The deliberative process privilege is a qualified privilege, not an absolute privilege, which entails a balancing of interests of the parties in civil litigation under Fed.R.Civ.P. rule 26(c). It is sometimes imperative to particularly engage in “a balancing of the competing interests, taking into account factors such as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation, the role of the government, and the possibility of future timidity [that would compromise deliberative candor] by government employees.” *In re Sealed Case*, 121 F.3d 729, 737-38 (D.C.Cir. 1997).

## V. PROCEDURES FOR UNSEALING

To ensure a prompt, but orderly, unsealing process that protects against a premature or erroneous public disclosure of any of the disputed materials, the following procedures shall be followed. GameFly shall be responsible for redacting all information that is to remain under seal. Within five (5) days after the date of this Ruling, GameFly shall serve upon the Postal Service a copy of the redacted materials. See 39 CFR 3001.15. The Postal Service shall within five (5) days after the date of receipt of such redacted materials from GameFly objections to such redactions, if any, with the Presiding Officer. Such objections shall be limited to claims that GameFly improperly failed to redact specific confidential or privilege information because it has not adhered to the findings in this Ruling or in the Appendix. The basis for any such objections shall be stated with particularity. Upon receipt of any such objections and GameFly's response, the Presiding Officer shall prescribe such further procedures as he deems to be necessary and appropriate, including a delay in public disclosure of the specific information at issue.

Aside from those situations, if any, which involve delays in public disclosure because of challenges for failure to adhere to the findings in this Ruling or the Appendix, public disclosure of unredacted information will not, except as otherwise ordered by the Presiding Officer or the Commission, be permitted until the sixth business day following the later of the date on which Postal Service receives the redacted materials served by GameFly; the final date for appealing the instant Ruling to the Commission under 39 CFR 3001.32(b)(2); or the date of a Commission order resolving an appeal of this Ruling.

The foregoing timetable for public disclosure is subject to modification by further ruling of the Presiding Officer or the Commission. Such a modification could be ordered for several reasons. For example, if the Postal Service were to elect not to object to any of the redactions made by GameFly but were to appeal the Presiding Officer's ruling with respect to some, but not all, disputed materials, the Presiding Officer could order

immediate public disclosure of unredacted information that is not subject to the outcome of the appeal. By retaining discretion to modify the timing of public disclosure of disputed materials, the Presiding Officer would be able to foster progress in the proceeding while the appeal is resolved.

Finally, in the interest of transparency, GameFly will be required to file copies of redacted materials with the Commission within five (5) days of the date upon which public disclosure of disputed materials is authorized. By requiring this filing, interested persons will be able to ascertain the extent to which disputed materials have been made public in this proceeding.

## RULING

1. The Application of the United States Postal Service for Non-Public Treatment of Materials, filed January 28, 2010, is granted, in part. Subject to the following ruling paragraphs, non-public treatment shall be accorded to those portions of the materials expressly identified in the body of this Ruling or the Appendix.
2. Except as provided in ruling paragraph 1, above, the Application of the United States Postal Service for Non-Public Treatment of Materials, filed January 28, 2010, is denied. Material denied non-public treatment shall be unsealed according to the procedure provided for in ruling paragraphs 3, 5, and 6 below.
3. GameFly shall redact the information that is ordered to remain under seal from the discovery material that was previously provided to GameFly by the Postal Service subject to protective conditions. GameFly shall serve a copy of such redacted materials on the Postal Service no later than five

(5) days after the date of this Ruling. The Postal Service shall have five (5) days from the date of receipt of the redacted materials served upon it by GameFly to object to those redactions, if any, that the Postal Service believes fail to adhere to the findings in this Ruling or the Appendix, hereto. Objections, if any, shall be filed with the Presiding Officer, who shall prescribe such further procedures as he deems necessary and appropriate. Unless otherwise ordered by the Presiding Officer or the Commission, public disclosure of unredacted information is authorized as provided in ruling paragraph 5, below.

4. GameFly will be required to redact the names, title, and identifying characteristics (*i.e.*, addresses, telephone number, *etc.*) of all individual employees, and to designate an encoded pseudonym in its place prior to unsealing or publication. GameFly shall file a list of the encoded pseudonyms under seal.
5. Except as otherwise ordered by the Presiding Officer or the Commission, public disclosure of unredacted information allowed under this Ruling is authorized beginning on the sixth business day following the later of: (a) the date on which the Postal Service receives the redacted materials served upon it by GameFly pursuant to ruling paragraph 3, above; (b) the final date for appeal of this Ruling under 39 CFR 3001.32(b)(2); or (c) the date of a Commission order resolving an appeal under 39 CFR 3001.32(b)(2). Not later than five (5) days after the date on which public disclosures are authorized, GameFly shall file with the Commission copies of the redacted materials.
6. The Appendix shall remain sealed until the date authorized for public disclosures by ruling paragraph 5 above. Until the Appendix is unsealed,

access by non-parties will be limited to those individuals who have satisfied the terms of access under the protective conditions to this case, as modified by Order No. 284.<sup>50</sup> Every signatory shall be obliged to treat the Appendix as non-public until it has been unsealed.

7. The Motion of GameFly, Inc. to Strike Responses of United States Postal Service to Order No. 381 or, in the Alternative, for Leave to File Reply, filed February 9, 2010 is denied as to the motion to strike, but granted as to its request in the alternative.
  
8. The Motion of the United States Postal Service for Late Acceptance of Its Reply in Opposition to Motion of GameFly, Inc., to Strike Responses of United States Postal Service to Order No. 381 or, in the Alternative, for Leave to File Reply, filed February 17, 2010, is granted.

Dan G. Blair  
Presiding Officer

---

<sup>50</sup> Order Granting, in Part, Joint Motion for Protective Conditions, August 21, 2009.