

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

RETAIL ACCESS OPTIMIZATION INITIATIVE

Docket No. N2011-1

**RESPONSE OF THE UNITED STATES POSTAL SERVICE TO
DAVID B. POPKIN MOTION NUMBER 17**
(November 1, 2011)

On October 21, 2011, David B. Popkin filed Motion 17, a motion to compel the Postal Service to provide a response to DBP/USPS-72 “without the utilization of placing material under seal.” David B. Popkin Motion Number 17, PRC Docket No. N2011-1 (October 21, 2011), at 7. On October 14, 2011, the Postal Service submitted Library References USPS-LR-N2011-1/24 and USPS-LR-N2011-1/NP20, which contained the information requested in DBP/USPS-72, and an application for non-public treatment explaining the basis for the redaction of finance numbers and revenue information. United States Postal Service Notice of Filing Library References USPS-LR-N2011-1/24 and USPS-LR-N2011-1/NP20, PRC Docket No. N2011-1 (October 14, 2011) (Postal Service Notice). In Motion 17, Mr. Popkin contends that the Postal Service’s response to NLP/USPS-1(e) included public disclosure of revenue information, and that this public disclosure forecloses the Postal Service from protecting confidential

information responsive to DBP/USPS-72. As described below, the Postal Service has a right to utilize Commission procedures to protect its confidential information from harmful public disclosure; the inadvertent disclosure of information on one occasion does not require that revenue information from other locations also be disclosed publicly, inadvertently or otherwise.

In responding to DBP/USPS-72, the Postal Service complied with Commission procedures that recognize the importance of protecting confidential information and apply specific procedures for protecting confidential information in the course of Commission proceedings. See Postal Service Notice. Motion 17 does not challenge the Postal Service's application for non-public treatment or its compliance with Commission procedures. Instead, Mr. Popkin argues that the Postal Service's inadvertent public disclosure of revenue information in one discovery response prohibits the Postal Service from utilizing Commission procedures to protect a different collection of confidential information included in other discovery responses.

The Postal Service regrets its inadvertent disclosure of revenue information in response to NLP/USPS-1(e), but it cannot, as Mr. Popkin appears to imply, unring the bell by filing a revised version that does not contain the information already inadvertently made public. Mr. Popkin neither makes a logical connection nor cites any claimed precedent in support of his position as to why the Postal Service should volunteer to damage itself through additional disclosures of information that is routinely disclosed in Commission proceedings, but only under seal.

In Library Reference USPS-LR-N2011-1/24, a public Library Reference containing information responsive to DBP/USPS-72, the Postal Service redacted protected confidential finance numbers and revenue information. None of the information included in Library Reference USPS-LR-N2011-1/24 was included in the response to NLP/USPS-1(e), which concerned revenue information – but not finance numbers - of different facilities.

In general, an agency's inadvertent disclosure of information does not trigger a waiver of the right to protect confidential information from public disclosure. See Department of Justice Guide to the Freedom of Information Act, *Discretionary Disclosure and Waiver*, available at http://www.justice.gov/oip/foia_guide09/disclosure-waiver.pdf, at 703 (recognizing general rule that “agency carelessness or mistake in permitting access to certain information is not equivalent to waiver”) (internal citations omitted). Even where withheld information is in the same category as information disclosed previously, no waiver occurs unless the withheld and disclosed information is identical. *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F.Supp. 2d 958, 966 (C.D. Cal. 2003) (rejecting waiver argument where protected information was “merely the same category of information, not the exact information” disclosed previously). In this case, information would be identical only if it had the same value and pertained to the same facility. The revenue information responsive to NLP/USPS-1(e) and DBP/USPS-72 is not the same because it is of different values and pertains to different facilities. Because the Postal Service's disclosure in its response to NLP/USPS-1(e) was

inadvertent and contained information that differed from the information responsive to DBP/USPS-72, this disclosure does not constitute a waiver of the right to protect information responsive to DBP/USPS-72.

Mr. Popkin has a procedural remedy for the problem he sees: he can undertake the simple steps to obtain access to the nonpublic information. His apparent choice not to do so, however, has no impact upon the necessity for protecting information that the Postal Service, in the exercise of good business judgment, determines should not be placed in the public domain. The Postal Service's judgment regarding the nondisclosure of this information publicly is a routine matter in Commission proceedings that has not been altered by one inadvertent disclosure. Thus, the inadvertent public disclosure of revenue information related to NLP/USPS-1(e) does not warrant compelling further damage to the Postal Service commercial interests in protecting the disclosure of sensitive financial information, and should accordingly effect no change in the protection of confidential information in the Postal Service's response to DBP/USPS-72.

This is not a situation where the Postal Service failed to respond to discovery. Library Reference USPS-LR-N2011-1/NP20 contains the information requested in DBP/USPS-72, unredacted and available to anyone – including Mr. Popkin – willing to abide by the Commission's straightforward procedures for obtaining access to confidential information.

As explained above, the Postal Service has supported the non-public treatment of its response to DBP/USPS-72 in compliance with Commission procedures. Accordingly, Motion 17 should be denied.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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