

**ORIGINAL**

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

APR 5 8 10 AM '99

INTERNATIONAL MAIL REPORT

DOCKET No. IM99-1

**UNITED STATES POSTAL SERVICE RESPONSE TO  
MOTION OF UNITED PARCEL SERVICE TO PROVIDE PUBLIC ACCESS TO  
INTERNATIONAL DATA REQUESTED IN ORDER NO. 1228 AND FOR  
OPPORTUNITY TO PROVIDE PUBLIC COMMENT**

**PROCEDURAL HISTORY**

On February 16, the Commission issued Order No. 1228, which identifies the information the Postal Service must provide to enable the Commission to prepare a report on international mail costs, revenues, and volumes in accordance with 39 U.S.C. § 3663. On March 15 and 26, the Postal Service provided materials responsive to Order No. 1228. In a transmittal letter accompanying the March 15 filing,<sup>1</sup> the Postal Service advised that the materials included in its filing were internal documents of a commercially sensitive nature that the Postal Service would not normally make publicly available. Accordingly, the Postal Service requested that the Commission withhold from public disclosure the materials it has filed with the Commission, and implement guidelines promulgated by the Department of Justice Office of Information and Privacy<sup>2</sup>

<sup>1</sup> Letter from William T. Johnstone, Managing Counsel, United States Postal Service, to Hon. Margaret Crenshaw, Secretary, Postal Rate Commission (Mar. 15, 1999).

<sup>2</sup> U.S. DEPARTMENT OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY, *OIP Guidelines: Referral and Consultation Procedures*, FOIA UPDATE, vol. XII, no. 3 (Summer 1991).



should the Commission receive requests for public disclosure of the information. The Postal Service also expressed its intent to provide the Commission with a more specific description of the commercially sensitive nature of the materials it has provided.

On March 26, the Commission received the Motion of United Parcel Service to Provide Public Access to International Mail Data Requested in Order No. 1228, and for Opportunity to Provide Public Comment (hereinafter "UPS Motion"). In its Motion, UPS requests, *inter alia*, that the Commission make public, to the maximum extent possible, the information provided by the Postal Service in Response to Order No. 1228, and that the Commission give interested parties access under protective conditions to information that the Postal Service demonstrates to be commercially sensitive.<sup>3</sup> The Postal Service respectfully requests that UPS's Motion be denied.

### **ARGUMENT**

The UPS motion rests on well-recognized policies favoring public disclosure of government records embodied in the Freedom of Information Act (FOIA). UPS cites basic caselaw interpreting the FOIA as the principal authority supporting its request in this context. UPS Motion at 2-3. In this regard, the Postal Service certainly recognizes the importance of public disclosure and openness that lies at the center of the FOIA mechanism. It bears emphasizing, however, that those policies, especially in the context of the FOIA statutory framework, are not unqualified. Specifically, Congress, in enacting the FOIA, and the courts, in interpreting it, have recognized important

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<sup>3</sup> UPS also requests the opportunity to comment on the data after it is made available.

countervailing policies that are embodied in the statute itself in the form of exemptions from mandatory disclosure. These generally protect such acknowledged interests in not disclosing government records as protection of trade secrets, avoiding interference with the free expression of ideas and the deliberative process within government organizations, and protection of investigative records.

Furthermore, the Postal Reorganization Act itself, as codified in Title 39 of the United States Code, incorporates specific policies favoring nondisclosure that recognize the unique nature of the Postal Service as a government entity that has wide-ranging responsibilities and authorization to function as a competitive enterprise, as well as a basic public service. Specifically, section 410 of title 39 includes an additional list of exemptions from the FOIA's mandatory disclosure provisions that embody recognition of the Postal Service's special status and interests. As an integral part of the Reorganization Act, furthermore, the policies protected by section 410(c) are tied to the general policies in title 39 that created the Postal Service and guide it in the conduct of its affairs. In this regard, we note in particular 39 U.S.C. § 410(c)(2). This subsection provides that neither the FOIA nor any of the other statutes incorporated in 39 U.S.C. § 410(b)(1), shall require the disclosure of:

information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed.

This provision decisively demonstrates that Congress, in creating the Postal Service as an entity expected to bring good business practice to bear on its activities on the public's behalf, recognized that there was need to observe the conventions of the

business environment in acting like a business. In this regard, we submit that there is no more recognized practice in modern business than that embodied in a firm's expectation that it should, and will be able to, protect sensitive information from inquiry by other businesses in competition with it. Not only does this policy loom large in the context of the Reorganization Act, furthermore, it has been recognized by the courts as a specific exemption statute under the FOIA. See *National Western Life Ins. Co. v. United States*, 512 F. Supp. 454, (N.D. Tex. 1980).

Nor does section 410(c)(2) exhaust these nondisclosure policies. Other provisions protect the work product of Postal Service consultants (§ 410(c)(5)), information related to collective bargaining (§ 410(c)(3)), and specifically information “prepared for use in connection with proceedings under chapter 36 of this title.” 39 U.S.C. § 410(c)(4). This latter provision, among other things, ensures that the federal record disclosure laws will not be permitted to circumvent the orderly rules governing authorized procedures in rate and classification matters under Chapter 36. The Postal Service regards this exemption as being particularly pertinent to prevent the premature or unauthorized disclosure of information that might have been developed to use in formal proceedings under Chapter 36 governed by federal regulations having the force of law.

In the current situation, UPS has not proceeded under the FOIA. Rather, UPS seeks to induce the Commission to disclose publicly certain Postal Service internal documents and records, which the Postal Service has provided in connection with its responsibilities to give the Commission access to information to enable it to carry out its responsibilities under the new reporting requirement established for the Commission in

39 U.S.C. § 3663. In this respect, it cannot be gainsaid that, whatever disclosure of data and information that might be contemplated by section 3663, it does not nullify the Postal Service's statutorily protected interests in withholding certain types of information in response to requests for its records under the FOIA and section 410(c).

The fact that the Commission has for now gained custody of these records for use in connection with section 3663 should not dispose of this matter. It was specifically in the context of this circumstance that the Postal Service respectfully requested that the Commission consider the information submitted to it to be internal records that the Postal Service would not voluntarily disclose to its competitors. Up to now, the Commission has respected that request. The Postal Service also requested that, at a minimum, the Commission should observe the Department of Justice guidelines pertaining to requests for records originating at another agency in responding to any public requests for the information the Postal Service has submitted. We attached a copy of these guidelines to the letter of March 15, 1999, that transmitted the materials.

UPS also couches its request for public disclosure in the context of 39 U.S.C. § 3663. In this regard, we note particularly that the Commission has deferred for now establishing through rulemaking any specific procedures for carrying out its reporting responsibilities under section 3663. A new docket series has been established (IM99-1), but the legal nature of activity within that docket has not yet been considered or established.

UPS's Motion seems to presume that the procedures that establish opportunities for the public to participate in rate and classification proceedings apply with equal force

to section 3663. Nothing in the plain language of section 3663 lends support to this conclusion. Section 3663 neither gives interested persons the opportunity to inspect the Postal Service's data filed under 39 U.S.C. § 3663, nor authorizes the public to influence the Commission's preparation of its report. In enacting section 3663, Congress did not amend 39 U.S.C. § 3624, which requires the Commission to hold hearings on domestic rate and classification matters on the record under Administrative Procedure Act (APA) procedures, to include section 3663 functions.<sup>4</sup> Indeed, nothing in section 3663 even requires the Commission to make its report available to the public; rather, the statute merely requires that the Commission "transmit to each House of Congress" its report. The fact that Congress has deliberately subjected a subset of Commission functions to Administrative Procedure Act procedures, and has not applied these procedures to section 3663, indicates strongly that Congress never intended to give the public the type of access to the information that UPS's Motion contemplates.

Furthermore, as noted above, there is at this time no procedural context for the Commission's reporting under section 3663. We submit that until the Commission

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<sup>4</sup> As the Presiding Officer observed in Docket No. R97-1, it is section 3624 that authorizes public access to information filed by the Postal Service:

Production of information in the course of formal Commission proceedings is authorized generally by 39 U.S.C. § 3624(a), which requires the Commission to provide an "opportunity for a hearing on the record under sections 556 and 557 of title 5[.]" In proceedings conducted under these provisions, parties are entitled "to conduct such cross-examination as may be required for a full and true disclosure of the facts[.]" and in general "[a]ny oral or documentary evidence may be received," with the exception of irrelevant, immaterial, or unduly repetitious evidence. 5 U.S.C. § 556(d).

P.O. Ruling No. R97-1/62 at 6.

formulates procedures, in a lawfully authorized rulemaking proceeding giving all parties an opportunity to comment on proposals, there is no legal foundation for UPS's demands. Even if the Commission pursues such a rulemaking, moreover, the Postal Service strongly disagrees with UPS's implication that the reporting responsibilities under section 3663 authorize the Commission to conduct, in effect, an international rate and fee proceeding, parallel in most respects to its functions under Chapter 36 with regard to domestic rates and fees. In electing to seek the Commission's expertise to advise it on international rates and fees, Congress clearly excluded other obvious alternatives in connection with the Postal Service's international business. Congress neither created Commission authority to issue a recommended decision on international rates, nor did it even establish any procedure leading to an advisory opinion. *Cf.* 39 U.S.C. § 3661(c). Clearly the analogues for those approaches coexist within the same statute.

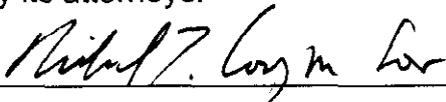
UPS's argument that public access will be beneficial because it will make possible *party comments on the Postal Service's data that will enhance the Commission's reporting competence* has a logical appeal, but it would be more persuasive if it arose in a more conventional context where the Commission was carrying out something other than a reporting responsibility. The Commission is an expert agency, and presumably that is why the Congress elected it for this reporting function. To the extent section 3663 contemplates a comparison with domestic ratemaking concepts, the Commission is qualified to pursue that exercise without input from competitors. The Postal Service, moreover, has expressed a willingness to work closely with the

Commission to provide whatever clarification and support might be needed in preparing the first report. Therefore, while the Postal Service does not repudiate the suggestion that *comment on issues might be worthwhile*, it does not believe that any value provided by that exercise would at this time outweigh the aforementioned policies protecting the Postal Service's internal records related to its commercial affairs.

In summary, no authority provides direct support for UPS's contention that it should be given access to the Postal Service's filing in the same capacity as a participant in a section 3622 or 3623 proceeding, whether access be under protective conditions or otherwise. To the contrary, there is no legal basis for grant of the relief requested in UPS's Motion. The Postal Service accordingly requests that the Commission deny UPS's Motion for access to the information provided by the Postal Service under 39 U.S.C. § 3663.

UNITED STATES POSTAL SERVICE

By its attorneys:



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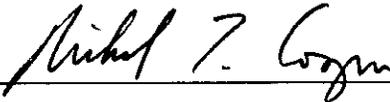
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April 5, 1999

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.



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