

Before the  
POSTAL REGULATORY COMMISSION  
Washington, DC 20268-0001

Freedom of Information Act Regulations

Docket No. RM2009-6

INITIAL COMMENTS OF THE GREETING CARD ASSOCIATION

The Greeting Card Association (GCA) files these initial comments pursuant to Order No. 230 (July 1, 2009; 74 Fed. Reg. 33388, July 13, 2009). GCA participated actively in the Commission's development of rules governing the treatment of non-public information in Docket No. RM2008-1.

In these comments we address certain aspects of the coordination of the confidentiality rules established in that docket with the proposed Freedom of Information Act (FOIA) regulations. While in general, the proposed rules seem appropriate for their purpose, a few provisions seem to call for clarification. As written, they raise the possibility that the protections established by the confidentiality rules could be eroded.

GCA understands that the Commission intends to take materials submitted under 39 CFR § 3007.10 out of the category of "public records."<sup>1</sup> We agree that that treatment is appropriate. Our concerns involve the proposed treatment of some categories of Part 3007 non-public materials which are or may be covered by a FOIA request.

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<sup>1</sup> Order No. 230, p. 4, states:

Proposed Rule 3004.10 references rule 3007.10 as an exception to "public records" as rule 3007.10 allows persons to designate as non-public and initially exempt from disclosure.

1. Section 3004.30 sets out to define the relationship among FOIA, the Privacy Act, and the Commission's confidentiality processes. The specific discussion of the relationship between FOIA and Part 3007 is in subsection (d):

(d) *Requesting a Postal Service record.* The Commission maintains custody of Postal Service records.

(1) Postal Service records which are covered by the Commission's treatment of non-public materials under part 3007 of this chapter may be requested following the procedures set forth in that part.

(2) A request to the Commission for Postal Service records via a Freedom of Information Act request pursuant to 5 U.S.C. 552 shall be referred to the Postal Service.

Paragraph (d)(1) may (and in GCA's view should) be read as meaning that a Postal Service record determined to be non-public under Part 3007 may be obtained, if at all, *only* through Part 3007 procedures, and not – separately, and under different rules – through FOIA. If that is the correct interpretation, the governing structure would be –

- A FOIA request, insofar as it asks for Part 3007 non-public materials which are also Postal Service records, will be denied and the requester will be allowed to seek access to them under Part 3007; and
- A FOIA request for Postal Service records, insofar as they are not Part 3007 non-public information, will be referred to the Postal Service's FOIA processes.

This is appropriate as far as it goes, but as described in proposed Rule 3004.30(d) it seems to make no provision for legitimately confidential third-party information which is not also a Postal Service record. Suppose, for example, that

in a Commission proceeding requesting party X requests data from respondent party Y through normal discovery processes (in the example, neither X nor Y is the Postal Service). Respondent Y obtains designation of the data as non-public pursuant to Rule 3007.22. The data, since they are provided by one private party to another via the Commission's Part 3007 process, seemingly would not constitute a Postal Service record and thus – literally speaking – would not be covered by subsection (d).

If the purpose of subsection (d) is *only* to clarify the handling of information which could be sought under FOIA either from the Commission or from the Postal Service – and not to create a different sort of protection for Part 3007 non-public data which also happen to be Postal Service records – the provision seems unproblematic. GCA suggests, however, that the intent of the provision be clarified.

2. Proposed Rule 3004.70 appears to raise two issues of interpretation. Under one possible interpretation, it could erode the protections created by Part 3007.

A. Subsection (a) deals with the “overlap” between FOIA and Part 3007 processes, and specifies that the submitter of material reasonably believed to be exempt from disclosure may apply for non-public treatment under § 3007.10. Subsection (b) states, *inter alia*, that the Commission will notify the submitter of a FOIA request covering exempt material. Subsection (c) reads:

(c) *Objections to disclosure.* A submitter may file written objections to the request specifying all grounds for withholding the information under FOIA within 7 days of the date of the notice. If the submitter fails to respond to the notice, the submitter will be considered to have no objection to the disclosure of the information.

If “all grounds for withholding the information under FOIA” is meant only to require such a statement *in addition to* the grounds already given, and accepted,

for non-public treatment under Part 3007, this provision would not be inappropriate. At most, it could require the objecting submitter to reiterate and reaffirm the Part 3007 grounds for non-public status.

The provision could, however, be read to mean that the submitter must state all the objections recognized by FOIA, *and that no other objections will be recognized*. This would mean that information properly found entitled to non-public treatment under Part 3007 could be deprived of that protection if it did not also fall within a FOIA exemption.

This issue is significant because the § 504(g)(1) grounds for non-public treatment are broader than the FOIA exemptions. First, that section allows the Service to designate information as non-public which is “described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5[.]” These two non-disclosure authorities are not conterminous. With respect to business information, for example, 39 U.S.C. § 410(c)(2) exempts

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[.]

Section 552(b)(4) of title 5 exempts:

trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]

It is not clear that “confidential” in FOIA Exemption 4 is as broad as the “good business practice” standard of § 410(c)(2). In addition, Exemption 4 applies only to information “obtained from a person” – i.e., not the agency’s own information – while § 410(c) applies regardless of the origin of the materials.

This possible construction of Rule 3004.70(c) raises another difficulty. If a person files a Rule 3007.31 request for early termination of non-public status, the

Commission will use one of two standards: the “two-factor” test of § 504(g)(1)(A) if the information belongs to the Postal Service, or the FRCP Rule 26(c) balancing test if it is third-party information. If the same requester asked for the same information under FOIA, however, the Commission would be committed by proposed Rule 3004.2(b)<sup>2</sup> to apply a “clear presumption of openness.” It is not easy to see how the Commission could meaningfully apply either of the balancing tests required by Rule 3007.33, if the proposed “clear presumption” must be thrown into the balance on the side of disclosure.<sup>3</sup> Such a parallel structure of disclosure authorities, with a higher probability of disclosure under FOIA procedures than under Part 3007, would foreseeably lead requesters to use the FOIA process rather than the one specifically designed to meet the requirements of 39 U.S.C. § 504(g).<sup>4</sup>

Perhaps the, or at least one, underlying question regarding proposed Rule 3004.70(c) is whether the Commission intends the filing of a FOIA request covering non-public material to reopen the question of its non-public status. If that is the Commission’s intent, then it is somewhat confusing to say that proposed Rule 3004.10(a) makes Part 3007 non-public material an exception to the category of “public records” – it is an “exception” only so long as no FOIA request for it has been filed. If non-public status is to be reopened, then, at the least, the submitter of the materials should be allowed to restate (and supplement, if need be) the § 504(g)(1)/ Part 3007 grounds for confidentiality as well as any objections recognized by FOIA, and to have these objections considered independently of the

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<sup>2</sup> “(b) It is the stated policy of the Commission that FOIA requests shall be administered with a clear presumption of openness.”

<sup>3</sup> Theoretically, the same problem could arise in connection with requests for access under Rules 3007.42 and 3007.52, although neither of those rules mandates general public disclosure of the information.

<sup>4</sup> Insofar as it affected Commission proceedings and annual compliance reviews, that situation would be undesirable because disclosure under FOIA is necessarily *public* disclosure: there is no room for protective conditions, limitation of disclosure to named persons, and the like.

obligations, policies, and procedures the Commission is establishing under FOIA.<sup>5</sup>

B. The title of proposed Rule 3004.70, and one part of its text, present an additional problem. The rule is titled "Submission of business information." In subsection (b) the Commission states that it "may also provide notice when it has reason to believe that business information possibly exempt from disclosure may fall within the scope of any FOIA request."

It is not clear, however, why only business information is so treated. Proposed Rule 3004.70(a) appears meant to cover all situations where Part 3007 non-public information is in issue, and a number of kinds of non-business information are protected from disclosure under both FOIA and 39 U.S.C. § 410(c). For example, both § 410(c)(6) and FOIA<sup>6</sup> allow the Service and the Commission to withhold law enforcement files. Since both statutes list business information as a separate category<sup>7</sup>, law enforcement files arguably would not be covered by Rule 3004.70 as now written. GCA would suggest removing the "business information" reference from the title and from subsection (b) and substituting an appropriately general term that would reflect the full scope of the statutory and Part 3007 protections for legitimately confidential information.

August 12, 2009

Respectfully submitted,

GREETING CARD ASSOCIATION

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<sup>5</sup> The problematic phrase could be rewritten as "specifying all grounds for withholding the information," or as "specifying all grounds for withholding the information both under FOIA and under Part 3007."

<sup>6</sup> 5 U.S.C. § 552(b)(7).

<sup>7</sup> 5 U.S.C. § 552(b)(4); 39 U.S.C. § 410(c)(2).

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