

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

Complaint of Capital One Services, Inc.

Docket No. C2008-3

RULING ESTABLISHING PROCEDURES FOR
THE DEPOSITION OF JESSICA DAUER LOWRANCE

(Issued August 26, 2008)

I. INTRODUCTION

Ruling No. C2008-3/2, issued on August 26, 2008, authorized the deposition of Jessica Dauer Lowrance of the United States Postal Service. This procedure is necessary because the Postal Service has stated that Ms. Lowrance will no longer be available for questioning after August 29, 2008. Any participant in this case may attend, but it is not open to the general public. Except as previously announced, Commission employees will not be present. The deposition is scheduled for 10 a.m. on August 27, 2008. This ruling sets out the procedures to be followed during Ms. Lowrance's deposition.

II. DOCUMENT PRODUCTION BY MS. LOWRANCE

Capital One requests that Ms. Lowrance bring with her to the deposition all documents from her offices relating to the issues in the Capital One Complaint.¹ The

¹ Application of Capital One Services, Inc. for Authorization to Depose Jessica Dauer Lowrance of the United States Postal Service, August 21, 2008 (Application) at 3.

request includes, but is not limited to, any documents she prepared, reviewed, or has on file that are responsive to Document Request COS/USPS-1-17, filed August 8, 2008.²

The Postal Service objects to this request because the Document Request is the subject of a pending discovery dispute.³ Document Request COS/USPS-1-17 is generally directed to the Postal Service, and not to specific Postal Service employees. The discovery dispute objections are based on relevance, undue burden, commercial sensitivity, and privilege.⁴

Relevance and Breadth. The Postal Service argues that the Document Request is overly broad, and thus lacks relevance. Objection at 1-2. However, the deposition document request is specifically directed to documents associated with Ms. Lowrance concerning this case. This request is relatively narrow and appears reasonably calculated to lead to the discovery of admissible evidence. The Postal Service also specifically argues that producing organizational charts, names and titles will not produce evidence that would assist the Commission. *Id.* at 2. As related to Ms. Lowrance and her responsibilities, however, the names of employees under her direction working on the agreements associated with this case and her chain of command are relevant and may lead to the discovery of admissible evidence.

Undue Burden. The Postal Service argues that the Document Request is unduly burdensome and will require countless work hours for compliance. *Id.* at 3-4. In contrast, the deposition document request is limited to the documents from Ms. Lowrance's offices relating to the issues in the Capital One Complaint. Production of these documents should not be overly burdensome.

Finally, the Postal Service objects to the Document Request based on commercial sensitivity, attorney-client privilege, and a deliberative process privilege. *Id.* at 5-7. As related to Ms. Lowrance's deposition, specific objections based on

² Document Requests of Capital One Services, Inc. to the United States Postal Service (COS/USPS-1-17), August 8, 2008 (Document Request).

³ Response of the United States Postal Service to Application of Capital One Services, Inc. for Authorization to Depose Jessica Dauer Lowrance, August 22, 2008 (Response) at 2.

⁴ Objection of the United States Postal Service to Document Requests of Capital One Services, Inc. (COS/USPS-DR-1-17), August 19, 2008 (Objection).

commercial sensitivity or privilege may be made during the deposition according to the procedures outlined below.

Exemption Claims. Under 39 U.S.C. 504(g)(1), the Postal Service may assert that materials Ms. Lowrance is asked to produce are exempt from disclosure due to their commercially-sensitive nature pursuant to 39 U.S.C. 410(c) or 5 U.S.C. 552(b). The Postal Service, however, must give specific reasons, in writing, for such a claim. See 39 U.S.C. 504(g)(1). Under 39 U.S.C. 410(c), the Postal Service may claim as exempt from public disclosure the name and address information of postal customers; certain commercial information, for example, trade secrets; certain information related to the negotiation of collective bargaining agreements; information prepared for proceedings before the Commission or the federal courts concerning postal rates, classes and services; reports and memoranda prepared by outside sources unless their disclosure would have been required if the Postal Service had prepared the reports or memoranda itself; and investigatory files compiled for law enforcement purposes, unless legally available to parties other than the Postal Service.

Under 5 U.S.C. 552(b), records that may be withheld from public disclosure include, but are not limited to, matters concerning only internal personnel matters of an agency; matters specifically exempted from public disclosure by statute; trade secrets and privileged or confidential commercial or financial information; non-public interagency or intra-agency memoranda or letters; privacy protected personnel, medical and other files; and certain law enforcement records or information. Section 552(b) specifically provides that any portions of records subject to disclosure that can be segregated from records otherwise exempt from disclosure must be provided.

As a general matter, the Commission evaluates such exemption claims by the Postal Service with an eye towards reaching a fair balance between the commercial interests of the Postal Service and the public interest in disclosure of information concerning a public entity that operates in commercial markets.

Privilege Claim. According to Commission rules when a party objects to a request for the production of documents by "claiming privilege [the party] shall identify

the specific evidentiary privilege asserted and state the reasons for its applicability.” 39 CFR 3001.26(c). The burden is on the party objecting to the discovery based on a claim of privilege to establish that the privilege is properly claimed.” *Horton v. U.S.*, 204 F.R.D. 670, 673 (D. Colo. 2002).

Procedure for Production of Documents. Ms. Lowrance must bring all documents from her offices relating to the issues in the Capital One Complaint to the deposition for her reference. If a request for production is made, a claim of exemption under 39 U.S.C. 410 (c) or 5 U.S.C. 552(b) or privilege may be interposed. With regard to any documents not produced at the deposition by Ms. Lowrance based on a claim that the documents are either privileged or exempt from disclosure under 39 U.S.C. 410(c) or 5 U.S.C. 552(b), the Postal Service must expressly allege the privilege or exemption claim asserted, and provide a detailed privilege log within 7 days. The privilege log must provide a specific and detailed description of the materials claimed to be privileged or exempt in a manner that, without revealing the materials at issue, will allow the Presiding Officer to thoroughly evaluate the basis for the claim that they are privileged or exempt from disclosure. See *e.g.*, Fed R. Civ. P. 26(b)(5).⁵

The Postal Service must also appropriately redact materials that contain both privileged and non-privileged information or exempt and non-exempt information. For example, the Postal Service may not identify a whole page as privileged or exempt from disclosure if the page contains both privileged and non-privileged or exempt and non-exempt information, but must redact only the information it claims to be privileged or exempt from disclosure under 39 U.S.C. 410(c) or 5 U.S.C. 552(b). If necessary and appropriate for efficient document management, the Postal Service shall sequentially number each page of the materials identified as non-privileged.

⁵ Such privilege log must also state “the precise reasons for each claim of privilege asserted.” *Horton v. U.S.*, 204 F.R.D. 670, 673 (D. Colo. 2002).

III. DEPOSITION TESTIMONY PROCEDURES

Timing and Sequence of Questioning. The deposition of Ms. Lowrance shall not exceed 7 hours on August 27, 2008. Capital One shall be the first to ask questions of Ms. Lowrance. If any time remains, other parties may ask questions after Capital One has finished its questioning.

Objections as to Form. Any objections as to the form of questions during the deposition shall be noted on the record. The deposition shall proceed, however, and Ms. Lowrance testimony will be taken and recorded subject to the objections posed.⁶

Objections Based on Privilege or Claim of Exemption. If objections to questions are made during the deposition based on a claim of privilege or claim of exemption under 39 U.S.C. 410(c) or 5 U.S.C. 552(b), and Ms. Lowrance is instructed by her counsel not to answer the question or questions, the court reporter will record such questions and specially mark them. Subsequent to the end of the questioning by Capital One, the deposition room will be cleared except for Ms. Lowrance, counsel, the court reporter, and Ms. Eichinger. If there are objections to the presence of counsel, the parties shall attempt to arrange mutually satisfactory protective conditions. If that proves impossible, counsel may be excluded. Any questions objected to by the Postal Service based on a claim of privilege or exemption and not answered by Ms. Lowrance will be repeated by the court reporter and then answered in full by Ms. Lowrance. This part of the record will be placed under seal for in camera review by the Presiding Officer. Before unsealing any part of the record, the Commission will give the parties ample opportunity to submit legal briefs on the issue.

⁶ Katja Eichinger, the officer assigned for purposes of taking oaths and clarifying procedures is not authorized to rule on any objections during the deposition.

RULING

1. The Procedures contained within the body of this ruling shall apply to deposition of Jessica Dauer Lowrance of the United States Postal Service scheduled for 10 a.m. on August 27, 2008.
2. Capital One Services, Inc. will bear the transcription costs of the deposition.

Dan G. Blair
Presiding Officer