

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

Regulations to Establish Procedure for
According Appropriate Confidentiality

Docket No. RM2008-1

**REPLY COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA**
(October 10, 2008)

The Newspaper Association of America (“NAA”)¹ respectfully submits these reply comments on the Commission’s Notice of Proposed Rulemaking² to implement 39 U.S.C. §504(g). NAA and its member newspapers have long advocated the free flow of information regarding governmental activities as necessary to protecting the public interest in a free society.

NAA will address three issues raised in the opening comments on the *NPRM*. These are:

- The inapplicability of the substantive standards drawn from Rule 26(c) of the Federal Rules of Civil Procedure to the Section 504(g)(3) test for weighing Postal Service assertions of confidentiality;
- The unauthorized expansion beyond the “commercial injury” recognized by Congress of the scope of material subject to Postal Service confidentiality assertions; and
- The treatment of third party documents within the possession of the Postal Service.

¹ The Newspaper Association of America (“NAA”) is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers. NAA members use all classes of mail. According to the most recent data available, NAA member newspapers spent nearly \$1 billion in postage in 2006.

² Order No. 96 (Aug. 13, 2008) (*NPRM*).

I. “PROCEDURES” BASED ON RULE 26 DO NOT INCLUDE THE SUBSTANTIVE JUDGE-CREATED BALANCING TEST APPLIED IN CIVIL LITIGATION, BECAUSE CONGRESS HAS PROVIDED THE APPROPRIATE STANDARD

Section 504 as enacted in the PAEA allows the Postal Service to designate, subject to a subsequent Commission determination, material as confidential pursuant to provisions of the Freedom of Information Act or the Administrative Procedures Act. Section 504 also empowers the Commission nonetheless to disclose such information upon making the requisite finding.

Section 504(g) does so in three paragraphs. Section 504(g)(1) grants the Postal Service the option to assert, if it chooses, confidentiality of any document or other matter that it provides to the Commission either pursuant to a subpoena or at the request of the Commission in connection with a proceeding or for any other purpose under the PAEA. Section 504(g)(2) establishes a general obligation on the part of the Commission to honor a Postal Service assertion of confidentiality.

Section 504(g)(3) establishes the circumstances under which the Commission may override the Postal Service’s assertion of confidentiality. There are two subparagraphs. Subparagraph 504(g)(3)(A) confers the Commission with the authority to make public information previously provided to it by the Postal Service subject to the latter’s designation of that material as confidential, so long as the Commission has adopted a process for determining the appropriate level of confidentiality. Adopting that process is the purpose of this proceeding.

In addition, in Subparagraph 504(g)(3)(A), Congress also prescribed the substantive standard that the Commission is to apply when determining whether to override the Postal Service's assertion of confidentiality with respect to filed material:

The Commission shall balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.

Thus, Congress decreed that the test the Commission shall apply to Postal Service assertions of confidentiality is one that balances "likely commercial injury" to the Postal Service from disclosure against the public interest in the financial transparency of that government establishment.

The second subparagraph, Section 504(g)(3)(B), reads as follows:

Paragraph (2) shall not prevent the Commission from requiring production of information in the course of any discovery procedure established in connection with a proceeding under this title. The Commission shall, by regulations based on rule 26(c) of the Federal Rules of Civil Procedure, establish procedures for ensuring appropriate confidentiality for information furnished to any party.

The first sentence in Section 504(g)(3)(B) ensures that Postal Service assertions of confidentiality will not prevent the Commission from requiring production of that information in discovery in proceedings under the PAEA. This is a specific application of the Commission's power to overrule Postal Service assertions of confidentiality with respect to material that the Postal Service has not previously filed under Section 504(g)(1) but which may be subject to a discovery request.

The second sentence by its terms directs the Commission to establish *procedures* for ensuring the confidentiality of materials provided during discovery. However, as both Val-Pak and the Postal Service point out in their comments, the *NPRM* appears to assume that the *procedures* in Rule 26(c) include the substantive “good cause balancing test”³ used by federal courts despite that the very next paragraph in the *NPRM* acknowledges that Section 504(g)(3)(B) instructs the Commission to adopt procedures only.

Val-Pak correctly points out that the Rule 26(c) judge-created balancing test used in civil litigation is incompatible with the substantive balancing test adopted by Congress in Section 504(g)(3)(A). The second sentence in Section 504(g)(3)(B) does nothing other than direct the Commission to use the *procedural* devices found in Rule 26(c), such as protective orders, to ensure appropriate confidentiality when the Postal Service provides assertedly nonpublic information to third parties in the context of adversarial discovery.

However, nothing in Section 504(g)(3)(B) empowers the Commission to import the substantive “balancing test” developed by federal courts in managing litigation discovery disputes into the substantive standard governing disclosure of material for which the Postal Service asserts confidentiality. Indeed, while such a

³ See *Arnold v. Penn. Dep’t of Transp.*, 477 F.3d 105, 108 (3d Cir. 2007). The Third Circuit’s factors are: (1) [T]he interest in privacy of the party seeking protection; (2) whether the information is being sought for a legitimate purpose or an improper purpose; (3) the prevention of embarrassment, and whether that embarrassment would be particularly serious; (4) whether the information sought is important to public health and safety; (5) whether sharing of the information among litigants would promote fairness and efficiency; (6) whether the party benefiting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.

test is necessary in civil litigation in the absence of any other standard by which confidentiality claims may be assessed, such a judge-created standard is not needed here, contrary to the position of the Postal Service, because Congress has already supplied the governing standard in Section 504(g)(3)(A).

The *NPRM* states that a “single rule governing disclosure” could apply to both Sections 504(g)(3)(A) (general) and (B) (discovery in Commission proceedings). *NPRM* at 5. It would be more accurate to say that a single standard applies, and that standard was established by Congress: the “likely commercial injury to the Postal Service” against the “public interest in maintaining the financial transparency of a government establishment competing in commercial markets.”⁴

Accordingly, Proposed Rule 3007.21(b)(1) is flawed insofar as it includes the phrase “and to qualify for a particular evidentiary privilege recognized by federal civil courts, in particular Federal Rule of Civil Procedure 26(c).” This phrase could be read as importing the substantive criteria developed in case law. The quoted language should be deleted from the final rule, and the Commission should apply only the substantive Section 504(g)(3) balancing test when determining, using *procedures* modeled on Rule 26(c) as appropriate, whether or on what terms information for which the Postal Service asserts a claim of confidentiality should be disclosed. Other evidentiary privileges should remain in Part 3001 of the Commission’s rules of practice.

⁴ Contrary to the Postal Service (at 5), the “likely commercial injury” to the Postal Service when the material concerns market-dominant products will be less pronounced, if it exists at all, than when the subject matter concerns competitive products. The Commission should be skeptical of unsupported assertions of competitive injury by the Postal Service.

II. CONGRESS STIPULATED THAT THE COMMISSION WEIGH ONLY LIKELY “COMMERCIAL INJURY” TO THE POSTAL SERVICE, NOT VAGUE AND OPEN-ENDED “OTHER INJURY”

As noted above, Congress established in Section 504(g)(3)(A) the standard by which the Commission must evaluate Postal Service assertions of confidentiality:

The Commission shall balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.

The *NPRM* states that Proposed Rule 3007.25(a) – entitled “Standard for decision” – “memorializes the balancing test prescribed in 39 U.S.C. 504(g)(3)(A) for determining the appropriate degree of confidentiality to be accorded non-public material.” *NPRM* at 12. But, as Val-Pak points out (at 11-12), Proposed Rule 3007.25(a) does not do so. Instead, the Proposed Rule significantly and materially modifies the statutory test to read “likely commercial *or other injury* identified by the Postal Service” (emphasis added).⁵

“Other injury” is undefined in the *NPRM*, but its weakening effect of its vagueness and open-endedness on the statutory test is clear. In fact, the Postal Service’s comments (at 5-6), in supporting this expansion, illustrate the loophole that the “or other injury” language would create by listing nine types of injury that it argues would be covered. It certainly can be expected to expand this list in the future. However, Congress addressed, and foreclosed, this open-ended grab for

⁵ To the extent the “other injury” language is intended to refer to the substantive standards developed in litigation under Federal Rule of Civil Procedure 26(c), it is defective for the reasons explained in Section I and should be deleted.

secrecy by establishing the standard in Section 504(g). Therefore, and contrary to the position of the Postal Service (at 5), the “or other injury” language is inconsistent with the statute and should be deleted from Proposed Rule 3007.25(a).⁶

Furthermore, there is no conflict between the Section 504(g)(3) test and Sections 5 U.S.C. §552(b) (FOIA) and 39 U.S.C. §410(c) on which the Postal Service may base assertions of confidentiality. Those provisions allow, but do not require, the Postal Service to assert confidentiality. They do not mandate confidentiality. Congress specifically authorized the Commission to evaluate and override those assertions by providing that the Section 504(g)(3) test applies.

The Postal Service (at 3) argues that Section 504(g) “was not enacted to establish the Commission as an appellate body to generally review Postal Service final agency decisions under FOIA to exempt records from mandatory public disclosure.” True enough, but beside the point. Direct review of Postal Service final actions denying FOIA requests lies in the federal courts. However, disclosures under Section 504(g) are evaluated under a different regulatory regime and the legal standard applicable to asserted confidentiality in that regime is quite different than under FOIA. A Section 504(g)(3) analysis is simply not an appellate review of a FOIA denial; it is a separate legal inquiry by the Commission, under its own organic legal authority, of a representation by its

⁶ At best, the Postal Service’s list (at 6) suggests a reason why some materials perhaps should not be required to be filed with the Commission on a routine basis. Indeed, the Postal Service points to no current obligation that it file any of those materials with the Commission on a periodic, routine basis.

regulatee.⁷ In other words, 5 U.S.C. §552(b) and 39 U.S.C. §410(c) have no independent legal effect in a Section 504(g)(3) analysis, but rather are subsumed by the term “commercial injury” insofar as Congress deemed them relevant.

In this regard, Proposed Rule 3007.25(b), which contemplates weighing “undue burden” or other evidentiary privileges when considering disclosure, also should not be adopted. First, to the extent “undue burden” may be an argument regarding *confidentiality*, it is subsumed within “commercial injury.” Otherwise, “undue burden” is simply a common objection to a discovery request under Part 3001 of the Commission’s rules, an entirely separate issue than the threshold question under Section 3007 of whether the information may be disclosed at all. Second, the proposed rule would further confuse discovery practice by inserting unrelated “specific evidentiary privileges” (that properly belong in ordinary discovery) into the test governing disclosure of allegedly confidential information. Congress having supplied the governing Section 504(g)(3) standard, the Commission simply has no statutory basis for introducing such vague additional considerations.

III. THIRD PARTIES HAVE NO ABSOLUTE RIGHT TO PREVENT DISCLOSURE OF THEIR DOCUMENTS IN THE POSSESSION OF THE POSTAL SERVICE

Finally, NAA opposes the position of Parcel Shippers Association *et al.* (at 4-5) that a third party that has provided documents to the Postal Service should

⁷ FOIA, in any event, applies to requests from the public, not other governmental agencies. The Commission is not “the public” so FOIA literally does not apply to the Postal Service vis a vis the Commission. Rather, Congress’s citation to FOIA is best understood as indicating the confidentiality claims that the Postal Service may wish to assert.

have an absolute right to prevent disclosure of that document. Disclosure of one's potentially sensitive documents, when in the possession of another entity, is always a risk in the business world. There is no reason why third parties dealing with the Postal Service should have any greater rights than in other business relationships. Parties assume that risk daily when they provide documents to the Postal Service or any other entity. Indeed, to the degree that the third party is seeking a preferential deal on rates or services, the public interest strongly favors more, not less, disclosure.

Under Rule 26, third-party documents in the possession of an entity to which a discovery request is made are subject to discovery to the same extent as the requestee's documents. Rule 26 contains no blanket exception to discovery of third-party materials of the type sought by *Parcel Shippers et al.* Instead, Rule 26 recognizes the third party's interests by allowing the third party to seek an appropriate protective order. That should be the procedure at this Commission as well, and to that extent NAA concurs with the suggestion of the Postal Service at page 10 of its comments. Appropriate protective orders, where justified, will protect a third party's information while still allowing such disclosure as may be necessary in Commission proceedings.

IV. CONCLUSION

For the foregoing reasons, the Newspaper Association of America urges the Commission to modify its proposed regulations to implement Section 504(g) in a manner consistent with these reply comments. In particular, the Commission

- should delete the phrase “and to qualify for a particular evidentiary privilege recognized by federal civil courts, in particular Federal Rule of Civil Procedure 26(c)” from Proposed Rule 3007.21(b)(1);
- should delete the phrase “or other injury” from Proposed Rule 3007.25(a);
- should delete Proposed Rule 3007.25(b) in its entirety;
- should reaffirm the statutory Section 504(g)(3) standard; and
- should reject the unsupportable notion that third-party material in possession of the Postal Service is absolutely privileged.

Respectfully submitted,

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