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UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

Before Commissioner: Edward J. Gleiman, Chairman  
W.H. "Trey" LeBlanc III, Vice Chairman  
Dana B. Covington, Sr.; \*Ruth Goldway; and  
George A. Omas

ORDER DENYING APPEAL OF PIPER & MARBURY FROM THE  
COMMISSION'S DISPOSITION OF ITS FOIA REQUEST FOR A  
COPY OF THE COMMISSION'S REPORT ON INTERNATIONAL MAIL

(Issued September 15, 1999)

On June 30, 1999, the Commission provided Congress with a report on the costs, revenues, and volumes of the international mail handled by the Postal Service during fiscal year 1998, as required by 39 U.S.C. § 3663. Virtually all of the data presented and analyzed in the Commission's report were provided by the Postal Service at the Commission's request. The Postal Service accompanied the information with a notice that it considered much of it to be commercially sensitive, and would not be disclosed under good business practice. See Letter to Margaret P. Crenshaw, Secretary, Postal Rate Commission, from William Johnstone, Managing Counsel, International Law and Ratemaking, dated March 15, 1999, accompanying the Postal Service's filing of the FY 1998 International Cost and Revenue Analysis report. The Postal Service elaborated on the rationale underlying its position in Comments of the United States Postal Service on the Commission's 39 U.S.C. § 3663 Report, filed April 8, 1999, in Docket No. IM99-1.

You filed a request under the Freedom of Information Act (FOIA) for a copy of the Commission's report on July 19, 1999. The Commission denied that

request in part, redacting certain commercially sensitive information from the copy of its report that it provided to you. Letter of Margaret P. Crenshaw, Secretary, Postal Rate Commission, to John McKeever, Piper & Marbury, dated July 29, 1999 (Commission Letter of July 29). On August 18, 1999, you filed an appeal from the Commission's partial denial of your request. Appeal on Partial Denial of Freedom of Information Act Request for Report Under 39 U.S.C. § 3663, filed August 18, 1999, at 4 (Appeal). In order to process a similar request from another party, the Commission asked the Postal Service to identify the specific portions of the Commission's report that it believed were commercially sensitive, and to provide an explanation of the legal basis for claiming that those portions should be exempt from public disclosure. Letter from Cyril J. Pittack, Acting Secretary, Postal Rate Commission to Mary Elcano, General Counsel, United States Postal Service, dated July 14, 1999.

The Postal Service responded on July 21, 1999, by submitting its proposed redactions, along with a memorandum containing the factual assertions and legal rationale supporting them. On July 29, 1999, the Commission provided you with a copy of its international mail report with redactions that the Commission believes are consistent with the Postal Service's factual representations and the applicable legal standards. In an accompanying letter, the Secretary of the Commission explained that, with certain modifications, the redactions and the supporting rationale submitted by the Postal Service had been accepted.

The letter explained that the basis of its redactions was the withholding provision of § 410 of the Postal Reorganization Act [39 U.S.C. § 410] and its relationship to the Freedom of Information Act [5 U.S.C. § 552], as that relationship has been interpreted by the Federal courts. The letter noted that § 410(b)(1) makes the FOIA applicable to the Postal Service, but that its applicability is limited by § 410(c), which provides that the FOIA shall not require the disclosure of

(2) 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 3604(e) of the Postal Reorganization Act makes the provisions of § 410 applicable to the Commission, "as appropriate." Section 410(c)(2) is among the provisions that are appropriately applied to the Commission.

Section (b)(3) of the FOIA [5 U.S.C. § 552(b)(3)] exempts from mandatory disclosure records that are "specifically exempted from disclosure by statute." Under subsection (B), agency records are specifically exempted by statute if they specify "the particular types of matters to be withheld." Two Federal District Court cases have interpreted § 410(c)(2) as sufficiently specific as to the type of matter to be withheld to come within 5 U.S.C. § 552(b)(3)(B)(2). See *Weres Corporation v. United States Postal Service*, C.A. No. 95-1984, at 3-5 (D.D.C. 1996) (unpublished memorandum opinion); and *National Western Life v. United States Postal Service*, 512 F. Supp. 454, 458-59 (N.D. Tex. 1980).

Neither of these opinions defines "good business practice," but in *National Western Life*, the court held that

[g]ood business practice is readily ascertainable by looking to the commercial world, management techniques, and business law, as well as to the standards of practice adhered to by large corporations.

512 F.Supp. at 459. The *Weres* court concluded that Congress intentionally left it to the Postal Service to determine what specific behavior constitutes "good business practice," reflecting the broad goal of the Postal Reorganization Act to eliminate legislative obstacles to the application of modern management and business practices to the Postal Service. *Id.* at 4.

Having concluded that § 410(c)(2) qualifies as a statutory exemption from the disclosure requirements of FOIA, the court in *National Western Life* found it unnecessary to determine whether § 410(c)(2) might authorize nondisclosure without reference to the FOIA. The court in *Weres* went further, declaring that

the intent of § 410(c)(2) to authorize withholding is plain on its face, and its withholding provisions “trump” those of the FOIA. *Id.* at 3.

The Commission read these two opinions as finding in the “good business practice” standard of § 410(c)(2) a Congressional intent to put the Postal Service “on an equal footing with private competitors with respect to its disclosure obligation, at least when the public hearing provisions of Chapter 36 of the Postal Reorganization Act do not apply.” Commission Letter of July 29 at 3-4. The Commission indicated, however, that this is only a rough equivalence, because the “good business practice” standard appears to require more than “standard business practice.” The Commission expressed the view that § 410(c)(2) does not authorize the withholding of information simply because it is commercial in nature and it is the business norm to withhold such information. In the Commission’s view, the Postal Service must still demonstrate some plausible scenario under which disclosure of commercial information could cause commercial harm, in order to justify withholding under § 410(c)(2). *Id.* at 6.

Your appeal primarily challenges the conclusion that the Commission draws from these two opinions that § 410(c)(2) puts the Postal Service on roughly the same footing as its private competitors with respect to its obligations to disclose commercial information, at least when the public hearing procedures of Chapter 36 do not apply.<sup>1</sup> You cite *National Western Life*, which rejected the Postal Service’s argument that it could withhold the names and duty stations of its employees under the “good business practice” standard of § 410(c)(2). You quote this language of the court, and supply the following emphasis

**It is quite true that in creating the United States Postal Service, the Congress intended that it should operate**

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<sup>1</sup> Your appeal primarily challenges the Commission’s conclusion that § 3663 does not override § 410(c)(2). For the most part, it does not challenge the Commission’s interpretation of what types of information come under the terms of § 410(c)(2). At page 4, note 2, of your appeal, however, you assert that § 410(c)(2) does not cover routinely collected cost data, but covers only trade secrets “and similar information whose value would be destroyed if made public.” This restrictive construction of § 410(c)(2) is undermined by the language of § 410(c)(2) itself, which identifies the information that it covers non-restrictively as “information of a commercial nature, including trade secrets . . .” (emphasis supplied). By using such language, Congress clearly intended § 410(c)(2) to cover a broader range of commercial information than that traditionally viewed as trade secrets.

more like a private business than a governmental agency. Nevertheless, the Postal Reorganization Act of 1970 did not remove all semblance of a public agency from the Postal Service, it is still a public agency and its employees are public employees. *Although it may not be good business practice for a private company to disclose names and addresses of its employees, that is not the only concern to be considered. The Postal Service is still subject to public responsibility, as evidenced by the applicability to the Postal Service of the Freedom of Information Act.*

You argue that in arriving at this conclusion, the court in *National Western Life*

treated § 410(c)(2) and FOIA's "commercial information" exemption of 5 U.S.C. § 552 together. *Id.* at 461-62. Thus, § 410(c)(2) does not "place[] [the Postal Service] on an equal footing with private competitors" when it comes to public access to information.

Appeal at 4.

You imply that the above-quoted language of the court in *National Western Life* demonstrates that § 410(c)(2) is synonymous with 5 U.S.C. § 552(b)(4). The Commission finds little in the court's opinion to support that implication. The court found that § 410(c)(2) qualifies as a statutory exemption from the disclosure requirements of the FOIA, for the reasons already described. Having decided that § 410(c)(2) qualifies as an exemption statute, the court observed, "it must then determine if the specific information sought by the Plaintiff is within the parameters of the exemption." Addressing the parameters of the § 410(c)(2) exemption, it noted that there is

no authority as to what constitutes "commercial information" for the purposes of Section 410(c)(2), and thus it may be useful to review related statutory and regulatory provisions to ascertain the intent of Congress.

512 F.Supp. 454, 460. In the absence of direct authority bearing on the meaning of the term "commercial" as it is used in § 410(c)(2), the court

looked at § 552(b)(4), as well as other FOIA exemptions, for any inferences it might draw<sup>2</sup>. The court concluded that “the list of employee names and addresses is not ‘commercial information’ under 39 U.S.C. § 410(c)(2).” 512 F.Supp. at 462. The court then observed

Since the information here requested is not commercial information, the court need not address the question of whether this information would not be disclosed pursuant to Section § 410(c)(2) on the basis of “good business practice.” Brief comments are perhaps necessary, however, because the government has implicitly argued that the public interest will be disserved by the disclosure of this information.

Id.

The public responsibility language taken from the court’s opinion that is the focus of your appeal (see Appeal at 3) comes after the court had already concluded that neither § 410(c)(2) nor the FOIA provided a basis for withholding the employee-related information sought by the plaintiff. In that language, the court is merely rejecting the Postal Service’s argument that the public interest would be disserved by disclosing the requested information.<sup>3</sup>

In the Commission’s view, *National Western Life* simply stands for the proposition that where commercial information is not involved, the public interest will favor disclosure of certain types of Postal Service records. In the Commission’s letter of July 29, it concluded that the Federal District courts appear to view § 410(c)(2) as putting the Postal Service in roughly the same position as its private competitors with

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<sup>2</sup> Specifically, it sought guidance as to whether the meaning of the term “commercial” should be affected by the identity of the requestor, or the use that requestor would likely make of the information.

<sup>3</sup> Technically, the “public responsibility” observations of the court, coming at this point in its opinion, are dicta. As noted above, the court explicitly held that the employee information sought by the plaintiff was not “commercial,” and, therefore, there was no need to decide whether it could be withheld “under good business practice.” Although the court went on to observe that the Postal Service has public responsibility to disclose certain kinds of information, the court did not purport to be balancing that consideration against the statutory withholding provisions that it had already found were inapplicable. 512 F.Supp. 462.

respect to its disclosure obligations. The letter should have been more explicit that it is *commercial* information to which this conclusion applies.

Your appeal asserts that there should be a general presumption that reports required by Congress should be made publicly available. You argue that public disclosure of the information elicited by § 3663 should be regarded as necessary to achieve the broad policy objectives of the Postal Reorganization Act. You argue further that § 3663 should be construed to override the withholding provision of § 410(c)(2), much as the public hearings provisions of Chapter 36 override § 410(c)(2) with respect to domestic mail. Appeal at 4-5.

Publicly disclosing the costs, volumes, and revenues of individual international mail products might enhance the ability of the public to question and comment on the fairness and efficiency of the rates charged for the Postal Service's international mail products. Nevertheless, at some level of detail, such disclosure could result in commercial harm to those services. The Commission presumes that Congress has weighed the various effects that might result from public disclosure of commercial information about the Postal Service's international mail products, and intentionally struck the balance it preferred by casting § 3663 in its present form.

In its present form, § 3663 does not mandate public hearings with respect to the economic and public service aspects of international mail, as other parts of Chapter 36 do with respect to domestic mail. Nor does § 3663 explicitly require the Commission's international mail report to be made public. In contrast, § 410(c)(2) explicitly states that the FOIA not be used to require the Postal Service to disclose commercial information that "under good business practice would not be publicly disclosed."

In your appeal, at 5, you argue that the interests of the competitors of the Postal Service's international mail services are among those that Congress sought to protect by establishing the § 3663 reporting requirement. From this you urge the Commission to infer that Congress,

without explicitly saying so, intended § 3663 to stand in conflict with, or to override § 410(c)(2). The Commission believes that it is more plausible to infer that Congress was aware of the competing concerns that the Postal Service has to keep certain data on international mail confidential, and that the Postal Service's competitors have to verify that international mail services are covering their costs. By requiring only that the Commission report its findings to Congress, Congress appears to have reserved to itself the task of balancing these competing concerns, aided by the information provided in the Commission's international mail report.

For these reasons, the Commission rejects the central premise of your appeal that § 3663 was intended to override the withholding provisions of § 410(c)(2), and affirms the initial disposition of your FOIA request for a copy of its international mail report. Please be advised that under 5 U.S.C. § 552 (a)(4)(B), you have a right to challenge the Commission's decision in Federal district court.

It is ordered:

The Appeal on Partial Denial of Freedom of Information Act Request for Report Under 39 U.S.C. § 3663, filed by Piper & Marbury on August 18, 1999, is denied for the reasons stated in the body of this Order.

By the Commission.  
(S E A L)



Margaret P. Crenshaw  
Secretary

\*Commissioner Goldway not participating.