



November 28, 2023

Mr. Ivan D. Butts
President
National Association of Postal
Supervisors
1727 King Street, Suite 400
Alexandria, VA 22314-2753

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Re: Requests for Postal Pulse Report

Dear Mr. Butts:

This letter is in response to your correspondence on behalf of the National Association of Postal Supervisors ("NAPS") requesting a report relating to the Postal Pulse survey.

NAPS has requested that the Postal Service produce "the full Postal Pulse report," which "accompanied the summary report." However, because the information NAPS requests is the property of a third-party entity – not the property of the Postal Service – the Postal Service cannot produce it.

The report is protected commercial information that would not be released under good business practice. See 39 C.F.R. § 410(c)(2); 5 U.S.C. § 552(b)(3). The report is "commercial information" because it is "proprietary or includes conditions or protections on distribution and disclosure, is subject to a nondisclosure agreement, or a third party has otherwise expressed an interest in protecting such information from disclosure[.]" 39 C.F.R. § 265.14(b)(i)(D). The report provides an assessment of employee satisfaction, safety and engagement and reveals a third party's confidential and proprietary methodologies for assessing survey results. And it is subject to disclosure and use restrictions which does not include disclosure to NAPS. It would not, then, be a good business practice to release this information because it is subject to disclosure restrictions and contains proprietary information. Disclosure could impact the Postal Service's business relationship with the third party and the Postal Service's ability to abide by any contract requirements with that party. Moreover, information in the record directly implicates the Postal Service's strategies and disclosure could be beneficial to the Postal Service's competitors, who could use the information to undermine the Postal Service's efforts or otherwise use the information to its own benefit. Last, other similar businesses do not appear to release such information. Thus, the Postal Service will not provide the record because of the protections afforded it by 39 C.F.R. § 410(c)(2), in conjunction with 5 U.S.C. § 552(b)(3).

In addition, the Postal Service declines to provide the report because it is copywritten by the third party owner. See 39 U.S.C. § 552(b)(4) ("Section (b)(4)"); *Hooker v. U.S. Dep't of Health & Hum. Serv.*, 887 F. Supp. 2d 40, 61 n.18 (D.D.C. 2012), *aff'd*, 2014 WL 3014213 (D.C. Cir. 2014). Section (b)(4) protects "[1] trade secrets and [2] commercial or financial information [i] obtained from a person and [ii] privileged or confidential." 5 U.S.C. § 552(b)(4). The terms "commercial" and "financial" are given their ordinary meaning. *Pub. Citizen Health Rsch. Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). "[I]nformation is commercial if it pertains to the exchange of goods or services or the making of a profit." *Citizens for Responsibility & Ethics in*

Washington v. Dep't of Justice, 2023 WL 1113218, at *4 (D.C. Cir. 2023) (citations omitted). Courts have noted that "the touchstone is whether the disclosure of the contested information 'could ... materially affect[]' the 'commercial fortunes' of the business." *Ctr. for Med. Progress v. Health & Hum. Serv.*, 2022 WL 4016617, at *5 (D.D.C. 2022), reconsideration denied, 2022 WL 17976633 (D.D.C. 2022) (citations omitted). The term "confidential" has also been given its ordinary meaning. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019). The term means "private" or "secret." *Id.* at 2363. It should be information that is customarily kept private or at least closely held by the person imparting it. *Id.* Courts in the District of Columbia "have taken the position that 'privately held information is generally confidential absent an express statement by the agency that it would not keep information private, or a clear implication to that effect (for example, a history of releasing the information at issue).'" *Wilson v. Fed. Commc'ns Comm'n*, 2022 WL 4245485, at *10 (D.D.C. 2022) (citations omitted).

Applying these principles, the record also falls within the ambit of 39 U.S.C. § 552(b)(4). The record was obtained from a third party, it is commercial information because it is related to the exchange of services (i.e., contracted services from the third party to the Postal Service), and disclosure could materially affect the commercial fortunes of the third party. Moreover, the record contains copywritten information covering its confidential assessment of the Postal Pulse survey results and its methodologies underlying that assessment. "A copyright holder ... naturally has a commercial interest in the information that [it] seeks to protect." *Naumes v. Dep't of the Army*, 2022 WL 17752206, at *2 (D.D.C. 2022) (internal quotation marks and citations omitted). Lastly, the record is confidential. It is subject to disclosure restrictions as defined in its "Copyright Standards" notice. This demonstrates that this record is privately and closely held by its owner.

Accordingly, the record is appropriately protected by 39 U.S.C. § 552(b)(4). *See, e.g., Flyers Rights Educ. Fund, Inc. v. Fed. Aviation Admin.*, 71 F.4th 1051, 1059 (D.C. Cir. 2023) (concluding that the FAA properly withheld information where it incorporated into its records proprietary Boeing information). NAPS' request should not otherwise serve "as an end run around the protections afforded by copyright to access information it would otherwise have to pay for." *Naumes v. Dep't of the Army*, 588 F. Supp. 3d 23, 40 (D.D.C. 2022) (citations omitted).

Thank you for your attention to this matter. If you have any questions, or would like to discuss further, please let me know. Moreover, if there are additional requests that are not covered by this letter, please let me know when we can set up some time to discuss further.

Sincerely,



Bruce A. Nicholson
Manager
Labor Relations Policy Administration

cc:

Ray E. Donahue, Esq.
Andrew D. Freeman, Esq.