ORDER NO. 6429

UNITED STATES OF AMERICA

POSTAL REGULATORY COMMISSION

WASHINGTON, DC 20268-0001

Before Commissioners: Michael Kubayanda, Chairman;

Mark Acton, Vice Chairman;
Ann C. Fisher;

Ashley E. Poling; and

Robert G. Taub

Annual Compliance Report, 2022 Docket No. ACR2022

ORDER GRANTING MOTION FOR ACCESS

(Issued January 25, 2023)

# INTRODUCTION

On January 13, 2023, United Parcel Service, Inc. (UPS) filed a motion requesting access to certain non-public library references filed by the Postal Service as part of its *Annual Compliance Report* (ACR).[[1]](#footnote-2) For the reasons discussed below, the Commission grants the motion.

# Procedural History

On January 13, 2023, UPS filed a motion requesting access to non-public Library References USPS-FY22-NP2, -NP3, -NP7, -NP8, -NP9, -NP10, -NP11, -NP12, -NP13, -NP14, -NP19, -NP20, -NP21, -NP22, -NP23, -NP24, and -NP30. Motion at 1. UPS requested continued access to the non-public library references granted to it in Docket Nos. ACR2014, ACR2015, ACR2016, ACR2017, ACR2018, ACR2019, ACR2020, and ACR2021. *Id*. Additionally, UPS requested access for 14 outside counsel and consultants only, so that “they may assist UPS in potentially making informed comments” in the instant proceeding. *Id.* at 2. The Motion included a list of outside counsel and consultants and certifications for each. *Id*. Exhibit 1; Motion, Appendix A to Part 3011.

In its Motion, UPS noted that it has conferred with the Postal Service, which consents to the Motion with respect to FY 2022 folders -NP10, -NP11, -NP12, -NP13, -NP19, -NP20, and -NP21 and continued access to those folders from previous years. Motionat 1-2. However, it further noted that the Postal Service

reserves the right to respond to UPS’s motion with respect to (1) this year’s versions of folders NP2, NP3, NP7, NP8, NP9, NP14, NP22, NP23, NP24, and NP30, insofar as third party information is implicated, and (2) continued access to folders NP2, NP3, NP7, NP8, NP9, NP14, NP22, NP23, NP24, and NP30 from previous years.

*Id.* at 2. As a result, on January 18, 2023, the Commission granted the Motion in part, permitting access to UPS and its outside counsel and consultants to those non-public library references that the Postal Service did not oppose (*i.e.*, Library References USPS-FY22-NP10, -NP11, -NP12, -NP13, -NP19, -NP20, and -NP21, and continued access to those folders from previous years).[[2]](#footnote-3)

On January 20, 2023, the Postal Service filed a response to the UPS Motion, related to its request to access non-public materials with information related to third-party foreign postal operators, specifically non-public Library References USPS-FY22-NP2, -NP3, -NP7, -NP8, NP9, -NP14, -NP22, -NP23, -NP24 and -NP30, as well as folders containing third-party business information in prior Annual Compliance Review dockets.[[3]](#footnote-4)

In this Order, the Commission addresses the remaining contested non-public library references noted by UPS and the Postal Service for which a Commission decision is pending (*i.e.*, non-public Library References USPS-FY22-NP2, -NP3, -NP7, -NP8, -NP9, -NP14, -NP22, -NP23, -NP24, and -NP30) and the request for continued access to those folders from previous years.

# positions of the parties

## UPS Motion for Access

UPS asserts that the information contained in non-public Library References USPS-FY22-NP2, -NP3, -NP7, -NP8, -NP9, -NP14, -NP22, -NP23, -NP24, and -NP30 will allow it to meaningfully comment on whether the Postal Service is in compliance with multiple applicable legal provisions.[[4]](#footnote-5) Additionally, UPS contends that its outside counsel and consultants believe it may be useful to compare the non-public library references from Docket Nos. ACR2014, ACR2015, ACR2016, ACR2017, ACR2018, ACR2019, ACR2020, and ACR2021 to the current non-public information requested in order to compare cost trends. *Id.* at 6-7. It states that although its outside counsel and consultants have previously gained access to this information, UPS has not obtained permission from the Commission for its outside counsel and consultants to use these materials for the purposes of developing comments in the instant docket. *Id.* at 7. It, therefore, requests that the Commission grant that permission along with access to the non-public materials requested in Docket No. ACR2022. *Id*.

## Postal Service Response

The Postal Service does not explicitly oppose the request for access to non-public Library References USPS-FY22-NP2, -NP3, -NP7, -NP8, NP9, -NP14, -NP22, -NP23, -NP24 and -NP30. However, as in prior years, the Postal Service notes that it is “especially difficult” for foreign entities to participate timely and directly in Commission proceedings.[[5]](#footnote-6) It further notes that it “ma[d]e various foreign postal operators aware” of the Motion, and that some of foreign postal operators “continue to raise concerns.” Postal Service Response at 2*.*  As part of its Response, the Postal Service attaches letters from the designated operators of Italy (Poste Italiane)[[6]](#footnote-7) and Canada (Canada Post Corporation),[[7]](#footnote-8) which indicate concerns regarding the adequate protection of data and other commercially sensitive information. The Postal Service requests that the Commission take these correspondence into account when evaluating the Motion. Postal Service Response at 3*.*

# Commission Analysis

## Legal Standard

The Postal Service may seek non-public treatment for materials that are submitted to the Commission if such information would be exempt from disclosure pursuant to 39 U.S.C. §§ 410(c), 504(g), 3652(f), or 3654(f).[[8]](#footnote-9) Under 39 U.S.C. § 504(g)(3), the Commission has specific authority to determine whether production of the non-public material is required in the course of “any discovery procedure established in connection with a proceeding [before the Commission].” 39 U.S.C. § 504(g)(3)(B). Section 504(g)(3)(B) provides that, in the context of discovery, the Commission may disclose information obtained from the Postal Service if the disclosure is found to be appropriate and consistent with the kind of balancing of interest that is performed by Federal civil courts when asked to establish protective conditions under Fed. R. Civ. P. 26(c). *Id.* Specifically, the statute requires the Commission to establish procedures by regulation based on Fed. R. Civ. P. 26(c) to ensure “appropriate confidentiality for information furnished to any party.” *Id.*

The Commission’s regulations governing access to non-public information codify this statutory requirement by setting forth rules providing for access to non-public materials along with strict protective conditions based on Fed. R. Civ. P. 26(c). In the rulemaking proceeding amending the rules relating to non-public information, the Commission provided an overview of how the rules function:

Recognizing that public disclosure of certain information may be commercially harmful to the Postal Service, other persons, or both, [the] existing [non-public materials rules] permit[] the filing of commercially sensitive information to be non-public (also known as “sealed” or “under seal”). At the same time, acknowledging the need for transparency, [the] existing [non-public materials rules] provide[] for procedures to allow for a person to request that non-public materials be disclosed to the public (also known as “unsealed”). Moreover, [the] existing [non-public materials rules] provide[] for procedures to allow for persons to request access to non-public materials, subject to protective conditions, in order to meaningfully participate in Commission proceedings.[[9]](#footnote-10)

The Motion concerns procedures relating to requests for access to non-public materials subject to protective conditions under subpart C of 39 C.F.R. part 3011. The parties do not dispute that the materials requested contain commercially sensitive information and that the material is designated by the Postal Service as non-public. Subpart C of 39 C.F.R. part 3011 sets forth rules allowing access to non-public materials that “allow non-public materials to remain under seal and allow specific persons to access the materials subject to protective conditions.”[[10]](#footnote-11)

As directed by 39 U.S.C. § 504(g)(3)(B), the rules in subpart C of 39 C.F.R. part 3011 state that “[i]n determining whether to grant access to non-public materials, the Commission shall balance the interests of the parties consistent with the analysis undertaken by a Federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).” 39 C.F.R. § 3011.301(e). Federal Rule of Civil Procedure 26(c) provides that a court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” upon a motion from “[a] party or any person from whom discovery is sought … [coupled with] a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.” Fed. R. Civ. P. 26(c)(1).

The party opposing access to non-public information, analogous to requesting a protective order under Federal Rule of Civil Procedure 26(c), “bears the burden of making the showing of good cause contemplated by the rule and therefore must make a specific demonstration of facts in support of the request[.]”[[11]](#footnote-12) Courts reviewing a request for a protective order “must weigh the movant’s proffer of harm against the adversary’s significant interest in preparing for trial.” *Smith*, 322 F.R.D. at 99 (internal citations and marks omitted). When determining whether to limit or deny discovery under this rule, the United States Court of Appeals for the District of Columbia Circuit balances several factors including “the requester’s need for the information from this particular source, its relevance to the litigation at hand, the burden of producing the sought-after material[,] and the harm which disclosure would cause to the party seeking to protect the information.”[[12]](#footnote-13) Other Federal courts consider additional factors such as whether the party benefiting from a protective order is a public entity or official and whether the information relates to issues important to the public.[[13]](#footnote-14)

Accordingly, the Commission’s rules permitting access to non-public materials set forth strict conditions that must be met prior to the disclosure of any information. Section 3011.301 requires that a motion requesting access to non-public materials shall “[i]dentify the particular non-public materials to which the movant seeks access” and “[i]nclude a detailed statement justifying the request for access[.]” 39 C.F.R. § 3011.301(b)(1)-(2). Additionally, “[i]f access is sought to aid participation in any pending Commission proceeding, the motion shall identify all proceedings (including compliance proceedings) in which the movant proposes to use the materials and how those materials are relevant to those proceedings[.]” *Id.* § 3011.301(b)(2)(i). The motion must “[a]ttach a description of protective conditions completed and signed by the movant’s attorney or non-attorney representative,” and it must “[a]ttach a certification to comply with protective conditions executed by each person (and any individual working on behalf of that person) seeking access[.]” *Id.* § 3011.301(b)(5)-(6). Furthermore, for individuals to be eligible for access, they must not be involved in “competitive decision-making for any individual or entity that might gain competitive advantage from using non-public materials[.]”[[14]](#footnote-15)

## The Motion complies with the Commission’s rules governing access to non-public material.

In reviewing the Motion and the Postal Service Response, the Commission will first determine whether UPS complied with the Commission’s rules governing access to non-public material. If UPS complied, the Commission will then balance the interests of the parties to determine whether access should be granted or whether good cause has been shown to deny access.

In accordance with section 3011.301, the Motion includes a list of non-public library references to which it requests access,[[15]](#footnote-16) specifies that access is for the purpose of assisting UPS in preparing comments in the FY 2022 Annual Compliance Review proceeding,[[16]](#footnote-17) and provides the requisite statements of protective conditions and signed certifications from each individual for whom UPS seeks access.[[17]](#footnote-18) Therefore, the Motion satisfies the requirements under section 3011.301 and meets the necessary conditions to receive access to non-public information under protective conditions.

The Motion properly identifies the non-public library references sought for the purpose of reviewing the Postal Service’s compliance in this docket. UPS has articulated its need for accessing the requested library references: namely, to review the Postal Service’s compliance with applicable statutes and regulations in FY 2022 and to provide informed comments in the instant docket.[[18]](#footnote-19) The Commission has previously recognized that the need to access non-public data for the purposes of participating in a proceeding is a legitimate purpose upon which the Commission may grant access.[[19]](#footnote-20)

The Motion also complies with the Commission’s strict protective conditions required in order to gain access to non-public, commercially sensitive materials. The protective conditions provided under the Commission’s rules strictly prohibit any “person involved in competitive decision-making for any individual or entity that might gain competitive advantage” from gaining access to the non-public library references at issue. 39 C.F.R. § 3011.300(b). None of the individuals for whom UPS requests access are involved in competitive decision-making. Motion at 11. UPS states that it is requesting access for only outside counsel and outside consultants. *Id*.at 2.

Additionally, the named individuals for whom access is requested certify that they will not disseminate information contained in the non-public library references to any person not granted access and will act to protect the material from any person not authorized to obtain access. *Id.* Exhibit 1; Motion, Appendix A to Part 3011. The certifications provide that the non-public materials will only be accessed for purposes of informing comments submitted in the instant proceeding and that any violation of the extensive protective conditions may result in sanctions by the Commission against any person who violates these protective conditions and/or on the persons or entities on whose behalf the individual was acting. *Id.*

Therefore, UPS has demonstrated compliance with the Commission’s rules permitting access to non-public information.

## The Postal Service has not made a showing of good cause to deny access.

The Postal Service has not made a showing of good cause to deny access to UPS’s outside counsel and consultants for the reasons discussed below.

As noted previously, the Postal Service does not explicitly indicate that it opposes the Motion. Presumably, as opposition, the Postal Service includes letters from two third parties indicating their opposition to access because they fear that the data will not adequately be protected and that access to commercially sensitive information by UPS will jeopardize the business interests of third parties. *See* Postal Service Response, Attachments 1-2.

The Commission specifically rejected these arguments in the FY 2019 Annual Compliance Review docket, noting that the presence of confidential and commercially sensitive information is not sufficient justification by itself to deny access.[[20]](#footnote-21) Contrary to the claim that the commercial nature of the information prevents access, subpart C of 39 C.F.R. part 3011 sets forth a process by which interested persons can gain access to commercially sensitive material under strict protective conditions.[[21]](#footnote-22) To accept the third parties’ argument would nullify subpart C of 39 C.F.R. part 3011 because no interested person could ever gain access to material filed under seal with the Commission. The rules permitting access take into consideration that information filed under seal with the Commission may contain sensitive commercial information and implement stringent safeguards to prevent the harms alleged by the Postal Service and the third parties. Moreover, the assertion that commercial harm might occur ignores the many requirements and protective conditions for any party requesting access to non-public information. Finally, accepting the third parties’ position would necessarily foreclose any interested party in logistics or delivery from ever meaningfully participating in the Commission’s annual compliance review process.

First, section 3011.300(b) provides that “[n]o person involved in competitive decision-making for any individual or entity that might gain competitive advantage from using non-public materials shall be granted access to non-public materials.” 39 C.F.R. § 3011.300(b). The Commission’s rules define “competitive decision-making” as including activities such as “consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals.” *Id.* However, the rules explicitly state that competitive decision-making does not include “rendering legal advice or performing other services that are not directly in furtherance of activities in competition with an individual or entity having a proprietary interest in the protected material.”[[22]](#footnote-23) This strict prohibition on access mitigates concerns of commercial harm, as any person involved in

competitive decision-making is not permitted access to non-public materials.[[23]](#footnote-24) The arguments proffered by the third parties, conversely, appear predicated on the unsubstantiated implicit assumption that the non-public materials would be utilized by UPS’s competitive decision-making persons, despite the protective conditions in place. *See* Postal Service Response, Attachments 1-2.

Second, the Commission’s rules place restrictions on the use and misuse of any non-public information and prohibit unauthorized or public disclosure. For example, persons with access are prohibited from “disseminat[ing] the materials or the information contained therein, in whole or in part, to any person not allowed access ….” 39 C.F.R. § 3011.302(a). Additionally, the non-public materials may only be used “for the purposes for which the non-public materials [were] supplied.” *Id.* § 3011.302(b). Here, UPS may use the non-public materials only to inform its comments submitted in this Annual Compliance Review docket. In addition, the Commission’s rules require individuals with access to take reasonable care in protecting the non-public material from any person not granted access. *Id.* § 3011.302(c). Reasonable care is defined to be the “same degree of care … to prevent the unauthorized disclosure of these materials as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially sensitive, and privileged information.” *Id.* These restrictions protect against concerns expressed by third parties regarding any potential improper disclosure of the information. *See* Postal Service Response, Attachments 1-2.

Third, the Commission’s rules provide that the Commission may sanction any person that violates the protective conditions under which he or she gained access. *Id.* § 3011.303(a). Sanctions include dismissing a pertinent proceeding, ruling by default against the person who violated the order, revoking access or restricting access in the future, and other sanctions as deemed appropriate. *Id.* The Commission’s rules also do not prevent the Postal Service or third parties harmed by any “violation of an order granting access subject to protective conditions[] from pursuing any remedies available under the law against the person who violated the order, the persons or entities on whose behalf the person was acting, or both.” *Id.* § 3011.303(b). These strict sanctions, whether delivered by the Commission or a court of law, provide adequate remedies in the event of any violation for both the Postal Service and any affected third party.[[24]](#footnote-25)

Finally, the Commission’s rules require interested participants seeking access to material filed under seal to comply with strict protective conditions. 39 C.F.R. § 3011.301(b)(5). The statement of protective conditions provided by UPS sufficiently negates concerns regarding improper use of commercially sensitive material.[[25]](#footnote-26)

Therefore, the third parties’ concerns about the commercially sensitive nature of the information and any potential improper disclosure are mitigated by the numerous protective conditions and prohibitions on improper disclosure of non-public information. Neither the Postal Service nor the third parties allege any history of improper disclosure by any individual seeking access under protective conditions that would provide grounds for denying access. To the contrary, UPS has an extensive history of participating in Commission proceedings and has routinely been granted access to non-public library references without issue. In addition, while not explicitly challenging any inadequacy of the protective conditions proffered by UPS, neither the Postal Service nor the third parties have suggested any additional protective condition that would make access more palatable.

As mentioned above, Federal civil courts consider several factors when balancing the interests to determine whether to grant a request for a protective order under Fed. R. Civ. P. 26(c). Such factors include whether the party benefitting from the protective order is a public entity or official and whether the case involves issues important to the public.[[26]](#footnote-27) Here, both of these factors weigh in favor of granting access under the agreed upon protective conditions.

In overseeing the Postal Service’s compliance with the Postal Accountability and Enhancement Act (PAEA),[[27]](#footnote-28) the Commission has routinely recognized the public’s interest and right to participate in Commission proceedings. The Commission finds that denying access to non-public materials would significantly restrict the ability of interested persons to comment on the Postal Service’s compliance under the PAEA. As a portion of the Postal Service’s compliance under the law relates to products that contain third-party data, prohibiting access to these data on the basis of their commercial sensitivity would negatively impact the public’s “interest in maintaining the financial transparency of a government establishment competing in commercial markets.” 39 U.S.C. § 504(g)(3)(A).

Here, where UPS has requested access to non-public library references containing commercially sensitive data under the strict protective conditions and restrictions set forth by the Commission’s rules, the Commission finds that its rules provide adequate protective conditions to prevent any commercial harm or unauthorized disclosure. Should any party violate protective conditions put in place to access non-public material, the Commission notes the range of remedies available to the Postal Service and third parties, both before the Commission and externally. Having balanced the public interest in the financial transparency of the Postal Service against the third parties’ claims of commercial harm, the Commission grants access.

# Conclusion

For the above reasons, the Commission grants the Motion for access to non-public Library References USPS-FY22-NP2, -NP3, -NP7, -NP8, NP9, -NP14, -NP22, -NP23, -NP24 and -NP30, as well as continued access to those folders previously granted to it in Docket Nos. ACR2014, ACR2015, ACR2016, ACR2017, ACR2018, ACR2019, ACR2020, and ACR2021.

# ORDERING PARAGRAPHS

*It is ordered*:

1. United Parcel Service, Inc.’s Motion Requesting Access to Non-Public Materials Under Protective Conditions, filed January 13, 2023, is granted, and access is hereby granted to the non-public materials for use in Docket No. ACR2022 for Library References USPS-FY22-NP2, -NP3, -NP7, -NP8, NP9, -NP14, -NP22, -NP23, -NP24, and -NP30.
2. United Parcel Service, Inc. is hereby granted continued access to the non-public materials in Docket Nos. ACR2014, ACR2015, ACR2016, ACR2017, ACR2018, ACR2019, ACR2020, and ACR2021 for use in Docket No. ACR2022.
3. Effective upon issuance of this Order, the 14 individuals covered by the Motion are each granted access to the non-public materials.

By the Commission.

Erica A. Barker

Secretary

1. United Parcel Service, Inc.’s Motion Requesting Access to Non-Public Materials Under Protective Conditions, January 13, 2023, at 1 (Motion). [↑](#footnote-ref-2)
2. *See* Order Granting Motion for Access, in Part, January 18, 2023 (Order No. 6417). [↑](#footnote-ref-3)
3. United States Postal Service Response to United Parcel Service Inc.’s Motion Requesting Access to Non-Public Materials Under Protective Conditions, January 20, 2023, at 3 (Postal Service Response). [↑](#footnote-ref-4)
4. Motion at 3-6. To wit: compliance associated with cost coverage, service performance results, the accuracy and completeness of figures, the extent to which costs attributed in certain cost components affect costs attributed in other cost components at the individual Competitive product level, and international competitive costing practices. *Id*. [↑](#footnote-ref-5)
5. *See* Postal Service Response at 2. *See also*, *e.g.*,Docket No. ACR2021, United States Postal Service Notice of Filing Responses to United Parcel Service Inc.’s Motion Requesting Access to Non-Public Materials Under Protective Conditions, January 26, 2022, at 2; Docket No. ACR2020, United States Postal Service Response to United Parcel Service Inc.’s Motion Requesting Access to Non-Public Materials Under Protective Conditions, January 19, 2021, at 2. [↑](#footnote-ref-6)
6. Postal Service Response, Attachment 1. [↑](#footnote-ref-7)
7. Postal Service Response, Attachment 2. [↑](#footnote-ref-8)
8. Non-Public Information, 83 Fed. Reg. 31,258, 31,282 (July 3, 2018) (to be codified at 39 C.F.R. § 3007.101(a)). These regulations went into effect on August 2, 2018. *Id*. at 31,258. The Commission’s regulations were later reorganized, and the rules pertaining to non-public material are now found at 39 C.F.R. part 3011. *See* Docket No. RM2019-13, Order Reorganizing Commission Regulations and Amending Rules of Practice, January 16, 2020 (Order No. 5407) (effective April 20, 2020). [↑](#footnote-ref-9)
9. Docket No. RM2018-3, Notice of Proposed Rulemaking Relating to Non-Public Information, February 13, 2018, at 2 (Order No. 4403). [↑](#footnote-ref-10)
10. Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, at 65 (Order No. 4679). [↑](#footnote-ref-11)
11. *Smith v. Yeager*, 322 F.R.D. 96, 99 (D.D.C. 2017) (internal citations and marks omitted). [↑](#footnote-ref-12)
12. *Burka v. U.S. Dep’t of Health & Hum. Servs.*, 87 F.3d 508, 517 (D.C. Cir. 1996) (internal citations omitted). Here, because the Postal Service has already provided the library references at issue, the burden of producing the requested material is not a factor in the Commission’s analysis. [↑](#footnote-ref-13)
13. *See* *Castellani v. Atl. City,* 102 F. Supp. 3d 657, 666 (D.N.J. 2015). [↑](#footnote-ref-14)
14. *Id.* § 3011.300(b). An individual is involved in “competitive decision-making” if that individual “consult[s] on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. [‘Competitive decision-making’] does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with an individual or entity having a proprietary interest in the protected material.” *Id.* [↑](#footnote-ref-15)
15. Motion at 1. [↑](#footnote-ref-16)
16. *Id.* at 2. [↑](#footnote-ref-17)
17. *Id.* Exhibit 1; Motion, Appendix A to Part 3011. [↑](#footnote-ref-18)
18. Motion at 2. The Postal Service does not contest the relevance of the requested library references to the instant proceeding nor UPS’s articulation of its need to access the requested library references to participate in the instant proceeding. *See generally* Postal Service Response. [↑](#footnote-ref-19)
19. Docket No. RM2016-10, Order Granting Motion for Access to Non-Public Materials Filed Under Seal, October 11, 2016, at 4 (Order No. 3560). In Order No. 3560, the Commission granted UPS access to information filed under seal, which included third-party information, on the condition that the parties first file an agreement regarding inadvertent disclosure. *Id.* at 4-5. In a later rulemaking, the Commission added the provision clarifying the rights of any aggrieved third party to seek all available remedies before the Commission or a court of law, thereby alleviating the need for any additional agreements between parties. *See* Order No. 4679 at 69-70. [↑](#footnote-ref-20)
20. Docket No. ACR2019, Order Granting Motion for Access, January 29, 2020 (Order No. 5416). Similar arguments have been rejected in other dockets. Docket No. ACR2018, Order Granting Motions for Access, February 8, 2019, at 19 (Order No. 4998); Docket No. ACR2020, Order Granting Motion for Access, January 28, 2021, at 10 (Order No. 5829); Docket No. ACR2021, Order Granting Motion for Access, February 1, 2022, at 10 (Order No. 6098). [↑](#footnote-ref-21)
21. *See* Order No. 4403 at 9;Docket No. RM2008-1, Notice of Proposed Rulemaking to Establish a Procedure for According Appropriate Confidentiality, August 13, 2008, at 7 (Order No. 96). [↑](#footnote-ref-22)
22. *Id.* This is consistent with Federal court restrictions on access to highly confidential information to independent outside counsel. *See, e.g.*, *W. Convenience Stores, Inc. v. Suncor Energy (U.S.A.) Inc.*, No. 11-CV-01611, 2014 WL 561850, at \*1 (D. Colo. Feb. 13, 2014) (“During discovery, [the non-party competitor’s] interest was addressed by a protective order that entitled Western’s counsel and retained experts to view [the non-party competitor’s] wholesale purchase and retail sales information, but forbade the recipients of the information from sharing it with [the plaintiff’s owner] ….”). [↑](#footnote-ref-23)
23. The United States Supreme Court acknowledged that even when confidential commercial information is at issue, “orders forbidding any disclosure … are rare.” *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 362 n.24 (1979). The Commission’s rules are akin to an “attorney’s eyes only” protective order, commonly issued by trial courts. *Merrill*, 443 U.S. at 362 n.24. *See* *United States ex rel. Purcell v. MWI Corp*., 209 F.R.D. 21, 28 (D.D.C. 2002) (good cause shown for issuance of protective order negated by agreement to exclude plaintiff from access to certain proprietary information and having an “attorney’s eyes only” agreement). [↑](#footnote-ref-24)
24. “Final § 3007.303(b) reserves the right of any person, including the Postal Service, to pursue other remedies.” Order No. 4679 at 28. [↑](#footnote-ref-25)
25. *Castellani*, 102 F. Supp. 3dat 668 (citing *Reid v. Cumberland Cnty.*, 34 F. Supp. 3d 396, 408-09) (finding that entry of confidentiality order negates potential harm resulting from disclosure). [↑](#footnote-ref-26)
26. *Castellani*, 102 F. Supp. 3dat 666 (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)). [↑](#footnote-ref-27)
27. Pub. L. 109-435, 120 Stat. 3198 (2006). [↑](#footnote-ref-28)