

particular facilities. Substantive Comments at 31–32. The position that the Postal Service has taken appears to be based in part on the assumption that facility-specific data would somehow be at risk if it were disclosed under the rule. The Commission has no intention of affording less protection to the information obtained under the Periodic Reporting Rule than it has consistently afforded in the context of a rate case. The position that the Postal Service has taken also appears to be influenced by its overly-broad and inaccurate characterizations of the documentation that the rule requires.

Express Authority for the Rule Is Not Required

The Postal Service emphasizes that the Postal Reorganization Act does not expressly authorize the Commission to require the Postal Service to provide access to information outside the context of Chapter 36 rate hearings. *Id.* at 24. The Postal Service further emphasizes that § 410(c) of the Act exempts it from the obligation to disclose the following information in response to Freedom of Information Act requests:

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.

The Postal Service assumes that § 410(c) not only exempts such information from mandatory disclosure in response to requests filed under the Freedom of Information Act, but, by implication, exempts it from mandatory disclosure under any circumstance, other than pending Chapter 36 hearings. *Id.* at 26.

Although the Act does not expressly authorize the Commission to require the Postal Service to provide information outside the context of Chapter 36 hearings, express authority is not required, given the availability of § 3603. Because of its broad language, any exercise of § 3603 authority is necessarily an exercise of implied authority. The issue is whether it is plausibly and reasonably implied.

The Commission has already explained why it needs the documentation required by the rule if it is to effectively evaluate all of the issues presented in § 3624 hearings within severely compressed litigation windows. It has already explained why that information is needed if the Commission is to ensure that intervenors in future rate cases have a realistic opportunity to understand the immensely complex documentation

supporting Postal Service rate requests, and to develop alternatives, in the severely compressed litigation window available. Having shown the need for the rule to carry out its functions under §§ 3622, 3623, and 3662 of the Act, the Commission has demonstrated that the rule is the kind of procedure that Congress meant to authorize by the general language of § 3603.

The Rule Does Not Conflict With the Policy Underlying § 410(c)

The Commission sees no conflict between the Periodic Reporting Rule, as authorized by § 3603, and the disclosure policy reflected in § 410(c) of the Act. Section 410(c) does not expressly apply in contexts other than Freedom of Information Act (FOIA) requests. There are special considerations that are likely to have led Congress to exempt the Postal Service from mandatory disclosure of commercially sensitive information in response to FOIA requests. The most significant of those considerations is that in deciding whether to comply with a FOIA request, an agency may not take into account the need of the requesting party for the information that it is requesting. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) at 143 n. 10, and it generally may not take into account its own burden in complying with such a request. See *Ruotolo v. Dept. of Justice*, 53 F.3d 4, 10 (2d Cir. 1995). Disclosure is mandatory unless the information falls within one of the narrow exemptions that the FOIA makes available. These simplifying procedures were thought necessary to make the FOIA effective, but they introduce a procedural arbitrariness that is not necessarily appropriate in all circumstances involving disclosure of sensitive materials. Aware that the FOIA does not allow a balancing of the public's need for information against the potential harm to the agency of providing it, Congress exempted the Postal Service from disclosing commercially sensitive materials in the FOIA context.

The Postal Service does not have express authority to withhold information that the Commission needs to effectively carry out its functions under the Act. Outside of the FOIA context, Congress did not expressly exempt the Postal Service from disclosure of commercially sensitive materials, or expressly make the Postal Service the arbiter of what materials should be considered commercially sensitive. What Congress intended where another Federal agency, such as the Commission, has demonstrated a substantial need for information from the Postal Service, and is willing and

able to balance its need for that information against the burden and potential commercial harm of providing it, can only be surmised from the other provisions of the Postal Reorganization Act.

The Postal Service frequently points out that Congress, in adopting the Postal Reorganization Act, intended that the Postal Service function more like a private business than it had been functioning. Exemption from responding to some kinds of FOIA requests is one way in which the Postal Service resembles a private business.

At the same time, however, Congress gave the Postal Service special monopoly privileges and made it clear that these privileges carried with them special duties toward the public that a private business does not have. The first section of the Act, 39 U.S.C. § 101, is replete with these special duties. Chief among these are its obligation to provide the public with universal service [§ 101(b)] that is capable of binding the nation together [§ 101(a)].²² The Postal Service is also required to charge rates that are based on principles of equity and other public policies, not just profitability. See § 101(d). The Postal Rate Commission has a key role to play in ensuring that rates comply with these policies.

Given the remarkable dissimilarities between the Postal Service and a private business with respect to its obligations to the public, it is implausible that Congress would have intended the Postal Service to have the power to decide for itself what the outside world may know about it, including what the outside world may know about its operations and finances that bear on ratemaking, except during rate litigation. The Commission is not aware of any government monopoly that has been granted absolute power to decide for itself what its disclosure policy will be. It is much more plausible to surmise that, apart from litigation, the Postal Service's power to decide what its disclosure policy will be is not absolute, but qualified. One of the respects in which it is qualified is where the

²² Section 101(a), states:

The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function, the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.