

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

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AIRLINE INDUSTRY CONDITIONS

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: Docket OST-03-14873  
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MOTION OF  
CONTINENTAL AIRLINES, INC.  
FOR CONFIDENTIAL TREATMENT  
PURSUANT TO RULE 12

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July 1, 2003

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Pursuant to Rule 12 of the Department's Rules of Practice, Continental moves to withhold from public disclosure confidential information submitted to the Department as required by the Department's Order 2003-6-36. In accordance with Rule 12 and Order 2003-6-36, Continental is submitting copies of its confidential reports to the Director of the Department's Office of Aviation Analysis marked with an Airline Industry Conditions caption saying "Classified or Confidential Treatment Requested Under § 302.12."<sup>1</sup> Continental's confidential reports contain confidential, privileged,

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<sup>1</sup> Although Rule 12 requires the submission of confidential information in sealed envelopes marked for confidential treatment, the Department's order strongly encourages submission by e-mail instead, so Continental is adapting its procedures to meet the Department's requirements.

proprietary business information which is not customarily released to the public, and release of this information from Continental's records would cause Continental substantial competitive harm. Moreover, release of this information would harm the competitive position of U.S. airlines engaged in foreign air transportation and the development and implementation of U.S. positions in international aviation negotiations.

Continental states as follows in support of its motion.

1. In requiring special reports from carrier records in April, the Department recognized "that much of the information to be submitted involves confidential business information," including "advance bookings and load factors," and indicated it would "provide the airlines submitting information pursuant to this order every assurance that the reports will be given confidential treatment." (Order 2003-4-12 at 1-2) Order 2003-6-36 has extended the reporting requirements and orders carriers objecting to the release of confidential information submitted pursuant to Order 2003-6-36 to submit a motion requesting confidential treatment for all reports submitted pursuant to Order 2003-6-36. The financial, operations, traffic, yield, bookings and advance flight cancellation information provided by Continental include confidential business information from Continental's records within the meaning of 5 U.S.C. § 552 (b)(4). Release of these records is prohibited by 49 U.S.C. § 46311, and, because disclosure of this information could adversely affect Continental's competitive position in foreign air transportation and prejudice U.S. negotiating positions, by 49 U.S.C. § 40115. Thus, disclosure is also prohibited by Freedom of Information Act (FOIA) Exemption 3 (5 U.S.C. § 552 (b)(3)).

2. FOIA Exemption 4 protects from public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” (5 U.S.C. § 552(b)(4)) Courts have interpreted this statutory exemption to prevent public disclosure of information that is not usually released to the public and which, if released, would cause substantial harm to the competitive position of the person from whom the information was obtained. (See, e.g., Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir 1980); American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 871 (2d Cir. 1978); National Parks & Conservation Association v. Kleppe, 547 F.2d 673, 684 (D.C. Cir 1976)) The Department has followed this interpretation of FOIA Exemption 4. (See, e.g., Orders 94-5-42, 93-1-11, 88-5-46, 86-5-54, 83-12-136, 2001-10-2 and 2003-4-12) The purpose of this statutory exemption “is to protect the confidentiality of information which citizens provide to their government, but which would customarily not be released to the public, and to facilitate citizens’ ability to confide in their government.” (Burke Energy Corp. v. Department of Energy, 583 F. Supp. 507, 510 (D. Kansas 1984))

3. For information to qualify for this exemption, the information must be: (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential. (See e.g., Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983)) The information provided by Continental pursuant to Orders 2003-4-12 and 2003-6-36 satisfies this three-part test. First, the information is commercial or financial in nature. Second, the information submitted under seal has been “obtained from a person” within the meaning of Exemption 4. Third, the information is “confidential.” This confidential information is not generally available to

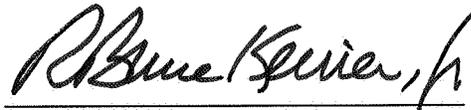
the public, and its public disclosure is not required to further the public interest or to promote competition. In National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), the court held that information is "confidential" for purposes of Exemption 4 if it would not customarily be released to the public by the person from whom it was obtained and if disclosure is likely to have either of the following results: "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." (498 F.2d at 770) Public disclosure of confidential information covered by this motion would cause substantial harm to Continental's competitive position and impair the Department's ability to obtain similar information on a voluntary basis in the future.

4. In accordance with Orders 2003-4-12 and 2003-6-36, Continental understands that these reports will not be used in any public proceeding, that Continental will be given notice and a further opportunity to object to the release of any of these reports if any person seeks release of these reports, that this one motion for confidential treatment will cover all of the material submitted by Continental pursuant to Order 2003-6-36, and that the Department will destroy all reports filed in this proceeding September 30, 2003.

For the foregoing reasons, Continental asks the Department to withhold from public disclosure the information submitted by Continental pursuant to the Department's Order 2003-6-36.

Respectfully submitted,

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