

# Snowden... Snail Mail... Surveillance

David Conaway asks if the US Postal Service is too big to fail?



**DAVID H. CONAWAY**  
Chairman of the Bankruptcy, Insolvency and Creditors' Rights Group, Shumaker, Loop & Kendrick, LLP (USA)

**A**s Edward Snowden pursues asylum in Russia, the world is reeling in the revelations of the United States' NSA (National Security Agency) surveillance activities and the US Postal Service's policy of photographing every "mail cover" passing through the system.

According to a July 3, 2013 NY Times article, the mail covers programme is more than a century old but is still considered a "powerful tool." At the request of various law enforcement officials, postal workers record information from the outside of the letters and parcels before they are delivered. The information is then sent to the particular law enforcement agency that requested the information. The mail covers programme became even more extensive in 2001 when, as part of the "war on terror" and after the anthrax scare, the Mail Isolation Control and Tracking programmes were developed. These are surveillance programmes in which USPS's computers photograph the exterior of every piece of paper mail circulated in the USPS system, estimated at 160 billion pieces in 2012. This would include mail to be delivered outside the US and received from foreign jurisdictions. It's also unknown how long the government saves the images.

The NY Times article cites Mark Rasch, a former Department of Justice employee, as stating "In the past, mail covers were used when you had a reason to suspect someone of a crime... Now it seems to be, 'Let's



*record everyone's mail so in the future we might go back and see who you were communicating with.' Essentially you've added mail covers on millions of Americans."* Mr. Rasch went on to say, "Basically they are doing the same thing as the other programmes, collecting the information on the outside of your mail, the metadata, if you will, of names, addresses, return addresses

*and postmark locations, which gives the government a pretty good map of your contacts, even if they aren't reading the contents,"* he said. Looking at just the outside of letters and other mail, the government can see who you bank and communicate with, which in turn gives investigators leads that they can then follow up on with a subpoena.

Make a comment!



For mail cover requests, law enforcement agencies submit a letter to the USPS, which can grant or deny a request without judicial review. In practice, the USPS rarely denies a request. Unlike other government surveillance programmes, such as wiretaps, no approval from federal judge is required. The mail cover surveillance requests are granted for about 30 days, but can be extended for up to 120 days. *“There are two kinds of mail covers: Those related to criminal activity and those requested to protect national security. Criminal activity requests average 15,000 to 20,000 per year... The number of requests for antiterrorism mail covers has not been made public.”*

For the most part, challenges to the programme have failed because courts have ruled that there is *“no reasonable expectation of privacy for information contained on the outside of a letter.”*

### Electronic communications

There is similar oversight exercised by the NSA over electronic communications. As required by provisions of the Foreign Intelligence Surveillance Act Amendments of 2008 (FISA) and the Patriot Act (as amended in 2005), the Department of Justice revealed to Congress that the number of the 1,789 requests made by the government to monitor the electronic communications of citizens, not a single one was rejected.

Challenges to mail privacy is not new. The Bush administration pushed for reform that *“allowed federal authorities to ask for all mail cover data and even to open your mail without approval.”* The administration argued that the Patriot Act allowed the government to intercept USPS deliveries in *“exigent circumstances, such as to protect human life and safety against hazardous materials, and the need for physical searches specifically authorised by law for foreign intelligence.”*

### Financial stress

It appears that Snowden’s fate and the political fallout from the NSA’s surveillance activities, both in the US and globally, will play out over months, if not years. In the meantime, could these issues add additional stress to an already financially stressed USPS?

In light of the recent Detroit Chapter 9 filing, some have wondered whether the financially distressed USPS which has suffered \$41 billion in losses in the last 5 years, is “insolvent”. Might the USPS file for Chapter 9 protection as Detroit has done? Or, file for Chapter 11 protection? A fundamental question is whether the USPS qualifies as a “debtor” in the first instance.

Chapter 9 does not apply since under Section 109 of the Bankruptcy Code a debtor is defined as “municipalities”, which includes a “political subdivision or public agency or instrumentality of a State”, not federal agencies or instrumentalities.

Moreover, Chapter 11 defines a debtor as a “person” which includes the following: *“individual, partnership, and corporation, but does not include a government unit”*. If the USPS is a governmental unit, it cannot file for Chapter 11 protection.

The interesting issue is whether the USPS is in fact a US governmental unit or more akin to an independent corporation. The short answer is the USPS is a hybrid, after the passage of the Postal Reorganisation Act in 1970 (which amended the Postal Service Act of 1792). Under the PRA, the USPS became *“an independent establishment”* of the executive branch of the US government. The USPS now has a Board of Governors, can incur debt to finance infrastructure, sets its own rates, and can sue and be sued.

In 2004, the US Supreme Court considered whether the USPS was a government unit. In *United States Postal Service v. Flamingo Industries (USA) Ltd.*,

*et al. (2004)*, Flamingo Industries had been making mail sacks for the USPS, which terminated Flamingo’s contract. In response, Flamingo sued and asserted that the USPS sought to suppress competition and create a monopoly in the mail sack production, in violation of the Sherman Act antitrust provisions. Although the US Supreme Court noted that the PRA waived immunity of the USPS and allowed it to “sue and be sued”, the PRA deemed the USPS to be an establishment “of the executive branch of the Government of the United States”. While the PRA gives the USPS a high degree of independence from other offices of the Government, it remains part of the Government. As such, the Supreme Court concluded the USPS could not be sued for Sherman Act violations.

### Too big to fail?

In an era of extreme financial distress, political manoeuvrings, and the need to “fix” a serious political problem, could the USPS be another “too big to fail”, allowed to become insolvent to precipitate a taxpayer rescue? Would the individuals whose mail covers were photocopied have tort claims for privacy invasions? Would those constitute “claims” as defined by the US Bankruptcy Code? Could those claims be discharged? The US government would likely be the largest creditor of the US Postal Service and the source of any “exit” financing (through taxpayers).

Whether or not the Snowden revelations become a tipping point for the USPS, or whether it can seek formal insolvency protection, it is clear the USPS needs to be restructured to survive long-term.

*The author would like to thank Mark A. Larouche, a Shumaker summer intern and law student at the University of North Carolina, for his research assistance for this article. ■*



**USPS’S  
COMPUTERS  
PHOTOGRAPH  
THE EXTERIOR  
OF EVERY PIECE  
OF PAPER MAIL  
CIRCULATED  
IN THE USPS  
SYSTEM,  
ESTIMATED AT  
160 BILLION  
PIECES IN 2012**

