

MEMORANDUM

March 1, 1989

ORIGINAL
COPY

TO : JAY TAYLOR, DIVISION OF ELECTRIC AND GAS
FROM: BILL BAKSTRAN, DIVISION OF APPEALS *wfB*
RE : DOCKET NO. 890252-PU -- AMENDMENT OF RULE 25-22.006, F.A.C.,
PERTAINING TO CONFIDENTIAL INFORMATION

Attached is a copy of what I believe is the final version of staff's initial draft of the rewrite of the confidentiality rule. We will need to check with David Smith to see if he wants to make any changes to this draft when he returns from Washington on Friday.

WJB:kp

Attachment

cc: David Smith
Tim Shea
Dale Mailhot
Frank Doud
Craig Hewitt
Bill Lowe
✓ Steve Tribble

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25-22,006 Confidential information.

(1) Definitions.

(a) "Confidential Information" means material that has been determined, pursuant to this rule, to be proprietary confidential business information under Section 350.121, 364.103, 366.093, or 367.106, F.S.

(b) "Formal proceeding" means a proceeding in which the substantial interests of a party may be determined by the Commission.

(c) "Inquiry" means an investigation set in motion by the Commission Chairman, the Executive Director, or the General Counsel to evaluate a complaint, allegation, or to develop information as a basis to initiate action or to dispose of any matter within the Commission's jurisdiction.

(d) "Material" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material regardless of physical form or characteristics, made or received by the Commission, its staff or consultants pursuant to law or in connection with the transaction of official business of the agency.

(e) "Taking possession of material" means obtaining physical control of material by taking the original material or a copy from the company's premises, or by the extraction of data by inclusion into working papers or memoranda.

(2) Material received during an inquiry.

(a) All material obtained incident to an inquiry by the Commission, its staff or any consultant employed by the Commission is exempt from the public access requirements of Section 119.07(1), F.S. during the pendency of the inquiry. When the Commission or its staff is requesting information incident to an inquiry, the source shall be informed in writing that the request

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is made incident to an inquiry.

(b) An inquiry will terminate 40 days after the transmittal of a notice of termination by the Division of Records and Reporting. This notice will be sent to all sources from whom confidential material was received during the inquiry and will include a list of all materials obtained from the source(s) during the inquiry and any portions of staff work papers, analyses and reports containing materials obtained from the source during the inquiry. The notice will indicate whether the Commission intends to retain, destroy or return the materials listed. A source may, within 30 days after issuance of the notice, file with the Division of Records and Reporting a written request that the material the Commission intends to retain be classified as confidential and exempt from Section 119.07 (1) F.S. Requests filed in response to this notice shall meet the same criteria and be processed in the same manner as other requests for confidential classification under this rule (see subsection 4). If no timely request for confidential classification is filed, confidentiality is waived and the material becomes subject to inspection and examination pursuant to Section 119.01 (7) F.S.

(3) Material received outside of an inquiry. Material received by the Commission or its staff outside of an inquiry shall be subject to inspection and examination pursuant to Section 119.07 (1), Florida Statutes, unless the utility requests that it be classified as confidential information.

(a) Prior to the staff taking possession of any material from a utility the staff will inform the utility in writing of the right to have confidential information exempted from the public access requirements of the Public Records Law by following the procedures in Section (4) of this Rule. A utility may obtain temporary exemption from Section 119.07(1), Florida Statutes by

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1 filing a notice of intent to request confidential classification.
2 This notice shall be filed with the Division of Records and
3 Reporting and shall have appended thereto a copy of the staff's
4 written request for the material to which it relates. A copy of
5 the notice shall be provided to the division(s) requesting the
6 material. To obtain continued confidential handling of the
7 material the utility must within 21 days after the staff takes
8 possession of the material, or in the case of material obtained
9 during the course of an audit, within three days after the field
10 audit exit conference, file a request for confidential
11 classification with the Division of Records and Reporting.

12 (b) When the material is received incident to a formal
13 proceeding, the utility requesting confidential classification
14 shall also serve a summary of its request on all parties of
15 record. The summary shall describe the material in sufficient
16 detail so as to reasonably inform the reader of the nature of the
17 material. Any party to a formal proceeding may file an objection
18 to the request for confidential classification within 14 days
19 after service of the summary.

20 (c) Requests for confidential classification and any
21 objections filed in response thereto shall be ruled on by the
22 presiding officer assigned to the docket and the Commission panel
23 assigned to the case will hear any protest to the ruling. If a
24 request is received outside a docketed proceeding, the request
25 itself will be docketed.

26 (d) All material that has been classified as confidential or
27 for which a ruling on confidentiality is pending shall be exempt
28 from Section 119.07(1), F.S., and will be accorded stringent
29 internal procedural safeguards against public disclosure. Any
30 staff or consultant reports or work products containing
31 confidential information extracted from material having been

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1 classified as confidential shall be handled in the same manner as
2 the material so classified. The Commission may in its discretion
3 retain or, after obtaining the consent of the Department of State,
4 destroy or return to its source any confidential material in its
5 possession. Material received during a formal proceeding and
6 classified as confidential shall remain so classified after the
7 formal proceeding is terminated.

8 (4) Requests for confidential classification.

9 (a) A request for confidential classification of material
10 shall be filed in writing with the Division of Records and
11 Reporting. The utility shall file with its request two copies of
12 the material for which confidential treatment is requested. On
13 each copy, the utility shall highlight the specific information it
14 is asserting to be confidential. Along with the highlighted
15 copies, the utility shall file two or more edited copies as
16 required by the type of proceeding, which will be made available
17 for public inspection. In the edited copies, the specific
18 information the utility is asserting to be confidential shall be
19 blocked out by the use of an opaque marker or other masking
20 device. The utility shall file with its request a line-by-line
21 justification for confidential classification of the specific
22 information it is asserting to be confidential.

23 (b) In the case of computerized material, such as magnetic
24 tape, the utility may submit one unedited version with a written
25 identification of the specific data fields for which confidential
26 classification is requested along with a field-by-field
27 justification for the confidential classification.

28 (c) In its line-by-line or field-by-field justification for
29 confidential classification, the utility must demonstrate how the
30 information it is asserting to be confidential qualifies as one of
31 the statutory examples listed in section 364.183(3), 365.093(3),

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§ 367.156(3), Florida Statutes. If no statutory example is applicable, then the utility shall include a statement explaining how the utility or its customers will be harmed by disclosure. The utility shall also specify a date by which the material will no longer be confidential or shall explain why such a date cannot be determined.

(d) The request shall include an affirmative statement that the material for which confidential classification is sought is not available in any other public forum such as Federal Communications Commission, Federal Energy Regulatory Commission, or other state commission and that the material is of the type normally treated as confidential by the industry.

(e) The burden of proof shall be on the utility to show that the material in question contains bona fide proprietary confidential business information. A request for confidential classification that fails to identify the proprietary information in sufficient detail to permit a reasoned analysis or which fails to provide a detailed justification for classification may be denied as insufficient on its face.

(5) Discovery.

(a) In any proceeding before the Commission, any utility may request a protective order protecting proprietary confidential business information from discovery. Upon a showing by the utility that such protection is necessary, the Commission shall issue the protective order. If the Commission determines that discovery of proprietary confidential business information is necessary to protect the public interest, the Commission shall enter a protective order limiting discovery in the manner provided for in Rule 1.280, Florida Rules of Civil Procedure.

(b) The Commission's protective orders shall exempt proprietary confidential business information from section

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1 119.07(1), Florida Statutes. Such exemption shall apply whether
2 the information is in the possession of an entity, individual, or
3 state agency, including the Office of Public Counsel.

4 (c) When a utility agrees to allow Public Counsel to inspect
5 or take possession of utility information with the understanding
6 that Public Counsel agrees to keep the information confidential,
7 either the utility or Public Counsel may request a protective
8 order exempting the information from section 119.07(1), Florida
9 Statutes. If the information is not to be used in a docket or
10 proceeding before the Commission, it may be destroyed or returned
11 to the utility in accordance with the record retention
12 requirements of the Department of State. If the information is to
13 be used in a docket or proceeding before the Commission, then the
14 utility must file a specific request for a protective order under
15 paragraph (a) above.

16 (d)(a) Any person may file a petition to inspect and examine
17 any material the Commission has exempted from s. 119.07(1),
18 Florida Statutes. A copy of the petition must be served on the
19 affected utility which shall have 14 days to file a response as to
20 why the material should remain exempt. The petitioner shall have
21 ten days to file a reply to the utility's response. The
22 Commission may set the matter for hearing or may issue a ruling on
23 the pleadings. Material obtained by the Commission in connection
24 with an inquiry shall not be subject to requests for inspection
25 and examination until after the inquiry is terminated.

26 (b) A finding of confidentiality notwithstanding, a source
27 may consent to inspection or examination by any person. Such
28 consent shall not constitute a waiver of confidentiality and only
29 the person(s) specified in the consent may inspect or examine the
30 material. The Commission may be requested to issue a protective
31 order to recognize the terms and conditions of the consent. All

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persons are urged to seek mutual agreement regarding access prior to bringing a controversy to the Commission.

(7) Use of confidential material during formal proceedings. The Commission may rely upon confidential material during a formal proceeding and such material, if otherwise admissible, will be received in evidence. In such event, reasonable precautions will be taken to segregate confidential material in the record and otherwise protect its integrity.

(8) Judicial review. When the Commission denies a request for specified confidential classification or disapproves a proposal to edit, the utility or other source may request continued confidential treatment until judicial review is complete. The request shall be in writing and filed with the Division of Records and Reporting. The material will thereafter receive confidential treatment through completion of judicial review.

Specific Authority: 353.127, F.S.

Law Implemented: 350.121, 364.183, 366.093, 367.156, F.S.

History: New 7/1/85, Amended

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