

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Gulf Power ) DOCKET NO. 881167-EI  
 Company for an Increase in Rate ) ORDER NO. 21102  
 and Charges. ) ISSUED: 4-24-89

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ORDER ON CONFIDENTIALITY REGARDING PORTIONS  
OF STAFF'S FIFTH SET OF INTERROGATORIES

On November 14, 1988, Gulf Power Company (Gulf), petitioned the Commission for a rate increase. As part of its discovery, Staff served a Fifth Set of Interrogatories to Gulf on January 30, 1989. On March 7, 1987, Gulf filed a Motion for Protective Order and Request for Confidentiality in Connection with Portions of Staff's Fifth Set of Interrogatories regarding Interrogatory Nos. 153, 154, 156, 157, 161, 162, 164, 166-174, and 179.

Interrogatory No. 153 asks:

Since 1983, what measures have been taken to determine the dollar amount of thefts from Gulf Power Company?

Gulf requests specified confidential classification pursuant to Section 366.093(3)(b) and (c), Florida Statutes, relating to internal audits and security measures, respectively. The question is "what measures have been taken to determine the amount of thefts?" Gulf states that "[i]n order to determine the amounts stolen, it was necessary for Gulf to perform an internal audit." The question requests a list of actions taken including audits, not the results of the audit. We find exemptions (b) and (c) do not apply.

Interrogatory No. 154 asks:

For 1980 - 1988 list by year the dollar amounts attributed to employee theft. How much did Kyle Croft, Lamar Brazwell, Art Peters, and Ronald Harris steal from Gulf Power Company individually?

Gulf requests confidentiality invoking Section 366-093(3)(b), Florida Statutes, relating to internal audits. Gulf argues that it conducted an internal audit to obtain the disputed information. We find the material is confidential business information pursuant to Section 366.093(3)(b). We also find that Gulf's answer was not fully responsive to the question because the interrogatory requested information on thefts for 1980 through 1988 and Gulf provided information only through 1984.

Interrogatory No. 156 asks Gulf to:

Provide a copy of the investigative report of Thomas D. Baker and J. L. Childers to Douglas McCrary revealing the results of their investigation into allegations of the misappropriation of labor and materials belonging to Gulf Power by Kyle Croft.

DOCUMENT NUMBER-DATE

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Gulf objects arguing that the approximately 250 page Baker-Childers report, a "summary prepared by Thomas D. Baker and J. L. Childers for the investigative period 1[sic]/22/83 - 1/23/84," was prepared in anticipation of litigation, the suit brought against Gulf by Kyle Croft, and is, therefore, undiscoverable work product. Gulf contends that once a document is protected by the work product doctrine, that protection continues in subsequent litigation, Alachua General Hospital, Inc. v. Zimmer USA, Inc., 403 So.2d 1087 (Fla 1st DCA 1981). Gulf also argues that forced disclosure of the results of a corporation's internal investigation would deter corporations from investigating allegations of corporate wrong in the future. In re: International Systems and Controls Corporation Securities Litigation, 693 F.2d 1235 (5th Cir. 1982). Gulf alternatively argues that the report is entitled to specified confidential classification as both an internal audit and a security measure pursuant to Sections 366.093(3)(b) and (c), Florida Statutes, respectively.

We do not find the disputed document to be work product. Baker, then Resident Investigator of the Northern Division of Mississippi Power Company, and Childers, then Manager of Security for Mississippi Power Company, were reassigned from Mississippi to Gulf on December 21, 1983, to investigate allegations of theft from Gulf by Croft. If the presence of both Baker and Childers was in response to allegations of theft by Croft, it is more reasonable to find that Gulf's investigation was not in anticipation of Croft filing suit against Gulf but to verify thefts sufficient to support Croft's termination. The Baker-Childers investigation ended on January 23, 1984. Croft was terminated from Gulf on or about January 30, 1984. Croft did not file his 5-count civil suit against Gulf until June 26, 1986, approximately two and a half years later. The Baker-Childers report is more accurately characterized as material assembled in the ordinary course of business unrelated to litigation, the result of an internal investigation into reoccurring allegations of employee theft, and excludable from work product. Cotton States Mutual Insurance Company v. Turtle Reef Associates, Inc., 444 So.2d 595, 596 (Fla 4th DCA 1984); United States v. El Paso Company, 682 F.2d 530, 542 (5th Cir 1982). Since Gulf itself has characterized the Baker-Childers report as an "investigative summary" in its response to Interrogatory No. 156, it is unclear, without more, upon what we could base a finding that the report is either an internal audit or a security measure as contemplated by Sections 366.093(3)(b) or (c), Florida Statutes. The burden of proof is on the source to show that the disputed material contains bona fide proprietary confidential business information, Rule 25-22.006(4)(c), Florida Administrative Code. Gulf has not met its burden.

We are also unpersuaded by Gulf's policy argument regarding the deterrent effect of the forced disclosure of internal corporate investigations in light of the logical conclusion of that argument; corporations chilled against pursuing, and paralyzed by, allegations of internal wrongdoing.

Interrogatory No. 157 asks Gulf to:

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Explain why only approximately \$16,000 of stolen inventory and labor was attributed to Kyle Croft when the investigators' report instituted as a result of employee thefts reported Croft was responsible for losses in excess of \$300,000.

Gulf argues that information concerning "losses in excess of \$300,000" and the results of an investigative report address issues subject to on-going litigation and are protected by the work product doctrine. Gulf's objection to Interrogatory No. 156 is incorporated by reference. Gulf alternatively argues that the Baker-Childers report is an internal audit entitled to confidentiality pursuant to section 366.093(3)(b), Florida Statutes, and that the \$16,000 promissory note was solicited by Gulf as a security measure entitling it to confidentiality pursuant to Section 366.093(3)(c), Florida Statutes.

We find that the Baker-Childers report summarizing Gulf's investigation into allegations of theft by Croft is not work product for reasons discussed in our ruling relating to Interrogatory No. 156. We find that Gulf's unilateral characterizations of the investigative summary as an internal audit insufficient to meet its burden under Rule 25-22.006(4), Florida Administrative Code, entitling the report to exemption from disclosure. We also find Gulf's curious characterization of the promissory note as a security measure unnecessary. The interrogatory did not request production of the \$15,986.62 promissory note executed by Croft which is already public record as Exhibit 3 to Croft's Third Amended Complaint in Croft v. Gulf Power, et al. The interrogatory more reasonably seeks an explanation of the disparity in the total amount of goods and services reported missing by Baker in his December 1983 - January 1984 investigation of Croft, \$300,000, and the amount, \$15,977.62, found misappropriated by Croft in the untitled, unsigned, four-page list of goods and services dated February 2, 1984, labeled Exhibit A to Jacob F. Horton's affidavit included in Gulf's Motion for Summary Judgment in Croft v. Gulf Power, et al. In any event, Gulf failed to produce a copy of the report pursuant to Rule 25-22.006(5)(b), Florida Administrative Code, without which a determination as to confidentiality cannot be made.

Interrogatory No. 158 asks Gulf to:

Reconcile the inventory shortage of only \$8,462, as reported in a 1983 audit of inventory, with the \$300,000 shortage reported by Tom Baker in connection with the 1983 investigation of employee theft.

Gulf reargues work product as to the Baker-Childers report. For the reason discussed in our rulings relating to Interrogatory Nos. 156 and 157, we find the report to be the results of an investigation of reoccurring allegations of theft from Gulf by Croft and, therefore, excludable from work product. Gulf alternatively argues that the Baker-Childers report and the 1983 audit, audit No. 83-06, indicating an \$8,462 shortage, are entitled to specific confidential

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classification pursuant to Sections 366.093(3)(b) and (c), Florida Statutes. We agree as to (b) as to the audit. As to the report, Gulf failed to submit a copy to Commission staff pursuant to Rule 25-22.006(5)(b), Florida Administrative Code, without which a determination as to confidentiality cannot be made.

Interrogatory No. 161 asks Gulf to:

Provide a copy of the April 1983 warehouse audit. Explain the gross shortage and gross overage. What actions or procedures have been instituted to correct inventory pricing and control?

Interrogatory No. 162 asks Gulf to:

Provide a copy of the warehouse audit report ordered by Douglas McCrary in late 1983 in response to allegations of theft by Kyle Croft.

Interrogatory No 164 asks:

When and by whom was the most recent inventory of the warehouses taken and what were the audit findings? Please provide a copy of the audit.

Interrogatory No. 167 asks asks Gulf to:

Please provide the most recent internal audit report on inventory.

Interrogatory No. 168 asks:

What internal control procedures are in place to prevent future thefts by employees?

Interrogatory No. 169 asks Gulf to:

Explain the internal controls governing the purchase of and payment for goods and services.

Interrogatory No. 170 asks Gulf to:

Describe internal controls relating to materials management.

Interrogatory No. 171 asks:

How long have the current internal controls been in effect? What was the prior policy?

Interrogatory No. 172 asks:

Since 1980, have Gulf's independent auditors made recommendations for improvements to internal controls? If so, on what date and what were their recommendations?

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Interrogatory No. 179 asks:

Why did Gulf's internal controls and audit procedures fail to detect the employee thefts?

Gulf requests specified confidential classification to its responses to the above Interrogatories pursuant to sections 366.093(3)(b) or (c), Florida Statutes. We find the disputed information as to Interrogatory Nos. 161, 162, 164, 167, 168, 169, 170, 171, 172, and 179 is exempt from public disclosure either as an internal audit or a security measure. We find exemption (b) applies to Interrogatory No. 171 to the extent of the current audit controls, but not as to the prior policy, and exemption (b) applies to Interrogatory No. 172 to the extent of the recommendations, but not as to the date the recommendations were made.

Interrogatory No. 166 asked Gulf to:

Describe the procedures employed by Gulf Power Company in conducting a physical inventory of warehouses and spare parts.

Gulf requests specified confidential classification pursuant to exemption (b) relating to internal audits. The question, however, addresses audit procedures, not audit reports or findings. It is also unclear whether Gulf has addressed the inventory of spare parts as directed in the interrogatory.

Interrogatory No. 173 asks:

How are vendors of goods and services selected?

Interrogatory No. 174 asks Gulf to:

Describe the vendor bidding process when it is used in the purchase of goods and services.

Gulf requests specified confidential classification of its responses to the above two questions pursuant to section 366.093(3)(e), Florida Statutes, arguing the disclosure of information concerning Gulf's vendor selection and its related bidding process would prejudice Gulf's ability to contract for services on favorable terms. We disagree. The requested information does not contain information concerning vendor selection or the bidding process which, if disclosed, would prejudice Gulf's ability to contract for services on favorable terms in the future. In fact, vendors must be cognizant of this information to make informed bids.

In consideration of the foregoing it is

ORDERED that Gulf's request for specified confidential classifications as to Interrogatory No. 153 is denied. It is further

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ORDERED that Gulf's request for specified confidential classification as to Interrogatory No. 154 is granted but that Gulf is directed to provide the requested information through 1988. It is further

ORDERED that Gulf's motion for protective order and request for specified confidential classification as to Interrogatory No. 156 are denied. It is further

ORDERED that Gulf's motion for protective order and request for specified confidential classification as to Interrogatory No. 157 are denied. It is further

ORDERED that Gulf's request for specific confidential classification as to Interrogatory No. 158 is granted as to Audit No. 83-06 and denied as to the Baker-Childers report. It is further

ORDERED that Gulf's requests for specified confidential classification as to Interrogatories Nos. 161, 162, 164, 167, 168, 169, 170, 171, 172, and 179 are granted to the extent specified. It is further

ORDERED that Gulf's requests for specified confidential classification as to Interrogatory Nos. 173 and 174 are denied. It is further

ORDERED that if a protest is filed within 14 days of the date of this order it will be resolved by the appropriate Commission panel pursuant to Rule 25-22.006(3)(d), Florida Administrative Code.

By ORDER of Commissioner Thomas M. Beard, as Prehearing Officer, this 24th day of APRIL, 1989.

  
THOMAS M. BEARD, Commissioner  
and Prehearing Officer

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