

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the) DOCKET NO. 910163-TL
integrity of SOUTHERN BELL) ORDER NO. PSC-92-1003-CFO-TL
TELEPHONE AND TELEGRAPH COMPANY'S) ISSUED: 09/17/92
repair service activities)
and reports.)
_____)

ORDER DENYING SOUTHERN BELL'S MOTION FOR CONFIDENTIAL CLASSIFICATION OF DOCUMENT NO. 6336-91, GRANTING SOUTHERN BELL'S MOTION FOR CONFIDENTIAL CLASSIFICATION FOR SPECIFIED PORTIONS OF DOCUMENT NO. 6337-91 AND DENYING SOUTHERN BELL'S MOTION FOR CONFIDENTIAL CLASSIFICATION FOR SPECIFIED PORTIONS OF DOCUMENT NO. 6339-91

On June 24, 1991, Southern Bell Telephone and Telegraph Company (Southern Bell or the Company) filed a Motion for Confidential Treatment and Permanent Protective Order for documents produced in response to Item No. 1 of the Office of Public Counsel's (OPC's) First Request for Production of Documents (Document Nos. 6336-91 and 6337-91) and for its response to Interrogatory No. 7 of OPC's First Set of Interrogatories (Document No. 6339-91). On July 8, 1991, OPC filed its Response and Opposition to Southern Bell's Motion for Confidential Treatment and Permanent Protective Order (OPC's Response). Subsequently, on July 22, 1991, Southern Bell filed its Response and Opposition to OPC's Response (Southern Bell's Reply).

I. Southern Bell's Response to Item No. 1 of OPC's First Request for Production of Documents (Document Nos. 6336-91 and 6337-91)

Southern Bell argues alternative theories in support of its motion for confidential treatment of the documents it produced in response to Item 1 of OPC's First Request for Production of Documents. Hence, the Company has filed two versions of its response to OPC's production request which have been assigned Document Nos. 6336-91 and 6337-91.

First, Southern Bell asserts that these internal review reports are the equivalent of internal audits and, therefore, should be granted confidentiality on the same rationale that the legislature created the specific statutory exemption from Florida's Public Records Act for internal audits in Chapter 119, Section 364.183(3)(b), Florida Statutes. On this basis, the Company has requested confidential treatment of these reports in their entirety. The Company has filed an unedited version of the documents, which has been assigned Document No. 6336-91.

DOCUMENT NUMBER-DATE

10799 SEP 17 1992

FPSC-RECORDS/REPORTING

In the alternative, if we deny the Company's motion for confidential treatment of the reviews in their entirety, Southern Bell requests confidential status for certain customer specific portions of the reviews, information which is exempt from Florida's Public Records Act by Section 119.07(w), Florida Statutes. The Company has filed a highlighted version of the documents with a line-by-line analysis of the specific information for which Southern Bell is requesting confidential treatment, which has been assigned Document No. 6337-91.

Document No. 6336-91

The documents submitted by Southern Bell in response to Item No. 1 of OPC's First Request for Production of Documents are described by the Company as "internal, self-evaluative review reports of Southern Bell's network operations in Florida as well as follow-ups to such reports." (Southern Bell's Motion at p. 3). The internal reviews were developed by employees of Southern Bell's network operations in Florida.

Southern Bell claims that it would harm the ratepayers and the Company if the internal review reports were disclosed and, therefore, that the reports are "proprietary confidential business information" exempt from public disclosure under Section 364.183(3), Florida Statutes. Southern Bell argues that the internal review reports, which analyze the Company's compliance with its own internal standards, might be "toned down" by the Company's managers if those managers believed that their reviews might be publicly disclosed during a Commission proceeding. The Company argues this self-critical analysis is absolutely necessary in order to assure compliance with the Company's internal standards and to improve the methods by which it conducts business. Southern Bell argues that areas directly related to the quality of service rendered by the Company might remain unexamined and unimproved, if self-critical analysis is not encouraged by the Commission. Southern Bell contends that such self-critical analysis protects both the Company and its ratepayers from inefficient operations.

In support of its argument for proprietary confidential treatment under Section 364.183(3), Florida Statutes, the Company argues by analogy to the specific exemption from Florida's Public Records Act for internal audits found in Section 364.183(3)(b), Florida Statutes, and by analogy to the federal self-critical analysis privilege.

Southern Bell argues that these internal review reports are the equivalent of internal audits and, therefore, should be granted

confidentiality on the same rationale that the legislature created the specific statutory exemption from Florida's Public Records Act for internal audits in Section 364.183(3)(b), Florida Statutes. Southern Bell asserts that these internal reviews are conducted for the very purpose that internal audits are conducted. The purpose of these reviews and the follow up material associated with them is to provide self-critical analysis of the operations of Southern Bell. The Company contends that the only difference between these reviews and internal audits, for which the legislature has created a specific statutory exemption, is that these reviews are performed by a network department review staff rather than a group of employees denominated as auditors.

Furthermore, although Southern Bell has not refused to produce the documents to OPC under a claim of privilege, the Company urges us to find that public disclosure of the internal review reports would harm the Company or its ratepayers for the same reason that the federal courts have held self-critical analysis to be privileged. While Southern Bell is not suggesting that the federal common law be used as precedent with regard to the issue of confidentiality, the Company does believe that the federal court decisions demonstrate that harm will occur if the internal review reports are disclosed. The harm underlying the federal self-critical analysis privilege, Southern Bell argues, is the possible chilling effect on self-critical analysis by the Company in the future if the information is disclosed.

In OPC's Response, it points out that these reviews, performed by Company employees other than internal auditors or accountants, are not confidential under the specific statutory exemption from Florida's Public Records Act for internal audits found in Section 364.183(3)(b), Florida Statutes. OPC contends that we should not broaden the specific statutory exemption found in Section 364.183(3)(b), Florida Statutes, to include any Southern Bell documents critical of the Company. Moreover, OPC argues that we should not rely on a rationale underlying the federal self-critical analysis privilege, a privilege that does not exist in Florida. Even if there was such a privilege in Florida, OPC contends it would not apply to the documents at issue here.¹ Further, OPC

¹ OPC points out that the privilege is usually recognized and applied in three distinct contexts: Confidential evaluations or peer reviews, affirmative action compliance reports setting forth an employer's affirmative action policies, and the results of certain internal investigations. OPC further contends that, since it is a government agency seeking production of the documents, the privilege does not apply.

points out that no chilling effect on the Company's self-critical analysis would occur if factual as opposed to valuative materials were disclosed.

In Southern Bell's Reply, the Company makes clear its position that, even though these documents are not enumerated as a specific exemption from public records requirements by Section 364.183(3), Florida Statutes, we should conclude that the internal review reports are otherwise proprietary confidential business information under Section 364.183(3), Florida Statutes, the disclosure of which will cause harm to the Company or its ratepayers.

In an opinion released after the briefing of the instant motion, Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission, 597 So.2d 873 (Fla. 1st DCA 1992), the First District Court of Appeal upheld our decision to deny Southern Bell's motion for confidential classification for documents which were not internal audits but contained self-critical analysis.

A document at issue in that appeal, Document "D", is, in part, a compilation of extracts from a group of documents known as the "Benchmark Reports" and Southern Bell's response to those reports. The Benchmark reports were created by an outside consultant Southern Bell retained to analyze and provide advice regarding the proposed combination of Southern Bell's regulated operations and non-regulated customer premises operations.

As to Document "D", Southern Bell contended that the Benchmark reports contain self-critical analysis and, therefore, fall within the classification of internal audits. Southern Bell reasoned that since the reports were created to obtain an understanding of the internal workings of the company, much like internal audits, it should not matter whether the reports were created by an internal auditor or an outside consultant.

Further, even if the document did not fit within any specific category set forth in Section 364.183(3), Florida Statutes, Southern Bell argued that it should be afforded confidential treatment because the disclosure of self-critical analysis would stifle the gathering of similar information in the future. The Company argued that public disclosure of the self-critical reports would have a chilling effect on the preparation of any such analyses in the future, in that those who supply the analyst with this information would be discouraged from investigating thoroughly and frankly.

The Court held that where the information was not an internal auditor's report, the Commission properly exercised its

discretionary delegated legislative authority in denying such material confidential treatment under the exception for internal audits in Section 364.183(3)(b), Florida Statutes. As for Southern Bell's self-critical analysis argument, the Court agreed with our reasoning that the legislature did not intend to create such a category in that no such exemption was explicitly set forth in the statute. The Court found that this conclusion is consistent with Florida's Public Records Act, which legislatively recognizes that all state, county and municipal records shall -- except those that are narrowly excepted from disclosure -- at all times be open for personal inspection by the public. The Court found our decision is also consistent with the liberal construction afforded Florida's Public Records Act in favor of open government. Once the exceptions set forth in Section 364.183(3), Florida Statutes, are considered in conjunction with Florida's Public Records Act, our conclusion that Section 364.183(3), Florida Statutes, should be narrowly construed and that no exception should be created for self-critical analysis is reasonable.

In so concluding, the Court agreed with our implicit determination that Southern Bell failed to establish the harm necessary to allow proprietary confidential business treatment of Document "D" under Section 364.183(3), Florida Statutes, where the only harm advanced by the Company is that the information's disclosure might result in embarrassment to Southern Bell's managers if the report were released to the public.

In a footnote to the opinion, the Court rejected Southern Bell's reliance on the federal self-critical analysis privilege in support of its argument that confidential treatment should be afforded to self-critical analysis. The Court recognized that, in the federal sector, self-critical analysis rises to the level of privilege; it is not merely confidential. Noting that privileges in Florida exist only by statute, the Court recognized that the self-critical analysis privilege, while accepted in the federal sector, has not been explicitly endorsed in Florida.² The Court

² Florida has protected the confidentiality of medical peer reviews. See e.g., Fla. Stat. s. 766.101 (1989); Holly v. Auld, 450 So.2d 217, 220 (Fla. 1984); Dade County Medical Association v. HLIS, 372 So.2d 117 (Fla. 3d D.C.A. 1979); Carter v. Metropolitan Dade County, 253 So.2d 920 (Fla. 3d D.C.A. 1971). The Third District Court of Appeal notes in Dade County Med. Association, 372 So.2d at 121, "We do not establish a general common law 'privilege' of non-disclosure of documents of the characters involved . . . much less indicate the parameters of such a privilege." Fitzgerald, Should Florida Adopt a Qualified Privilege for Self-

noted that the state of Florida is dedicated to its policy of "government in the sunshine" and personal access to all public records. The Court concluded that the federal case law, on which Southern Bell relied in support of its argument that confidential treatment should be afforded to self-critical analyses, is inapplicable.

In sum, the Court held that the Commission had not abused its discretion by declining to afford proprietary confidential business status for the self-critical Benchmark reports. The reasoning applied by the First District in reviewing our decision regarding the confidential status of the self-critical Benchmark reports is equally applicable to Document No. 6337-91, the internal self-critical review reports under consideration here. Our analysis is not changed by the fact that the documents at issue in the appeal were prepared by an outside consultant and the documents at issue in the pending motion were prepared by a Southern Bell employee. In that case, as well as in this instance, the internal reviews are not reports of internal auditors.

We believe that the specific statutory exemptions to the public records requirements of Section 119.07(1), Florida Statutes, are meant to be construed narrowly in order to further the important policy of "government in the sunshine" in the State of Florida. These internal reviews are not reports of internal auditors and, therefore, we find they cannot be granted confidential status through the specific exemption granted by Section 364.183(3)(b), Florida Statutes.

Moreover, we conclude that Southern Bell has failed to establish the harm necessary to allow proprietary confidential business treatment under Section 364.183(3), Florida Statutes. The harm advanced by Southern Bell is that public disclosure of the report might result in embarrassment to Southern Bell's managers which could have a chilling effect on the Company's self-critical analysis of its operations. This situation, Southern Bell contends, could lead to a degradation in the quality of service provided by Southern Bell.³ We have previously rejected this argument with regard to the Benchmark reports and likewise reject this argument with regard to the internal self-critical review reports under consideration here. Furthermore, to the extent Document No. 6337-91 contains factual as opposed to valiative

Critical Analyses, 46 Fla.B.J. 6 (Nov. 1991).

³ We note that Southern Bell has a statutory duty to provide sufficient service under Section 364.03(1), Florida Statutes.

material, we question the chilling effect such disclosure would have on the Company's self-critical analysis. See, e.g., Gillman v. United States, 53 F.R.D. 316 (S.D.N.Y. 1971).

In so concluding, we are not foreclosing the possibility that a claim of confidentiality could exist for documents that are "like internal audits." See Order No. 24437. Under these circumstances, however, we conclude that Southern Bell has not demonstrated that the documents fall into one of the statutory exemptions set out in Section 364.183(3), Florida Statutes, and has failed to establish the harm necessary to allow proprietary confidential business treatment under Section 364.183(3), Florida Statutes.

We deny Southern Bell's request for confidential treatment of Document No. 6336-91. Since we conclude in our discussion regarding Document No. 6337-91 that specified customer specific information contained in these internal reviews is entitled to confidential treatment, Document No. 6336-91 will be returned to the Company. As discussed below, the Company shall file a redacted version of Document 6337-91.

Document No. 6337-91

Southern Bell requests that, if we do not find that the reviews are confidential in their entirety, we find certain customer specific portions of the reviews to be confidential. This customer specific information consists of names, addresses and phone numbers of subscribers.

Section 119.07(w), Florida Statutes, clearly provides an exemption from public disclosure for such information. Therefore, we grant Southern Bell's motion for confidential treatment for the highlighted customer specific information found in Document No. 6337-91. The Company shall file a redacted version of these documents.

**II. Southern Bell's Response to Interrogatory No. 7 of OPC's
First Set of Interrogatories (Document No. 6339-91)**

Document No. 6339-91

OPC's Interrogatory No. 7 of its First Set of Interrogatories requested the names of employees who were disciplined as a result of improper practices related to the falsification of repair

service records. The request also asked for certain other information, including why the employees had been disciplined and how they were disciplined. The Company has filed a highlighted version of the documents with a line-by-line analysis for the information for which Southern Bell is requesting confidential treatment, which has been assigned Document No. 6339-91.

The Company requests confidential classification only for the names of employees who were disciplined by Southern Bell and not for information on how or why these employees were disciplined. Section 364.183(3)(f), Florida Statutes, states that "proprietary confidential business information" includes "[e]mployee personnel information unrelated to compensation, duties, qualifications or responsibilities." Southern Bell argues that this information falls within the specific exception to Florida's Public Records Act found in Section 364.183(3)(f), Florida Statutes, since the identification of the employees in question in this context does not relate to compensation, duties, qualifications or responsibilities. OPC contends that the information falls outside the exception found in Section 364.183(3)(f), Florida Statutes.

We adopt OPC's position that the names of employees, identified as those who were disciplined by Southern Bell, as found in Document No. 6339-91, is information not exempt from Chapter 119, Florida's Public Records Act, by Section 364.183(3)(f), Florida Statutes. The names of employees who were disciplined by Southern Bell is information related to performance of the employees' jobs. As such, this information is not "proprietary confidential business information" as defined by the legislature in Section 364.183(3)(f), Florida Statutes, since it is employee personnel information which is related to duties or responsibilities.⁴ Therefore, we deny the Company's request for confidential treatment of the highlighted information, which is the names of the employees who were disciplined by Southern Bell, found in Document No. 6339-91.

⁴ Compare Michel v. Douglas, 464 So.2d 545 (Fla. 1985) (Florida Supreme Court held that there was no state or federal right of disclosural privacy in tax-supported hospital's personnel records in context of Florida Public Records Act, although it was suggested but not required that public agencies monitor their personnel records and exclude information not related to their employees' qualifications for their jobs or performance of their jobs) and News-Press v. Wisher, 345 So.2d at 648 ("No policy of the state protects a public employee from the embarrassment which results from his or her public employer's discussion or action on the employee's failure to perform his or her duties properly.")

ORDER NO. PSC-92-1003-CFO-TL
DOCKET NO. 910163-TL
PAGE 9

Based on the foregoing, it is, therefore,

ORDERED by Chairman Thomas M. Beard, as Prehearing Officer, that Southern Bell's Request for Confidential Classification for Document No. 6336-91 is denied. It is further

ORDERED that Document No. 6336-91 shall be returned to Southern Bell. It is further

ORDERED that Southern Bell's Request for Confidential Classification for specified information contained in Document No. 6337-91 is granted. It is further

ORDERED that Southern Bell shall file a redacted version of Document No. 6337-91. It is further

ORDERED that Southern Bell's Request for Confidential Classification for specified information contained in Document No. 6339-91 is denied. It is further

ORDERED that pursuant to Section 364.183, Florida Statutes, and Rule 25-22.006, Florida Administrative Code, the confidentiality granted to the documents specified herein shall expire eighteen (18) months from the date of issuance of this Order in the absence of a renewed request for confidentiality pursuant to Section 364.183, Florida Statutes.

BY ORDER of Chairman Thomas M. Beard, as Prehearing Officer, this 17th day of September, 1992.


THOMAS M. BEARD, Chairman and
Prehearing Officer

(S E A L)

JRW

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.