Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
AudioText International, Ltd.,	)	
	)	
Complainant,	)	
	)	**File No. EB-03-MD-010**
v.	)	
	)	
AT&T Corp.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 23, 2004 **Released: January 27, 2004**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, we deny the request of defendant AT&T Corporation ("AT&T") for confidential treatment and other relief relating to eleven pages of documents ("the Subject Documents") that complainant AudioText International, Ltd. ("AudioText") included in the appendix to the formal complaint that AudioText filed with the Commission under section 208(a) of the Communications Act of 1934, as amended ("Act").[1] AT&T seeks confidential treatment of the Subject Documents pursuant to sections 0.457 and 0.459 of our rules,[2] on the grounds that they are protected by the attorney-client and attorney work product privileges.[3]

---

[1] 47 U.S.C. § 208. *See* Formal Complaint, File No. EB-03-MD-010 (filed May 13, 2003) ("Complaint"). The Complaint alleges that AT&T violated sections 203(c)(3) and section 201(a) of the Act by engaging in conduct that was not authorized by AT&T's governing tariffs. Citations to the appendix to the Complaint appear in the form ("Complaint App. at __").

[2] 47 C.F.R. §§ 0.457 and 0.459.

[3] *See* Letter from Jennifer L. Leuba, Counsel for AT&T to Marlene H. Dortch, Secretary, Federal Communications Commission, File No. EB-03-MD-010 (filed June 4, 2003) ("June 4, 2003 Letter"). The Subject Documents appear at the following pages of the appendix to the Complaint: Complaint App. at 270-271; 277-79; 281; 282; 303-06; 307-08. *See* June 4, 2003 Letter at 5-7. *See also* Letter from Jennifer L. Leuba, Counsel for AT&T to Marlene H. Dortch, Secretary, Federal Communications Commission, File No. EB-03-MD-010 (filed June 18, 2003) ("June 18, 2003 Letter") at 10. AT&T has described the eleven pages of Subject Documents as consisting

(continued....)

AudioText opposes AT&T's request.[4] As explained below, we deny AT&T's requests relating to the Subject Documents, because we find that AT&T has waived any attorney-client privilege and/or work product protection that may have once attached to these documents.

II. FACTUAL BACKGROUND

A. The District Court Litigation

2. Prior to initiating this proceeding before the Commission, AudioText had filed a complaint against AT&T in the United States District Court for the Eastern District of Pennsylvania ("the District Court") alleging breach of contract and of the covenant of good faith and fair dealing.[5] In the course of that litigation, AT&T produced the Subject Documents to AudioText on August 2, 2001 in response to AudioText's discovery requests. AT&T's outside counsel, Thomas P. Bracaglia, enclosed the Subject Documents in a transmittal letter to AudioText's outside counsel, Stephen G. Burns,[6] and advised that "[a]dditional documents which are deemed confidential and/or privileged will be produced upon receipt of the signed Protective Order."[7]

3. On August 31, 2001, Mr. Bracaglia sent a letter to Mr. Burns stating that certain documents protected by the attorney-client privilege, including the Subject Documents, "were inadvertently produced by error."[8] Mr. Bracaglia asked whether AudioText would return the documents or whether AT&T would instead need "to file a motion to correct this error."[9] Mr. Burns responded in two letters, both dated September 13, 2001, in which he indicated that because AudioText lacked information about the authors and recipients of the Subject

---

(...continued from previous page)
of "emails written to and/or from AT&T in-house attorneys, on the subject of AT&T's legal right to suspend services to AudioText . . .;" a "facsimile from an AT&T sales executive, transmitting fact information to Sharon Gans, an AT&T in-house litigator, for the purpose of receiving legal advice, and in anticipation of litigation"; "handwritten notes of Ms. Gans, reflecting internal, privileged communications with AT&T clients on the subject of suspension;" and "a draft of an AT&T tariff, prepared by, and in consultation with, AT&T in-house attorneys." June 4, 2003 Letter at 2.

4 *See* Letter from Russell D. Lucas, Counsel for AudioText, to Marlene H. Dortch, Secretary, Federal Communications Commission, File No. EB-03-MD-010 (filed June 11, 2003) ("June 11, 2003 Letter"); Letter from Russell D. Lucas, Counsel for AudioText, to Marlene H. Dortch, Secretary, Federal Communications Commission, File No. EB-03-MD-010 (filed June 23, 2003) ("June 23, 2003 Letter").

5 Joint Statement of the Parties, File No. EB-03-MD-010 (filed July 23, 2003) ("Joint Statement") at 34, ¶ 181.

6 June 11, 2003 Letter, Exhibit 1.

7 June 11, 2003 Letter, Exhibit 1. On October 11, 2001, the District Court entered an order adopting an Agreed Protective Order submitted by the parties that, *inter alia*, provided for confidential treatment of designated information produced in discovery. *See* Order and attached Agreed Protective Order, attached as an exhibit to June 4, 2003 Letter. The Agreed Protective Order contains no language or provision addressing inadvertent production of privileged documents.

8 June 11, 2003 Letter, Exhibit 2; June 18 Letter, Declaration of Thomas P. Bracaglia ("Bracaglia Decl."), attached as exhibit, at 3, ¶ 14.

9 June 11, 2003 Letter, Exhibit 2.

Documents, it could not agree that the documents were attorney-client communications.[10] Mr. Burns invited Mr. Bracaglia to call him to discuss the matter further.[11] Three months passed, during which AT&T failed to persuade AudioText to return the Subject Documents.

4. On December 17, 2001, AT&T filed a motion asking the District Court to dismiss AudioText's complaint or, in the alternative, to dismiss it without prejudice to AudioText's submission of its claims to the Commission for disposition pursuant to the primary jurisdiction doctrine.[12] On December 18, 2001, AT&T's in-house counsel, Jennifer L. Leuba, sent a letter to AudioText's outside counsel, Mr. Burns, noting that the parties "had agreed last week to resolve the privilege issues" prior to the deposition of AT&T in-house counsel, Andrew Schlafly, which was scheduled for December 21, 2001.[13] Ms. Leuba asked Mr. Burns to let her know "which documents you will not return, so that we may file the appropriate motion with the Court."[14] On December 19, 2001, Mr. Kasman informed Ms. Leuba by letter that AudioText did not intend to return any of the documents that AT&T had requested because AudioText did not believe they were privileged.[15] Mr. Kasman advised AT&T to "take any steps you deem appropriate with respect to these documents."[16]

5. The deposition of Mr. Schlafly was held on December 21, 2001, as scheduled.[17] During the deposition, Ms. Leuba and Mr. Burns discussed their dispute concerning the Subject Documents, and Ms. Leuba noted that "the parties have not yet briefed the issue of privilege, and I think we all assume we may be doing that in the near future."[18] On January 17, 2002, the District Court ordered that AudioText may submit its claims to the Commission, and stayed all further proceedings in the case pending completion of administrative proceedings before the Commission.[19] AT&T did not file a motion to compel the return of the Subject Documents, or otherwise notify the District Court of the parties' dispute regarding these documents, at any time before or after the District Court issued the stay order.

6. In August 2002, AudioText filed a second complaint in the District Court charging that AT&T violated section 201 of the Act and AT&T's tariffs by terminating

---

[10] June 11, 2003 Letter, Exhibit 3.

[11] June 11, 2003 Letter, Exhibit 4.

[12] Complaint App. at 402-37; Bracagalia Decl. at 3, ¶ 16; Joint Statement at 34, ¶ 186. AT&T's motion was entitled, Motion Of Defendant, AT&T Corp., To Dismiss, Or In The Alternative, Motion To Dismiss Without Prejudice To Submit This Matter To The Federal Communications Commission For Disposition ("Motion to Dismiss").

[13] June 11, 2003 Letter, Exhibit 5.

[14] June 11, 2003 Letter, Exhibit 5. Ms. Leuba made a similar request to Mr. Burns's colleague, Andrew Kasman, that same day. *See* June 11, 2003 Letter, Exhibit 6.

[15] June 11, 2003 Letter, Ex. 7.

[16] June 11, 2003 Letter, Ex. 7.

[17] Complaint App. at 438.

[18] Complaint App. at 454, page 96.

[19] Complaint App. at 565-66; Joint Statement at 35, ¶ 191.

AudioText's services and blocking its traffic.[20] In November 2002, the District Court granted a motion by AT&T to consolidate AudioText's two suits, and to stay both cases pending referral to the Commission for disposition.[21]

B. The Complaint Proceeding Before The Commission

7. AudioText filed and served its Complaint before the Commission on May 13, 2003 following an unsuccessful effort at pre-complaint mediation before Commission staff.[22] AudioText included the Subject Documents in the appendix it filed and served with its Complaint, and quoted or divulged information from the Subject Documents in several paragraphs of the Complaint.[23] AT&T did not notify the Commission that it considered the Subject Documents to be privileged and confidential until May 22, 2003, and only then raised the issue in response to an inquiry from Commission staff about whether certain documents included in the appendix to the Complaint, that were stamped "confidential" or "proprietary," were intended to be made publicly available.[24] In response to this inquiry, AT&T made an informal request to staff that the Subject Documents be excluded from the public record because they are privileged documents.[25]

8. At the suggestion of staff, AT&T documented this request in a letter to the Commission, which AT&T filed on June 4, 2003.[26] In that letter, AT&T requested confidential treatment of the Subject Documents pursuant to sections 0.457 and 0.459 of our rules,[27] on the asserted grounds that the documents were protected by the attorney-client and work product privileges.[28] Two weeks after filing its June 4 Letter, AT&T made an additional request to the Commission for an order requiring AudioText to return to AT&T all copies of the Subject Documents, and precluding AudioText from introducing, referencing, and/or relying upon the Subject Documents in this proceeding.[29] This was AT&T's first and only request to an

---

20 Complaint App. at 580-86.

21 Complaint App. at 587.

22 *See* Addendum to Complaint at 26-27, ¶¶ 70-74. In its June 11, 2003 Letter, AudioText argues that a submission that AudioText provided to Commission staff during the pre-complaint mediation process included quotes from some of the Subject Documents. *Id.* at 6. According to AudioText, AT&T raised no objection to these disclosures. *Id*. AT&T did not dispute this contention in its June 18 2003 Letter responding to AudioText's arguments.

23 *See* Complaint at ¶¶ 161, 177, 178, 180, 181, 182, 183, 184, 206, 325, and 328.

24 *See* e-mail communications between Christopher N. Olsen, Assistant Chief, Market Disputes Resolution Division, Enforcement Bureau, and Jennifer L. Leuba, counsel for AT&T, attached hereto as Exhibit 1. AT&T's counsel noted in the June 4, 2003 Letter that she had sent AudioText's counsel a letter on May 20, 2003 requesting the return of the Subject Documents. *See* June 14, 2003 Letter at 1-2. According to AT&T, AudioText refused this request. *Id.*

25 *Id*. AT&T's counsel advised staff that a few of the Subject Documents contain both privileged and non-privileged information, and offered to provide redacted versions of such documents for inclusion in the record. *Id.*

26 June 4, 2003 Letter.

27 47 C.F.R. §§ 0.457 and 0.459.

28 *See* June 4, 2003 Letter at 1.

29 June 18, 2003 Letter at 6, 10.

adjudicatory entity for an order requiring return of the Subject Documents, and it came almost two years after AT&T produced the documents. AudioText submitted letters opposing both requests.[30]

9. We have excluded the Subject Documents from the public record to preserve the status quo pending resolution of AT&T's request. We have not, however, ordered AudioText to return the Subject Documents to AT&T or precluded AudioText from referencing and/or relying upon them.[31]

III. DISCUSSION

10. AT&T's request to exclude the Subject Documents from the public record rests on sections 0.457 and 0.459 of the Commission's rules,[32] which implement the Freedom of Information Act ("FOIA").[33] Under FOIA, the Commission must disclose reasonably described agency records requested by any person, unless the records contain information that fits within one of the nine exemptions from disclosure provided in the Act.[34] Section 0.457(d) of the Commission's rules, which implements FOIA Exemption 4, provides that records not routinely available for public inspection include "[t]rade secrets and commercial or financial information obtained from any person and privileged or confidential."[35] Section 0.459(a) provides that any person submitting information or materials to the Commission may request that such information not be made routinely available for public inspection.

11. AT&T advances two principal arguments in favor of withholding the Subject Documents from the public record. First, AT&T argues that AudioText should not have included the Subject Documents in its Complaint to the Commission, because AT&T had asserted a claim of privilege with respect to these documents and notified AudioText that the documents had been produced inadvertently in the District Court litigation.[36] AT&T contends that "[i]t is contrary to the basic tenets of FOIA to take information that is otherwise private and unavailable to the public," such as the Subject Documents, and "place that information in the public domain by capitalizing on an inadvertent mistake made by" AT&T's counsel.[37] AT&T asserts that the Subject Documents should be excluded from the record "[o]n this ground alone,"

---

30 *See* June 11, 2003 Letter; June 23, 2003 Letter.

31 *See* 47 C.F.R. § 0.459(d)(1)(where the Commission has received a request that information submitted to the Commission be withheld from public inspection, "the information will be accorded confidential treatment. . . until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted.")

32 47 C.F.R. §§ 0.457 and 0.459.

33 5 U.S.C. § 552.

34 *See* 5 U.S.C. § 552(b).

35 47 C.F.R. § 0.457(d). *See* 5 U.S.C. § 552(b)(4) (Exemption 4, stating that the government need not disclose "trade secrets and commercial or financial information obtained from a person and privileged or confidential.")

36 June 4, 2003 Letter at 2.

37 June 4, 2003 Letter at 2.

and that the traditional tests governing application of FOIA Exemption 4 are inapplicable.[38]

12. Second, AT&T argues that even if AT&T is required to make a showing that the Subject Documents are excludable from the public record under FOIA Exemption 4,[39] the Bureau should conclude that the Subject Documents qualify for protection under that exemption.[40] AT&T contends that the Subject Doctrines are protected under Exemption 4 because they are "commercial" documents, in that they involve attorney-client communications with respect to AT&T's ability to suspend service to a business customer, and are both "privileged" and "confidential."[41]

13. Regarding AT&T's first argument, we reject AT&T's suggestion that AudioText's allegedly improper submission of the Subject Documents to the Commission relieves AT&T of its obligation to satisfy the standards for excluding material from the public record under FOIA exemption 4. We have no authority to exclude the Subject Documents from the public record under FOIA Exemption 4 without a showing that the Documents qualify as "trade secrets" or "commercial or financial information" that is "privileged or confidential" within the meaning of FOIA Exemption 4 and section 0.457(d) of our rules.[42]

14. We also reject AT&T's second argument, which attempts to show that the Subject Documents are protected under Exemption 4 on the ground that they are "commercial" materials that are both "privileged" and "confidential." As discussed below, even assuming, *arguendo*, that the Subject Documents are commercial documents that were subject to the attorney-client and work product privileges before AT&T produced them to AudioText in August 2001, and even assuming such production was inadvertent, we find that AT&T waived any privilege or confidentiality relating to these materials by failing to take reasonable action in the District Court to secure their return. The Subject Documents thus do not qualify for protection under FOIA Exemption 4, because they lost whatever confidentiality or privilege that may have once attached to them, before AudioText ever filed the Subject Documents with the Commission.

---

[38] June 4, 2003 Letter at 2-3 (citing the tests set forth in *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) and *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992 (*en banc*), *cert denied*, 507 U.S. 984 (1993)).

[39] 5 U.S.C. § 552(b)(4).

[40] June 4, 2003 Letter at 3.

[41] June 4, 2003 Letter at 3. AudioText contends that the protections of sections 0.457 and 0.459 are not available to AT&T because AT&T was not the person who submitted the Subject Documents to the Commission. According to AudioText, only persons who have submitted materials to the Commission are entitled to request that they be withheld from the public record under sections 0.457 and 0.459 of our rules. *See* June 11, 2003 Letter at 1-2. AudioText's suggestion that *only* the person who has submitted information to the Commission may request confidential treatment of the information appears to be at odds with section 0.459(i) of our rules, which provides that "[t]hird party owners of materials submitted to the Commission by another party may participate in the proceeding resolving the confidentiality of the materials." 47 C.F.R. § 0.459(i). We need not, however, decide whether AT&T is entitled to request that the Subject Documents be withheld from public inspection under sections 0.457 and 0.459, even though AT&T itself did not submit these materials to the Commission, because we find that AT&T has not established that the Subject Documents qualify for confidential treatment under those rules, regardless of who submitted the Subject Documents to the Commission.

[42] 47 C.F.R. § 0.457(d). *See* 5 U.S.C. § 552(b)(4).

15. Courts have widely recognized in cases involving inadvertent or involuntary production of privileged materials that the privilege holder waives the privilege where he "fails to pursue all reasonable means of preserving the confidentiality of the privileged matter."[43] The law of the Third Circuit, which AT&T urges us to apply in this case,[44] provides a case on point. In *Grand Jury*,[45] the court held that a party waived the work-product privilege when he waited three and a half months before filing a motion to compel the return of a file that had been inadvertently produced to his adversary.[46] Because the involuntary disclosure was made directly to the party's adversary, who refused requests for return of the file, the court in *Grand Jury* found that judicial enforcement of the privilege was the "only remedy" that would have foreclosed the adversary's use of the documents.[47] "Without such judicial vindication," the court held that the adversary "was free to continue to utilize the documents, thereby negating their confidential character."[48] The court observed that

> [A] reasonable person would not only inform his or her adversary of the breach of the privilege, but also would seek a judicial determination of the controversy if his or her adversary took an opposing stance. Merely asserting the privilege to an adversary is not sufficient to protect the privilege in these circumstances inasmuch as the adversary has possession of the materials claimed to be privileged and thus can make use of them.[49]

16. In this case, as in *Grand Jury*, the holder of the alleged privilege, AT&T, failed to take reasonable steps to retrieve the inadvertently produced Subject Documents. The record indicates that three months after AudioText told AT&T's counsel on September 13, 2001 that AudioText could not agree that the Subject Documents were attorney-client communications,[50]

---

[43] *United States v. de la Jara*, 973 F.2d 746, 749-50 (9th Cir. 1992)(finding that attorney-client privilege was waived where a criminal defendant waited six months before seeking the return of a privileged letter that the government seized in executing a search warrant). *See, e.g., In re Grand Jury (Impounded)*, 138 F.3d 978 (3d Cir. 1998) (holding that in cases of inadvertent disclosure, "the party asserting the work product doctrine must pursue all reasonable means to restore the confidentiality of the materials and to prevent further disclosures within a reasonable period to continue to receive the protection of the privilege"); *SEC v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997)(noting that the D.C. Circuit "adheres to a strict rule on waiver of privileges," and holding that "'the confidentiality of communications covered by [a] privilege must be jealously guarded by the holder of the privilege lest it be waived.'") (citations omitted).

[44] June 18, 2003 Letter at 3 and n.1 (arguing that "[b]ecause the AudioText litigation was pending in Pennsylvania and because the inadvertent production of these privileged documents at issue occurred in Pennsylvania, the holdings of the Court of Appeals for the Third Circuit and the District Courts sitting in Pennsylvania should govern the scope of the privilege afforded the documents and all issues regarding waiver").

[45] 138 F.3d 978 (3d Cir. 1998).

[46] Although *Grand Jury* addressed the work-product privilege, in analyzing the factors considered in determining whether a waiver occurred, the court in *Grand Jury* relied upon decisions concerning the attorney-client privilege. 138 F.3d at 981 (citing the holding in *United States v. de la Jara*, 973 F.2d at 750).

[47] *Id*. at 982.

[48] *Id*. at 982.

[49] *Grand Jury*, 138 F.3d at 982.

[50] June 11, 2003 Letter, Exhibit 3.

AT&T had failed to obtain the return of the Subject Documents, either by agreement or by requesting court intervention.[51] Moreover, after AudioText informed AT&T, in its letter of December 19, 2001, that AudioText did not intend to return the Subject Documents,[52] AT&T again took no action to obtain relief from the District Court. Indeed, although AT&T's counsel informed AudioText's counsel on August 31, 2001, and again on December 18, 2001, that AT&T would file a motion with the District Court if AudioText did not return the Subject Documents, AT&T never did so.[53]

17. AT&T's suggestion that it was prevented from filing such a motion to compel by the District Court's decision to stay the litigation is wholly unpersuasive.[54] First, AT&T was the party who filed the Motion to Dismiss that resulted in the District Court decision to stay the action. If filing the Motion to Dismiss jeopardized AT&T's ability to protect the privilege and confidentiality of the Subject Documents, AT&T has only itself to blame. Second, the District Court order staying the litigation was issued on January 17, 2002 – nearly a month after AudioText informed AT&T that it did not intend to return the Subject Documents. AT&T has not explained why it did not file a motion to compel return of the Subject Documents *before* the stay order issued.[55] Nor has AT&T explained why it did not ask the District Court to lift the stay, once it issued, for the limited purpose of addressing AT&T's request for return of the Subject Documents.[56] The testimony of AT&T's outside counsel, Mr. Bracaglia, indicates that AT&T intended to ask the court to compel return of the Subject Documents *only if* the District Court did not dismiss or stay the case.[57] This testimony, and AT&T's failure to seek court

---

[51] *See* June 11, 2003 Letter, Exhibits 5, 6.

[52] *See* June 11, 2003 Letter, Exhibit 7 at 1(stating that AudioText "did not intend to return any of these documents to [AT&T]," and advising AT&T's counsel to "take any steps you deem appropriate with respect to these documents.") .

[53] Like the privilege holder in *Grand Jury,* AT&T does not even claim that it had "had reason to believe that the adversarial party was not making use of" the allegedly privileged material. 138 F.3d at 982. The record shows that, at the Schlafly deposition, held in December 2001, AT&T's counsel noted that several of the topics on which AudioText sought deposition testimony were based on the privileged documents that AT&T had asked AudioText to return. *See* Complaint App. at 439-40.

[54] *See* June 18, 2003 Letter at 2, 5 (arguing that "AT&T had intended to file a motion for their return when the matter was referred to the Commission" and that "AT&T's efforts to rectify the disclosure were not only timely but ongoing and persistent up until the time this action was stayed"). *See also* June 4, 2003 Letter at 1 (arguing that the District Court's Order of January 17, 2002 "stayed 'all further proceedings,' which, among other things, included all motion practice.")

[55] Indeed, AT&T could have asked the District Court for expedited treatment of such a motion to compel in view of the pendency of the Motion to Dismiss, or requested that the court decide the motion to compel before ruling on the Motion to Dismiss.

[56] AT&T apparently did not regard the January 17, 2002 stay order as precluding *all* activity in the District Court litigation, as evidenced by its successful motion, in November 2002, to have AudioText's second-filed action consolidated with the action that was the subject of the January 17, 2002 stay order. *See, supra,* at ¶ 6. In addition, the fact that AudioText filed a motion with the District Court on January 25, 2002 seeking reconsideration of the January 17, 2002 stay order, which the District Court denied in an order dated August 21, 2002, provides further evidence that the January 17, 2002 stay order did not bar all motion practice in the District Court litigation *See* Complaint App. at 567-79.

[57] Bracagalia Decl. at 4, ¶ 17(stating that AT&T "intended to file a motion to compel return of the documents if its [Motion to Dismiss] was not been [sic] granted.")

intervention, suggest that AT&T was willing to leave the Subject Documents in the hands of its adversary, AudioText, as long as the District Court action was dismissed or stayed. Based on this record, we cannot conclude that AT&T "pursue[d] all reasonable means of preserving the confidentiality" of the Subject Documents."[58]

18. AT&T's reliance on case law holding that inadvertent production of privileged documents does not, as a matter of law, result in a waiver of the privilege is unavailing.[59] AT&T cites cases from Pennsylvania setting forth five factors that courts consider in determining whether inadvertent disclosure waives the attorney client privilege, and attempts to show that these factors support the conclusion that no waiver occurred here.[60] To the extent these arguments had merit, AT&T should have presented them to the District Court, as AT&T repeatedly told AudioText it would do. At this point, after AudioText has been in possession of the Subject Documents for two years, has thoroughly analyzed and digested the documents, and included them in its pleadings, the confidentiality of the Subject Documents has been completely destroyed, and no order from this agency can restore it.[61]

19. For all of these reasons, we conclude that AT&T has failed to show that the Subject Documents are confidential or privileged. Thus, we deny AT&T's request that the Subject Documents be excluded from the public record under sections 0.457 and 0.459 of the Commission's rules. We also deny AT&T's further request for an order requiring AudioText to return to AT&T all copies of the Subject Documents, and precluding AudioText from relying upon the documents in this proceeding. AT&T has failed to cite any authority permitting the Commission to order a party to return documents produced in the District Court litigation and, in any event, we see no basis to require AudioText to return the Subject Documents, or to refrain from relying upon them, in view of our finding that the Subject Documents have lost any privilege or confidentiality that may have once attached to them.

---

58 *United States v. de la Jara*, 973 F.2d at 750.

59 *See* June 18, 2003 Letter at 3

60 June 18, 2003 Letter at 3. The five factors are as follows: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; (5) whether the overriding interests of justice would or would not be served by relieving a party of its error. *Id*. citing *Rotelli v. 7-Up Bottling Co. of Phila.*, 1995 WL 234171 (E.D. Pa. 1995); *Advanced Medical, Inc. v. Arden Medical Services*, Inc., C.A. No. 87-3059, 1988 WL 76128 (E.D. Pa. July 18, 1988).

61 *See In re Grand Jury Investigation of Ocean Transp*., 604 F.2d 672, 674-75 (D.C. Cir.), *cert denied*, 444 U.S. 915 (1979) (where documents were turned over one year prior to the assertion of privilege, and they had already been "copied, digested and analyzed" before a motion was filed with the district court, "the disclosure [could not] be cured simply by a return of the documents" and the "privilege ha[d] been permanently destroyed); *McGreevy v. CSS Industries, Inc*., Fair Empl. Prac. Cas. (BNA) 1644, 1996 WL 412813, at *2 (E.D. Pa. 1996) (disclosure of privileged document was already complete, as opposing party had learned its full contents); *Advanced Medical, Inc.*, 1988 WL 76128, at *3 (E.D. Pa. 1988) (noting that, although a "limited disclosure resulting from glancing at an open file drawer or designated documents for copying may not justify a finding of waiver when the party does not know the essence of the document's contents. . . when disclosure is complete, a court order cannot restore confidentiality").

IV. ORDERING CLAUSES

20. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, sections 0.457 and 0.459 of the Commission's rules, 47 C.F.R. §§ 0.457 and 0.459, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that AT&T's requests for confidential treatment of the Subject Documents and for an order requiring AudioText to return to AT&T all copies of the Subject Documents, and precluding AudioText from introducing, referencing, and/or relying upon the document in this proceeding, are DENIED.

21. IT IS FURTHER ORDERED, pursuant to section 0.459(g) of the Commission's rules, 47 C.F.R. §0.459(g), that AT&T may, within five working days, file an application for review of this Order by the Commission.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau