IN THE SUPREME COURT OF FLORIDA

DEAN FORSBERG and WALTER FREEMAN,

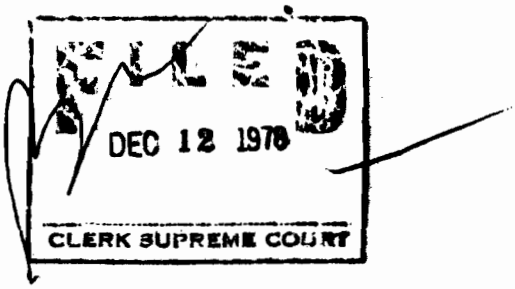
Appellants,

vs.

THE HOUSING AUTHORITY OF THE CITY OF MIAMI BEACH AND MURRAY GILMAN, Executive Director,

Appellees.

Case No. 54,623



BRIEF OF AMICI CURIAE

THE MIAMI HERALD PUBLISHING COMPANY (The Miami Herald); GORE NEWSPAPERS COMPANY (The Fort Lauderdale News and the Sun-Sentinel); THE TRIBUNE COMPANY (Tampa Tribune and Tampa Times); SENTINEL STAR COMPANY (Orlando Sentinel Star); PALM BEACH NEWSPAPERS, INC. (The Palm Beach Post and The Palm Beach Times); and THE TALLAHASSEE DEMOCRAT, INC. (The Tallahassee Democrat)

PAUL & THOMSON
Parker D. Thomson
Franklin G. Burt
1300 Southeast First National Bank Building
Miami, Florida 33131
(305) 371-2000

Attorneys for Amici Curiae

Table of Contents

Table of Authorities

CASES:

IN THE SUPREME COURT OF FLORIDA

DEAN FORSBERG and WALTER FREEMAN,	)	
Appellants,	)	
vs.	)	Case No. 54,623
THE HOUSING AUTHORITY OF THE CITY OF MIAMI BEACH AND MURRAY GILMAN, Executive Director,	)	
Appellees.	)	
	)	

BRIEF OF AMICI CURIAE
THE MIAMI HERALD PUBLISHING COMPANY (The Miami Herald); GORE NEWSPAPERS COMPANY (The Fort Lauderdale News and the Sun-Sentinel); THE TRIBUNE COMPANY (Tampa Tribune and Tampa Times); SENTINEL STAR COMPANY (Orlando Sentinel Star); PALM BEACH NEWSPAPERS, INC. (The Palm Beach Post and The Palm Beach Times); and THE TALLAHASSEE DEMOCRAT, INC. (The Tallahassee Democrat)

STATEMENT OF THE CASE AND FACTS

The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc. (publisher of The Miami Herald), Gore Newspapers Company (publisher of The Fort Lauderdale News and the Sun-Sentinel), The Tribune Company (publisher of the Tampa Tribune and Tampa Times), Sentinel Star Company (publisher of the Orlando Sentinel Star), Palm Beach Newspapers, Inc. (publisher of The Palm Beach Post and The Palm Beach Times), and The Tallahassee Democrat, Inc.

(publisher of The Tallahassee Democrat), ("amici") are filing this brief as amici curiae in support of affirmance of the decision of the Circuit Court. Amici adopt Appellants' and Appellees' Statements of the Case and Facts (except insofar as Appellants' Statement of Facts contains legal conclusions). In addition, Amici have attached to this Brief as an Appendix, a copy of Appellee Housing Authority's Application For Admission, the basic form to be utilized by persons such as Appellants seeking public housing. Though not part of the pleadings in this case, this application form is a public record under Chapter 119, Fla. Stat. (1977).

SUMMARY OF ARGUMENT

Appellants' Brief vigorously argues that constitutional rights of privacy preclude effectuation of the Florida Public Records Act as to public records related to Appellants.[1/] But Appellants' Brief does not really attempt to isolate the privacy interests asserted or the conflicting public interests involved. Consideration of these interests is required:

1. The Florida Legislature has adopted a sweeping public records law which, as part of Florida's commitment to

---

1/ Appellants filed this cause as a class action, but normally a party has no standing vicariously to assert the constitutional rights of third persons. Warth v. Seldin, 422 U.S. 499. In News-Press Publishing Co. v. Wisher, 345 So.2d 646, 647 (Fla. 1977)., this Court declined to consider the "question of general access" in part because "[N]o employee is before us as a party to raise possible constitutional issues." Acceptance of Appellants' assertion of "class" rights would constitute acceptance of the "question of general access" rejected by this Court in Wisher.

open government, mandates "inspect[ion] and examinat[ion]" of "all" documents "made or received" pursuant to law "or in connection with the transaction of official business by any [governmental] agency."[2/] The only exceptions to this rule are the statutory exceptions found in the Public Records Act itself[3/] and in some 100 other statutory provisions.[4/]

2. The records here involved are public records, being records received by a governmental agency in the conduct of its official business. Appellants concede this fact.

3. The records are utilized by Appellee govermental agency in determining eligibility for governmental provision of housing costs for certain individuals in society. The governmental funds used to provide this subsidy are, of course, derived from taxation of all citizens. Public housing programs being very expensive, these funds are limited and various applicants must compete for the available funds. Hopefully they will be dispensed to those most in need of them. The general public, which provides funds for housing of its most needy members, has a continuing interest in seeing these funds are used for those in need, and only for those persons.

2/ §119.011(1), Fla. Stat. (1977) (emphasis supplied).

3/ §119.07(2)(b), Fla. Stat. (1977).

4/ These other statutory exceptions are recognized in §119.07(2)(a), Fla. Stat. (1977). A compendium of these exceptions through the 1977 session of the Florida Legislature is found in the Florida Open Government Laws Manual, prepared by the Office of the Attorney General (June, 1978) at pp. 49-77.

4. Abuses exist in the administration of many public programs. Unfortunately, one fact of modern life is that "social welfare programs," including public housing, have been riddled by administrative abuse and fraud. Press review of records utilized in administration of these programs and resultant press exposure of abuse has often directly led to institution of corrective measures.

5. No assertion is here made that any aspect of Appellants' decisional autonomy is invaded by the Florida Public Records Act. This aspect of constitutional privacy law has no relevance to this case. The only arguable privacy interest at issue here is a disclosural one.

6. The Application for Admission into the public housing program here involved seeks minimal information necessary to make governmental decisions required by the program. Appellants' Complaint indicates they have without challenge disclosed this information and such other information as Appellee governmental body may have requested. If Appellants have been subjected to any government law or action which forced them to disclose information to the government, that law or action is not here contested. In any case, the Florida Public Records Act has no such impact. That law requires disclosure by the government, not to the government.

7. Thus, the only constitutional objection here raised by Appellants is to disclosure by government of data collected without objection pursuant to valid legislative governmental interests.

8. No federal case has even suggested a constitutional privacy interest which prohibits disclosure by government of information disclosed to it without objection and necessary for conduct of its business.

9. This Court's decisions have established no privacy interests other than the decisional autonomy protected by the Federal Constitution.[5/] The Florida electorate recently rejected an "omnibus" revision of the Florida Constitution which contained a sweeping constitutional privacy provision. The single Florida appellate court decision finding a separate Florida Constitutional privacy protection[6/] is pending before this Court. This appellate court decision, which tortures the Florida constitutional protection against eavesdropping[7/] into a general privacy protection is in direct conflict with the prior decisions of this Court.[8/]

5/ Laird v. State, 342 So.2d 962 (Fla. 1977); Miami Herald Publishing Company v. Marko, 352 So.2d 518 (Fla. 1977).

6/ Byron, Harless, Schaffer, Reid and Associates, Inc. v. State ex rel Schellenberg, et al., 360 So.2d 83 (Fla. 1st DCA 1978) pending on appeal/certiorari.

7/ Art. I, §12, Fla. Const. "The right of the people to be secure in their persons, houses, papers and effects against... unreasonable interception of private communications by any means, shall not be violated." The appellate court also made reference to Art. I, §§2, 3, 4 and 9. 360 So.2d at 93, fn. 2.

8/ See cases cited in footnote 5 above.

ARGUMENT

AN INDIVIDUAL WHO HAS WITHOUT OBJECTION DISCLOSED DOCUMENTARY INFORMATION TO A GOVERNMENT AGENCY IN THE COURSE OF CONDUCT OF ITS BUSINESS MAY NOT THEREAFTER PREVENT DISCLOSURE OF THE RESULTANT PUBLIC RECORD

1. The Florida Public Records Act serves important public purposes.

The Florida Public Records Act reflects the profound commitment of the people of Florida to open government. This commitment reflects the inherent connection between public knowledge of governmental activities and the prerequisites of participatory democracy. The public may neither participate in, nor evaluate governmental functions without disclosure of information contained in public records. This Court has repeatedly explained this strong Florida policy in evaluating the Public Records Act's sister statute--the Government-in-the-Sunshine Law:

> "The evil of closed door operation of government without permitting public scrutiny and participation is what the law seeks to prohibit. City of Miami Beach v. Berns 245 So. 2d 38, 41 (Fla. 1971)."

> "During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as ... closed records ... have become synonymous with "hanky panky" in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive

> the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made. Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969)."

The Public Records Act serves identical interests. The Act does not say what records information a governmental agency must create or receive. But it does mandate that once created or received all such records are open to public inspection. State ex rel. Veale v. City of Boca Raton, 353 So.2d 1194 (Fla. 4th D.C.A. 1978), cert. denied 360 So.2d 1247 (Fla. 1978).

2. The Federal Constitution does not prevent disclosure of records required to be disclosed under the Florida Public Records Act.

The original articulation of a constitutional protection of privacy interests was probably Mr. Justice Brandeis' observation in dissent in Olmstead v. United States, 277 U.S. 438, 478 (1928): "The makers of our Constitution...conferred, as against the government, the right to be let alone[9/]--the most comprehensive of rights and the most valued by civilized men." This has led to two separate

---

9/ A right the protection of which the United States Supreme Court has observed is "left largely to the law of the individual States." Katz v. United States, 389 U.S. 347, 351 (1967). The Florida Legislature responded by protecting disclosural privacy in some 100 instances. See p. 3, fn. 2, supra. It is, of course, possible that some of the statutory protections against disclosure under the Public Records Act may apply to Appellee's records relating to Appellants. However, since Appellants chose a constitutional attack on the Act this cannot be determined.

concepts of privacy interests to be afforded federal constitutional protection: (i) personal decisional autonomy and (ii) a right not to be governmentally required to make personal disclosures.

> "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest of independence in making certain kinds of important decisions." Whalen v. Roe, 424 U.S. 589, 599-600 (1977)

The second of these interests--decisional autonomy--has seen substantial case development.[10/] To date this is the only aspect of constitutional protection of privacy recognized by this Court.[11/] The other privacy interest

---

1/ See Whalen v. Roe, supra, 429 U.S. at 600, fn. 26:

> "Roe v. Wade, 410 US 113, 35 L Ed 2d 147, 93 S Ct 705; Doe v. Bolton, 410 US 179, 35 L Ed 2d 201, 93 S Ct 739; Loving v. Virginia, 388 US 1, 18 L ed 2d 1010, 87 S Ct 1817; Griswold v. Connecticut, 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678; Pierce v. Society of Sisters, 268 US 510, 69 L Ed 1070, 45 S Ct 571; Meyer v. Nebraska, 262 US 390, 67 L Ed 1042, 43 S Ct 625; Allgeyer v. Louisiana, 165 US 578, 41 L Ed 832, 17 S Ct 427. In Paul v. Davis, 424 US 693, 713, 47 L Ed 2d 405, 96 S Ct 1155, the Court characterized these decisions as dealing with 'matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the States' power to substantively regulate conduct.'"

11/ Miami Herald Publishing Company v. Marko, 352 So.2d 518, 520 fn. 5 (Fla. 1977).

> "The 'constitutional' right of privacy has generally been narrowly confined to matters of marital intimacy, procreation and the like. See Laird v. State, 342 So.2d 962 (Fla. 1977)."

acknowledged in Whalen has been the subject of only two United States Supreme Court decisions, Whalen itself and Nixon v. Administrator of Public Services, 433 U.S. 425, 455-465 (1977)[12/] Whalen upheld the statutory mandate of reporting to the government information as to prescription of drugs, because of the strong governmental interest in drug abuse. Nixon upheld mandatory disclosure to governmental officials of the former President's records. Thus these cases deal with the issue of constitutional protection against required disclosure to government, a different form of asserted governmental intrusion than that addressed in Katz v. United States, supra. Neither involved mandated disclosure by government, as here, of information collected without objection in the conduct of government business. To date the Supreme Court has rejected all claims that such disclosure would violate constitutional protections of privacy. Paul v. Davis, 424 U.S. 693 (1976)[13/]

12/ The asserted interest was also raised in Mr. Justice Powell's concurring and Mr. Justice Douglas' dissenting opinions in California Bankers Assn v. Schultz, 416 U.S. 21, 78, 79 (1974).

13/ See also Whalen v. Roe, supra, Stewart, J. concurring:

> "Whatever the ration decidendi of Griswold, it does not recognize a general interest in freedom from disclosure of private information." Whalen v. Roe, 429 U.S. at 609 (Stewart, J. concurring).
>
> "Forces and factors other than the Constitution must determine what government-held data are to be made available to the public." Houchins v. KQED, Inc., ____ US ___, 57 L.Ed.2d 553, 556 fn. * (1978) (Stewart, J. concurring).

A final litigated aspect of disclosural privacy is found in Plante v. Gonzalez, 577 F.2d 1119 (5th Cir. 1978) which involved the requirement of the Florida Constitution's Sunshine Amendment that government officials publicly disclose financial information. But Appellants do not here challenge a government law or action requiring disclosure by them. The Florida Public Records Act mandates no disclosure by Appellants to anyone. Accordingly, no federal case affords any basis for Appellants' assertion of constitutional protection of a privacy interest.

In any case, no one has ever suggested any privacy interest is absolute. Mr. Justice Brandeis followed his famous "right to be let alone" with an injunction against "unjustifiable intrusion by government." (emphasis supplied) As the Supreme Court later observed:

> "Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution." Katz v. United States, 389 U.S. at 350.

In each case the privacy interest involved must be weighed against the public interest in the challenged government law or action. When "disclosural privacy" is at issue, the Fifth Circuit in Plante v. Gonzalez concluded a "balancing test" is appropriate:

> "Although in the autonomy strand of the right to privacy, something approaching equal protection 'strict scrutiny' analysis has appeared, we believe, that the balancing test, more common to due process claims, is appropriate here. The constitutionality of the [challenged

> governmental action] will be determined by comparing the interests it serves with those it hinders." 575 F.2d at 1134.

The broad public interest in open government embodied in the Florida Public Records Act, coupled with the compelling need for public examination of governmental conduct of public housing programs, requires vindication even if Appellants had some cognizable federal constitutional interest in preventing disclosure.

3. The United States Supreme Court's decisions in Wyman v. James and subsequent cases are dispositive.

The specific information requested of the applicants by the Application for Admission form relates to the prospective tenants' family size and composition relative to housing needs and to the prospective tenants' "means." In Wyman v. James, 400 U.S. 309 (1971) the Court held there was no constitutional right of privacy against home visitation of welfare recipients. The Court based its decision on the often ignored and forgotten fact that;

> "[The New York Social Service] agency, with tax funds provided from federal as well as state sources, is fulfilling a public trust. The State, working through its qualified welfare agency, has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." 400 U.S. at 318-319.

The Court characterized Appellants' position:

> "It seems to us that the situation is akin to that where an Internal Revenue Service agent, in making a routine civil audit of a taxpayer's income tax return, asks that the taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax. If the taxpayer refuses, there is, absent fraud, only a disallowance of the claimed deduction and a consequent additional tax. The taxpayer is fully within his 'rights' in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detriment of the taxpayer's own making. So here Mrs. James has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid, similar to the taxpayer's resultant additional tax, flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved." 400 U.S. at 324. [emphasis supplied].

Unfortunately, administrative and "client" abuse of welfare programs has been rampant. Abuse of the federal Comprehensive Employment and Training Act of 1973 (CETA), largely press-exposed from public records, has recently led to legislative change. The necessity of policing all welfare programs is thus apparent. The only certain check on the administration of such programs is operation in the "sunshine". The Public Records Act plays its part in ensuring press and public scrutiny to aid in keeping these programs on the intended track.

Balanced against these compelling public interests are Appellants asserted "humiliation and embarrassment" (Appellants Brief p.13) None of the questions on the Application for Admission form seeks information inherently humiliating or embarrassing. If Appellants chose to supply such infor-

mation, they did so without objection and may not now be heard to assert a constitutional right to prevent its disclosure.

Where potentially derogatory information about an individual serves a significant governmental purpose, its disclosure is not unconstitutional.[14/] In Paul v. Davis, supra (1976) the Supreme Court, finding no constitutional protection for disclosural privacy explained the historical narrowness of the constitutional concept:

> "Respondent's claim is far afield from this line of decisions. He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private', but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner..." Id. at 712-713.

4. There is no independent Florida Constitutional right of privacy.

As noted, past decisions of this Court have limited constitutional protection of privacy interests to decisional

---

1/ Doe v. Norton, 365 F.Supp. 65 (D. Conn. 1973) vacated and remanded by reason of intervening legislation sub nom, Roe v. Norton, 422 U.S. 391 (1975) and Saiz v. Goodwin, 325 F.Supp. 23 (D.N.M. 1971) vacated and remanded with directions to convene a three-judge court, 450 F.2d 788 (10th Cir. 1971) found no constitutional protection against the requirements that mothers on public assistance name the fathers of their illegitimate children, answer questions of an intimate nature, and in some cases institute support proceedings.

autonomy.[15] The only appellate decision attempting to expand that reach is Byron, Harless, Schaffer, Reid and Associates, Inc. v. State ex rel Schellenberg, supra, ("Harless"). Were the First District's position accepted, this Court would be required to evaluate on a case-by-case basis the competing social values of open-government and "privacy," and, of course, on that case-by-case basis define "privacy". To do so this Court would necessarily reject the Florida Legislature's power and right to balance these interests.

The First District's attempt in Harless to base a privacy interest on Art. I, §§2, 3, 4 and 9, Fla. Const. is hardly serious,[16] is contrary to this Court's decisions in Laird v. State and Miami Herald Publishing Company v. Marko, supra, and contrary to the Florida electorate's decision last month to reject a proposed "omnibus" revision to the Constitution containing a specific sweeping privacy protection. Harless's further attempt to base a constitutional protection of disclosural privacy on the "unreasonable interception" provision of Art. I, §12, Fla. Const. can have no relevance

---

15/ "Justice Blackman's articulation in Roe v. Wade of the limited scope of the right to privacy remains the current state of the law." Laird v. State, supra at 965.

16/ The First District cited as some authority for its position Hagaman v. Andrews, 232 So.2d 1 (Fla. 1970) and In re Grand Jury Investigation, 287 So.2d 43 (Fla. 1973). Hagaman involved an assertion of associational privacy, which is not at issue here (or in Harless). Grand Jury involved a wiretap (which is, of course, the subject of Article I, Section 12) and standing to challenge its illegality. Neither is a basis for a conclusion that this Court has ever upheld a Florida Constitutional protection of disclosural privacy of the sort here asserted.

here. No "interception" could exist in disclosure of information to the government without objection by Appellant. Once disclosed to the government, disclosure by the government can hardly be an interception.

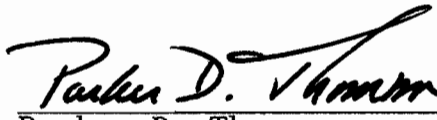
Protection of privacy interests does exist in Florida. Invasion of those interests may create tort liability. See, e.g. Cason v. Baskin, 144 Fla. 198, 200 So.2d 243 (1945). So also the Florida Legislature may lawfully enact statutes to protect privacy interests. Shevin v. Sunbeam Television Corp., 351 So.2d 723 (Fla. 1977). But to conclude from these common law and statutory protections of privacy that the Florida Legislature may not constitutionally require disclosure, as the First District concluded in Harless, is to turn these decisions upside down. These decisions hold there are common law and may be legislative protections of privacy. They most certainly do not even imply the Florida Constitution creates a separate non-federal constitutional protection of privacy interests.

17/ See "Commentary" on Art. I, §12, Fla. Const., 25 A. Fla. Stat. Ann. 269.

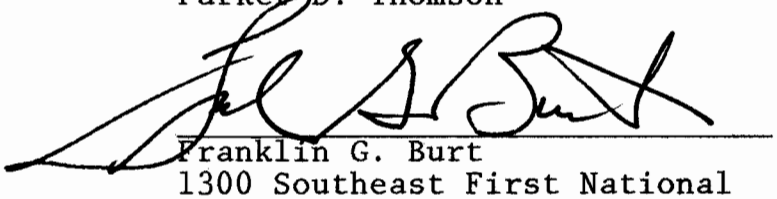
CONCLUSION

Having failed to timely assert any challenge to the collection of the information which they assert is embarrassing, Appellants have failed to demonstrate any cognizable right of privacy which, when weighed against the compelling state interests which caused the Florida Legislature to require disclosure, would prevent inspection of the public records here involved. The Circuit Court's Order Dismissing the Complaint should therefore be affirmed.

PAUL & THOMSON



Parker D. Thomson



Franklin G. Burt
1300 Southeast First National
Bank Building
Miami, Florida 33131
(305) 371-2000

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of The Miami Herald Publishing Company, Gore Newspapers Company, The Tribune Company, Sentinel Star Company, Palm Beach Newspapers, Inc. and The Tallahassee Democrat, Inc. was served by mail this 12th day of December, 1978 upon the following:

John Lazarus
Larry Baker
Charlene Carres
Attorneys for Appellants
Legal Services Of Greater Miami
1393 S. W. 1st Street Suite 330
Miami, Florida 33135

Honorable Robert Shevin
Attorney General
State of Florida
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32304

Joseph A. Wanick
City Attorney
1700 Convention Center Drive
Miami Beach, Florida 33139
Attorney for Appellees