IN THE SUPREME COURT OF FLORIDA

DEAN FORSBERG and WALTER FREEMAN,

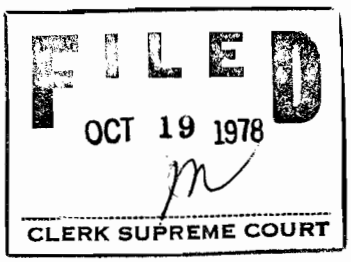
Appellants,

vs.

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

Appellees.

CASE NO. 54,623



APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR DADE COUNTY

ANSWER BRIEF OF APPELLEES

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POINT ONE

THE MAINTAINING OF THE TENANT'S APPLICATIONS FOR PUBLIC LOW INCOME HOUSING AS PUBLIC RECORDS DOES NOT VIOLATE ANY CONSTITUTIONALLY PROTECTED RIGHT.

The crucial question for resolution here is whether the tenant applications maintained by the Miami Beach Housing Authority come within the protection of the right of privacy found within the Constitution and the Bill of Rights and its penumbras. The Supreme Court has recognized two zones of privacy: the individual's interest in avoiding disclosure of personal matters and an interest in independence in making certain kinds of important decisions, Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869 (1977). It is the contention of the Appellees that the tenants' applications fall within neither of these zones of privacy, that these applications are legally and validly public records, that the Authority is bound by the Public Records Act, §119.01, et seq., Fla. Stat. (1977), and that no fundamental rights of the Appellants have been violated.

In Zablocki v. Redhail, 97 S.Ct. 673 (1978), the United States Supreme Court this year, again, was faced with a claimed invasion of the fundamental right of privacy. The Court, while acknowledging that the outer limits of the right of privacy have not yet been marked, did enunciate the areas where they have so far found that the right of privacy does

exist. These areas include personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education. In Zablocki, the challenged statute provided that a man could not remarry without first obtaining Court approval when he had previously sired a child and had failed to support that child.

The statute in Zablocki was found to be a direct and substantial interference with the fundamental right of marriage, but is surely far different from the case at hand. What Appellants are asking this Court to do is to step beyond the area which the Supreme Court has so far defined as the limit of the right of personal privacy and to add a new dimension to the right of privacy. Appellees strongly urge that this is not such a matter wherein the right of privacy should be extended.

As this Court itself has acknowledged in Laird v. Florida, 342 So.2d 962 (Fla. 1977), this Court is bound by the definition of the right of privacy as enunciated by the United States Supreme Court, definitions such as in the Zablocki case, and before that in Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L. Ed. 2d 675 (1977). In Laird, the Florida Supreme Court further acknowledged that the United States Supreme Court recently has declined to extend further the scope of the constitutional right to privacy.

> "The Court recently affirmed the constitutionality of Virginia's anti-sodomy statute even as applied to two consenting adult male homosexuals. Doe v. Commonwealth's Attorney, 425 U.S. 901, 96 S.Ct. 1489, 47 L. Ed. 751 (1976), aff. 403 F. Supp. 1199 (E.D. Va. 1975). In Paul v.

> Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed. 2d 405 (1976), respondent's name and photograph were included in a flier of 'active shoplifters' after he had been arrested on a shoplifting charge in Louisville, Kentucky. . . . The Supreme Court, in denying Davis relief held, inter alia, that his contention that the defamatory flier deprived him of his constitutional right to privacy was meritless." 342 So.2d at p. 964.

In the case of Paul v. Davis, 424 U.S. 712, 96 S.Ct. 1155 (1976), would seem to be controlling for this case. In Paul v. Davis, the United States Supreme Court essentially held that a person's reputation is not a property interest such as to be protected under the Constitution, and further, that the plaintiff's constitutional right of privacy, as established previously by the Supreme Court, was not invaded in this situation. The Court said:

> "In Roe the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty' as described in Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288, 292 (1937). The activities detailed as being within this definition were ones very different from that for which respondent claims constitutional protection. . . ." 96 S.Ct. at p. 1166.

The Court went on to discuss Davis' claim of constitutional protection against the disclosure of the fact of his arrest on a shlplifting charge and found that the fact of his arrest was not within any protected zone of privacy. The Court analyzed his claim as being based on the proposition that a state may

not publicize a record of an offical act such as an arrest and specifically rejected that contention as a basis for invoking the constitutional right of privacy.

This Court, being bound by the decisions of the United StatesSupreme Court and having acknowledged that these decisions constitute the current definition of the law of privacy in the State of Florida, Laird v. Florida, supra, it would seem to be bound to hold that the publicizing of a record of an official act, such as the granting of the right to public low income housing, is not such an act as to come within the constitutional protection of the right of privacy. The Supreme Court in Paul v. Davis, supra, specifically said that they declined to extend their privacy decisions and that they have never held in any of the privacy decisions that an official record of a public act comes within the substantive right of privacy.

Paul v. Davis, supra, is further significant for the fact that the Court clearly considered whether reputation was a property interest such as to be granted the protection of the Constitution and rejected that theory. The Court clearly held that the respondent's reputation was not a property interest protected by the Constitution. Thus, it would seem that any claim of the Appellants founded on the damage to individuals or families in their reputation in the community must fail.

Other courts in analogous situations have held that the right of privacy has not been invaded. In Wyman v. James,

400 U.S. 381, 91 S.Ct. 381 (1971), the plaintiffs attacked New York's Aid to Families with Dependent Children requirement of a home visit by a caseworker as a condition for receiving assistance. The United States Supreme Court held that this home visit was not a search in the traditional Fourth Amendment context and that therefore it did not fall within the area protected by the right of privacy. The Court further held that the home visitation was a reasonable administrative tool and served a valid and proper administrative purpose for the dispensation of the program.

In O'Brien v. DiGrazia, 544 F.2d 543 (1st Cir. 1976), the plaintiffs were patrolmen in the Boston Police Department. The defendant Police Commissioner had ordered the plaintiffs to complete financial questionnaires listing all of their sources of income for the year for themselves and their spouses and all significant assets held by them and any members of their household. The plaintiffs refused to supply this information, and were suspended without pay. The plaintiffs attacked the financial questionnaires as an invasion of their right of privacy. The Court discussed what it considered to be the constitutional right of privacy and held that the plaintiffs did not fall within that right of privacy protection.

In discussing the right of privacy the O'Brien Court stated:

> "The Supreme Court in its occasions to deal with the concept of privacy has

> seemed to refer to autonomy. . . . and even autonomy has been protected only within a limited sphere; 'matters relating to marriage, procreation, contraception, family relationships and child rearing and education.' . . . Privacy in the sense of freedom to withhold personal financial information from the government or the public has received little constitutional protection." 544 F.2d at pp. 545-546.

The First Circuit went on to hold that even if this sort of intrusion comes within the protection of the Fourth Amendment the patrolmen's legitimate expectation of privacy had not been invaded.

In Whalen v. Roe, supra, the plaintiffs were seeking to enjoin the enforcement of portions of the New York State Controlled Substances Act of 1972 which required the recording of the names and addresses of all persons who obtained, pursuant to a doctor's prescription, certain drugs for which there was both a lawful and an unlawful market. The plaintiffs in that case grounded their claim on the right to privacy. The Supreme Court discussed the Act in terms of the right to privacy of the plaintiffs, and held that the Act did not invade that right of privacy and that the Act was constitutional. The Court said that no individual had been deprived of the right to decide independently whether to acquire and use medication; that neither the immediate nor the threatened impact of the patient identification requirements constituted an invasion of any right or liberty protected by the Fourteenth Amendment; and that a statutory scheme such as the one involved here was

within the government's powers.

These three cases along with the cases of Zablocki v. Redhail and Paul v. Davis, supra, mandate that the courts should be very hesitant about expanding the constitutional right of privacy, and that in order for that right to be expanded, something very intimate and unique to the individual must be affected so as to take away that individual's right to make a free and independent decision in the matter.

What is really at issue here is a standardized procedure wherein, in order to effectively and efficiently administer public housing, the Appellants have had to fill out an application form with a public agency, the Housing Authority. The information supplied by these people is necessary in order for the Housing Authority to manage the low income housing program. These applications, with all of the information contained therein, cannot fall within the areas of privacy which the United States Supreme Court has recognized: it does not affect the tenants' decisions on whether to marry or not; it does not affect the tenants' decisions on whether to conceive a child or not; it does not affect the tenants' decisions on how to educate their children; in fact, it does not fall within any of the so-far protected areas of privacy. The Courts have always maintained a policy that they are extremely loathe to expand the areas within the right to privacy and in this instance there is no need to expand the right to privacy.

POINT TWO

THE GOVERNMENT HAS A BONA FIDE AND LEGITIMATE INTEREST IN HAVING THESE TENANT APPLICATION FILES BEING TREATED AS PUBLIC RECORDS AND THIS INTEREST IS SUFFICIENT TO OVERRIDE ANY INDIVIDUAL CLAIMS.

The Miami Beach Housing Authority, the Defendant below and the Appellee herein, is a public agency whose charge is to administer a public trust fund financed by tax dollars. As part of its duties as a public trustee, the Authority must devise a way to make certain that the available low income housing goes to those who are the most needy and to make sure that the program is administered efficiently. As part of carrying out this charge the Authority has, at all times, required that the application form, which is the subject to this suit, be filled out by all applicants. In this case, as in Califano v. Jobst, 98 S.Ct. 95 (1977), the provision challenged is part of a larger, complex statutory scheme designed to administer a public trust fund. The application is a legitimate part of this statutory trust fund.

The right to housing is not a fundamental right. In Lavine v. Milne, 96 S.Ct. 1010 (1976), the Supreme Court held that welfare benefits are not a fundamental right. In the case of Alcala v. Burns, 545 F.2d 1101 (8th Cir. 1977), the plaintiffs were appealing from a denial of assistance in the Aid to Dependent Children program. The Eighth Circuit Court said:

> "Welfare benefits are not available as a fundamental right. Lavine v. Milne, 424 U.S. 577, 96 S.Ct. 1010, 47 L.Ed.2d 249 (1976). Therefore, the denial of medical assistance under Title XIX, which flows directly from ineligibility for A.F.D.C. cash benefits under Iowa law, does not deprive plaintiffs of their rights to equal protection of the law." 545 F.2d at p. 1105.

While both the Lavine and Alcala cases deal with welfare benefits under the Social Security system, the effect is no different in this case. The right to housing is not a fundamental right constitutionally protected. Perhaps more on point is the case of Black v. Beame, 419 F. Supp. 599 (S.D.N.Y. 1976). In that case the Court held:

> "There is no constitutional obligation on the State either to provide plaintiffs with welfare or housing benefits or to affirmatively insure a given type of family life, and none may be created by inference and misdirection through the penumbral constitutional right to familial privacy." 419 F. Supp. at p. 607.

Appellees contend that such is also the case here. That is, the right to be housed in the low income housing is not such a fundamental right that it therefore comes within the Constitutional protection of the right to privacy.

In the Black case, supra, which has some interesting parallels to the situation at hand, the New York Court said that while it may not always agree with the state's distribution or the state's largess, it is not empowered to enforce its own views without a constitutional basis, and that they

can find no such basis there. The New York Court then goes on to quote the U. S. Supreme Court saying:

> "'The Constitution may impose certain procedural safeguards upon systems of welfare administration, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 287 (1970). But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients' Dandrige v. Williams, 397 U.S. at 487, 90 S.Ct. at 1163." 419 F.Supp. at 607.

This would certainly appear to be the situation here. The Constitution does not empower this Court to second-guess what the housing officials, charged with the difficult responsibility of ensuring that the public housing goes to those in the most need, chooses as its methods for granting the available housing space.

In order to ensure that the low income housing available goes to those who are most needy the Housing Authority has devised a plan by which to administer the housing program. According to this plan, it is a necessity and a requirement that an application be filled out by all prospective tenants. This application details the applicant's background and financial assets and highlights any special needs or problems. It is only through these applications that the Housing Authority is able to evaluate all of the applicants and to fairly and equitably give the housing space available to those who are the most needy. This is the way the Housing Authority has chosen to administer its public trust. There is nothing within this procedure that denies any person a fundamental

right nor invades any person's right to privacy.

The Public Records Act which makes all public documents open to the public unless there is a statutory exception, also serves a valid public purpose. What happens when these two statutory schemes are combined is that all of the applications on file at the Public Housing Authority become public records. As public records they are open to public viewing by anyone who comes in during reasonable hours and makes a proper request to the Housing Authority. By having these files subject to the Public Records Act, the taxpayers, who are the funders of this public trust, are able to come in, to inspect the records, and to assure themselves that the Public Housing Authority is being run properly; that is, the taxpayers are able to make certain that those people who are most needy are the ones who are being granted public housing.

The Appellants are essentially claiming that when these two statutory schemes, the low-income housing plan and the Sunshine law, combine, there is somehow created a right of privacy that does not exist under either statutory scheme separately, and that this right of privacy is then being constitutionally invaded. It is hard to see how the Appellants can successfully promote this "newly-created privacy."

From the foregoing, and from the holdings and direc-

tives of the United States Supreme Court, it should be concluded that no fundamental right has been invaded. Therefore, under substantive due process analysis, the standard which must be met is whether there exists a legitimate governmental interest in this area, whether the means of safequarding this interest are rationally related, and whether these means are reasonably drawn so as to not unnecessarily interfere with other rights. It is hard to see how the requirement that these applications be public documents and the interest of the public in making certain that the Housing Authority is properly administered and run are not rationally and reasonably interrelated. If these documents were not available to the public, and if the Housing Authority officials were able to secretly proceed to assign housing, the Housing officials might then be subject to bribes or political pressures thus abolishing the guarantee that those who are the neediest would be the first to be assigned housing.

Even should it be determined that a fundamental right has been interfered with, not all governmental regulation which relates to a fundamental right is unconstitutional. Illustrious of this is the case of Zablocki v. Redhail, supra, where the United States Supreme Court said:

> "By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every State regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the

> contrary, reasonable regulations that do not significantly interfer with decisions to enter into the marital relationship may legitimately be imposed." 98 S.Ct. at p. 681.

Regulations here do not substantially nor directly interfere with any tenant's right to marry, to procreate, or to engage in any other protected intimate decision that falls within the established right of privacy.

The Fifth Circuit's discussion of what standard to use in Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), is helpful in this situation. As the Court acknowledged, the Supreme Court has provided little specific guidance:

> "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." 575 F.2d at p. 1132.

This would appear to be the situation at hand.

In the Plante case, the Florida legislators were challenging the Florida statute which required financial disclosure of Florida politicians. The Court discussed two ways within which financial privacy could fall within the autonomy branch of the right to privacy, and then rejected both of these claims. The Court held:

> "Financial privacy does not fall within the autonomy right on its own. The essence of that right is 'the interest in independence in making certain kinds of important decisions'. Whalen v. Roe, 429 US 599-600, 97 Sup. Ct. 876. Disclosure laws, unlike laws banning contraception, miscegenation, or abortion, do not remove any alternatives from the decision-making process." 575 F.2d. at p. 1130.

After discussing the fact that the financial disclosures do not fall within the decision-making process protection of the Constitution, the Court held that financial disclosure did not fall within the protected area of family-linked concerns:

> "There is no doubt that financial disclosure may affect the family, but the same can be said of any government action. While disclosure may have some influence on intimate decision-making, we conclude that any influence does not rise to the level of a constitutional problem." 575 F.2d at p. 1131.

The Fifth Circuit considered and rejected the fact that the disclosure requirement may affect First Amendment rights such as the freedoms of membership, association, and belief, adding that it believed this threat to be too remote. This reasoning is persuasive in the case at hand. If the required application affects these First Amendment freedoms, it is only tangentially so.

The proper standard for review in this case is a balancing of the interests at hand. The interest of the State and the Housing Authority is in seeing that the public housing goes to those people who are most needy. In order to promote this interest a scheme was devised to determine who the neediest people were and to give them housing on a priority basis. The further State interest is to ensure that government is open to the people and that there is no corrupting of public officials. When these two governmental schemes combine there is a legitimate interest in making certain that the public knows that the housing program is

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being run efficiently and that it is benefiting those whom it was intended to benefit. This is to be balanced against the fact that the Appellants have had to reveal some of their family history, some of their financial background, and other relevant data necessary to determine the priority of the applicants for public housing. In balancing these claims it would surely seem that the Housing Authority must prevail.

POINT THREE

THE PUBLIC RECORDS ACT AND THE AREA WITH WHICH IT DEALS ARE CLEARLY WITHIN THE LEGISLATIVE FUNCTION OF GOVERNMENT AND ANY EXCEPTIONS TO BE CARVED OUT FROM THAT ACT SHOULD BE THE PREROGATIVE OF THE FLORIDA LEGISLATURE.

Section 119.07 (1) of the Florida Statutes provides that every public records custodian shall permit any person desiring to inspect those records to do so. Subsection (2) is at the crux of this appeal. It provides:

> "(2)(a) All public records which presently are provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, shall be exempt from the provisions of subsection (1)."

Subsections (2)(b) and (2)(c) proceed to provide specific exemptions of certain public documents.

In 1975, the Legislature changed the wording of §119.07 (2)(a) from "All public records which presently <u>are deemed by law</u> to be confidential...." to "All public records which presently <u>are provided by law</u> to be confiden-

tial. . . ." This was a significant change by the Legislature and evidences a continuing concern and an overall legislative scheme in the area of public records.

The Fourth District Court discussed this legislative change rather extensively in State ex rel. Veale v. City of Boca Raton, 353 So.2d 1194 (Fla. 4th DCA 1977). The interpretation given was that "provided by law" meant by statutory law.

This Court, in its decision in News-Press Publishing Co. v. Wisher, 345 So.2d 646 (Fla. 1977), continued to affirm its holding in State ex rel. Cummer v. Pace, 118 Fla. 496, 159 So. 679 (1935), that no non-statutory exceptions to the Public Records Act may be created by the Courts. At 159 So. 681 the Supreme Court held:

> "The statute applies specifically to 'all' municipal records, and, where the legislature has preserved no exception to the provisions of the statute, the courts are without legal sanction to raise such exceptions by implication. . ."

This is the interpretation recently given by the First District in Wait v. Florida Power & Light Co., 353 So.2d 1265 (Fla. 1st DCA 1978), when it interpreted the Public Records Act in relation to the attorney-client privilege, and concluded that §119.07 (2)(a) waives any common law privilege such as confidentiality unless specifically provided for by general or special law.

This is also the interpretation which has been consistently followed by the Office of the Attorney General of Florida. In 1977 Op. Att'y Gen. Fla. 077-48 (May 19, 1977), the Attorney General followed the Supreme Court's

decision in State ex rel. Cummer v. Pace, supra, opining that unless the Legislature specifically provided for an exception, none existed. Further, applying the rule "expressio unius est exclusio alterious," the Attorney General's opinion concluded that §119.07(2)(a), Fla. Stat., operates on those areas expressly enumerated or expressly mentioned and excludes from its operations all areas not expressly mentioned.

Further, it is persuasive that the Legislature made the above-cited amendment in 1975. It clearly evinces a legislative intent to control this area and to provide safeguards for the residents of Florida when necessary. Changing or modifying this statute should not be done by judicial fiat. Under the separation of powers, this is an area in which the Legislature has the prerogative to act or not to act. Since it has chosen not to carve out an exception for personal information in this area, while it has done so in other areas such as in banking §658.10(3), Fla. Stat., or in insurance matters §§624.319(3) & (4) and 624.311(2), Fla. Stat., it must be presumed the Legislature felt it was of paramount interest to insure that low income housing priority was given to those in the most need and that the public would be able to ascertain that this public trust was being fulfilled.

CONCLUSION

Appellants have no fundamental right to low income public housing. Further, the filling out and filing of the tenant application form violates no fundamental right of the Appellants. Once these applications are filed with the Housing Authority they are properly public records and come within the purview of the Public Records Act. The maintaining of these applications as public records serves a valid public purpose and this purpose outweighs any secondary effect which might arise as to the Appellants' rights. The proper way for these tenants' applications to become exempt from the Public Records Act is for the Florida Legislature to carve out a specific exemption from the Public Records Act. Therefore, Appellees respectfully urge this Court to hold that these tenants' applications are public records.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 1978, a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEES was mailed to: JOHN LAZARUS, LARRY BAKER, and CHARLENE CARRES, Attorneys for Appellants, LEGAL SERVICES OF GREATER MIAMI, INC., 1393 S. W. 1st Street, Suite 330, Miami, Florida 33135; and HON. ROBERT SHEVIN, Attorney General, State of Florida, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32304.

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