IN THE SUPREME COURT
OF FLORIDA

CASE NO. 54,623

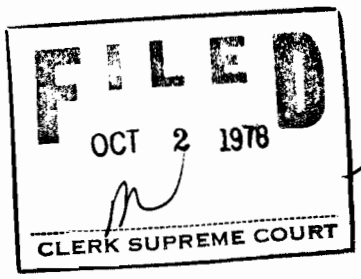
DEAN FORSBERG and
WALTER FREEMAN,

Appellants,

vs.

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

Appellees.



DIRECT APPEAL FROM THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA.

INITIAL BRIEF OF APPELLANTS

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POINTS ON APPEAL

POINT I

WHETHER FEDERAL CONSTITUTIONAL GUARANTEES OF PRIVACY PROTECT PUBLIC HOUSING TENANT FILES FROM GENERAL PUBLIC RUMMAGING?

POINT II

WHETHER APPELLANTS CAN BE DENIED THEIR CONSTITUTIONALLY GUARANTEED RIGHT TO PRIVACY MERELY BECAUSE THEY HAVE EXERCISED THEIR FEDERALLY GUARANTEED RIGHT TO PUBLIC HOUSING?

POINT III

WHETHER THE FLORIDA CONSTITUTIONAL GUARANTEES OF PRIVACY PROTECT PUBLIC HOUSING TENANT FILES FROM GENERAL PUBLIC RUMMAGING?

POINT IV

WHETHER THERE IS A COMPELLING STATE INTEREST IN PUBLIC RUMMAGING OF TENANT FILES?

POINT V

WHETHER PUBLIC POLICY MANDATES THAT PUBLIC HOUSING TENANT FILES BE EXEMPT FROM GENERAL PUBLIC RUMMAGING?

STATEMENT OF CASE AND FACTS

Appellants filed a class action suit in the Circuit Court of the 11th Judicial Circuit seeking injunctive and declaratory relief on the basis that they would suffer great humiliation, embarrassment and loss of their right of privacy, if their files were released to the general public for inspection (R-1)(A-1).[1] This appeal is from a Final Order of the Circuit Court dismissing Appellants' class action Complaint for failure to state a cause of action (R-51, 52)(A-8, 9). Appellants were the Plaintiffs below. Appellees, the Housing Authority of the City of Miami Beach and Murray Gilman, Executive Director, were the Defendants below. In the brief, the parties will be referred to as Appellant and Appellee. The symbol "R" will designate the Record on Appeal. The symbol "A" will designate the Appendix.

On November 17, 1977, Appellees filed their Motion to Dismiss (R-17). On January 25, 1978, Appellants filed a Motion for Determination of Class (R-32). On March 22, 1978, Appellee filed an Amended Motion to Dismiss (R-49). On June 9, 1978, after hearing argument, the Circuit Court entered its Order granting Appellees' Amended Motion to Dismiss (R-51, 52)(A-8). On June 22, 1978, the Court granted the Appellants' Motion to Proceed in Forma Pauperis (R-54) and on July 5, 1978, Appellants filed their Notice of Appeal (R-55).

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[1] This case was brought before this Court (Case No. 52,090) for emergency relief after both the Circuit and District Courts denied motions to maintain the status quo pending a full hearing on the merits. Upon denial of the relief sought requests for voluntary dismissal of the interlocutory review were granted by all courts. The case herein stands as it was refiled when Appellants' motion for leave to amend their Complaint was denied.

In its Order on Appellees' Amended Motion to Dismiss, the Circuit Court passed directly on the validity of Chapter 119,Florida Statutes (1975), as it applied to the subject tenant files, and construed controlling provisions of the Florida and Federal Constitutions, finding that said statute was valid and not violative of the Florida and Federal Constitutions (R-51, 52)(A-8, 9). This court has jurisdiction to hear this appeal pursuant to Art. V §3(b)(1) Fla. Const. and Fla. R. App. P. 9.030(a)(1)(A)(ii).

Appellants, DEAN FORSBERG and WALTER FREEMAN, live in public housing operated by the Housing Authority of the City of Miami Beach, Florida. MR. FORSBERG is disabled and receives Social Security disability benefits. MR. FREEMAN is 84 years of age and has no assets. (R-1)(A-1). They bring this action on behalf of themselves and on behalf of the proposed class of approximately 1,539 tenants and 2,300 applicants (R-48), who are compelled by their economic circumstances to seek and accept Miami Beach Public Housing.[2]

Public Housing is housing of last resort for those of limited income. It is the only source of safe, sanitary and decent housing, available at low cost, to low income individuals, such as Appellants and their proposed class (R-4)(A-4). The public housing provided by Appellees is built with and subsidized by funds from the United States

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[2]For convenience, the proposed class, consisting of present tenants and those who have applied,but are not currently tenants, will be referred to as "tenants".

Department of Housing and Urban Development (HUD) in accordance with 42 U.S.C. Section 1401 et seq. Rents paid are determined by considering items such as family income, including income of children, age, medical expenses and disabilities or handicap. 42 U.S.C. §1437(a). The difference between the rent paid, and the cost of providing the housing, is provided to the Housing Authority pursuant to an annual contributions contract entered into with HUD. 42 U.S.C. §1437(c)(R-3, 4)(A-3, 4).

Appellants provided information of a personal and confidential nature concerning their family status and relationship, income, expenses, assets, employment and medical history, (R-3)(A-3). The files also reflect the tenant's name, address, sex, age, occupation, next of kin, social service requests and needs (R-40). This information was provided by Appellants as a condition of obtaining safe and sanitary housing at a price they could afford (R-3)(A-3). Appellants lawfully and honestly included the correct information required with the expectation that the personal information provided would remain confidential (R-3)(A-3).

Indeed, until July 19, 1977, the Miami Beach Housing Authority considered the tenant files to be confidential, and refused to allow the general public access (R-4)(A-4). On or about July 19, 1977, Appellee MURRAY GILMAN, Executive Director of the Miami Beach Housing Authority, implemented a new policy of making all tenant files available to unfettered and uncensored public viewing, in accordance with

an Attorney General's opinion which he had requested. 1977 Op. Att'y. Gen. Fla. 077-69 (July 11, 1977), (A-10). After the policy change, as of February 15, 1978, eight persons had demanded to see the tenant files (R-45, 46). The requesting parties were allowed to view the original files with no deletions to protect sensitive and potentially damaging information (R-40, 43). The Miami Beach Public Housing Authority does not require the requesting party to state any reason or purpose for wanting to obtain access to the information maintained on tenants and applicants (R-42) and gives no instruction or advice regarding the confidentiality of said information (R-42). Appellants have suffered and will continue to suffer humiliation, embarrassment, needless invasion of their personal privacy, denial of their right to be let alone, harassment and other adverse consequences when information concerning their personal lives is subject to public inspection (R-4, 5)(A-4, 5).

SUMMARY OF ARGUMENT

Section 119.01 et seq. Fla. Stat. (1975), as presently applied to public housing tenant files, provides for the general public rummaging of said files. Appellants' files contain information of a personal and confidential nature concerning, inter alia, their family status and relationship. Such rummaging has subjected Appellants to humiliation, embarrassment and invasion of their "personhood", thereby violating public policy and their fundamental right of privacy as guaranteed by the Federal and Florida Constitutions. Nixon v. Administrator of General Services, 433 U.S. 425 (1977);

Roe v. Wade, 410 U.S. 113 (1973); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978); Cason v. Baskin, 20 So. 2d 243 (Fla. 1945); Harless v. State ex rel Schellenberg, 360 So. 2d 83 (Fla. 1st DCA 1978).

Appellants cannot be denied their constitutionally guaranteed right of privacy merely because they have exercised their federally guaranteed right to public housing. Garrity v. New Jersey, 385 U.S. 493 (1967); Wyman v. James, 400 U.S. 309 (1971); Pennypack Woods Home Ownership v. Dahlberg, 47 L.W. 2058 (C.P. Phila. July, 1978).

The statute, as applied, invades "intimate protected relationships" without serving a compelling state interest for the invasion. Roe, supra at 152, 153; Harless, supra, at 91. For the foregoing reasons tenant files are provided by law to be exempt from the disclosure provision of Section 119.01 et seq. Florida Statutes (1975).

ARGUMENT

POINT I

FEDERAL CONSTITUTIONAL GUARANTEES OF PRIVACY PROTECT PUBLIC HOUSING TENANT FILES FROM GENERAL PUBLIC RUMMAGING.

A. Appellants Will Suffer Humiliation And Invasion Of Their Personal Privacy If Intimate And Confidential Information They Provided To Secure Public Housing Is Released To The General Public.

We have long understood that worship and speech are constitutionally protected, not only for their benefits to a democratic state, but also because liberty in such matters is the essence of personhood.

> We now know that the U.S. Constitution similarly protects privacy, another fundamental aspect of personhood, and that it does so without pretext. Harless v. State ex rel Schellenberg, 360 So.2d 83, 90 (Fla. 1st DCA, 1978) (hereinafter referred to as Harless).

Appellants assert that as public housing tenants, their constitutional right of privacy mandates that the personal information placed on their applications and in their tenant files remain confidential and, because of constitutional guarantees of privacy, be exempt from the disclosure provisions of Section 119.01 et seq. Florida Statutes (1975).

The trial court granted Appellees' Motion to Dismiss for failure to state a cause of action. The law in Florida is well established that in determining whether a valid cause of action has been stated, the Court, for the purposes of a motion to dismiss, must assume all facts alleged are true. Hammonds v. Buckeye Cellulose Corporation, 285 So.2d 7 (Fla. 1973). Thus, Appellants' allegations that public housing provided the only safe, sanitary and decent housing available to them and that they furnished, in confidence, information of a personal, confidential nature concerning family status and relationship as a condition for obtaining such housing, the release of which would cause them humiliation, embarrassment and invasion of their privacy, must be taken as true.

Some of the confidential information that can be revealed by access to the tenants' files concerns: illegitimacy, infidelity,

abortion, mental illness, mental disability, retardation, educational failure and a multitude of other intimate details. This information concerning "protected intimate relationships" is within the "protected zones of privacy."

> A full categorical description of the protected zones of privacy is as of yet impossible, but the Supreme Court recognized in Roe v. Wade, that persons enjoy a fundamental right of decisional autonomy, absent compelling state interests in activities within the 'protected intimate relationships' of 'marriage ... procreation ... contraception... family ... and child rearing and education.' (Citations omitted) Harless, supra at 91.

Unless this Court recognizes this information to be provided by law to be confidential, the general public will have complete access to every detail. They will have access although they disclose no reason or purpose for seeing these documents. §119.07(1) Fla. Stat. (1975). There is nothing in Chapter 119, Florida Statutes (the Public Records Act) that would prevent this information from being disseminated in the school-yard, to the collection agency, the "town crier", the neighborhood gossips, and, indeed, any person, whether that person's interest is legitimate or not.

B. Public Disclosure Of Appellants' Files Would Violate Their Right To Decisional And Disclosural Privacy.

It is from within the Bill of Rights that the concept of privacy has emerged to protect the fundamental integrity of "personhood". The First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments, on their

own merits, and in combination with the other amendments create a privacy model affording this inchoate freedom and right to all persons. This penumbral approach allows privacy protection to expand according to the needs and dictates of our ever-changing society.

It has been mostly in the last thirty years, and especially within the past 15 years, that the right of privacy has evolved into more meaningful focus. Such focus may be due, in part, to the geometric growth of technology and cybernetics encroaching ever more rapidly upon the individual citizen. Both the government and the private sector are able to conjure up, almost magically, the most intimate and potentially devastating details of a person's life at the push of a button. The potential for such abuse not only invades the right to be let alone, but if left unchecked, heralds the downfall of individual privacy.

The Courts, recognizing the danger to individual privacy that our modern society presents, have taken definite steps to reaffirm and further develop the constitutionally protected right of privacy fundamental in our democratic society. The First and Fourteenth Amendments were held by the United States Supreme Court to protect the privacy of an individual to read in his own home material that outside of his home would be illegal. Stanley v. Georgia, 394 U.S. 557 (1969). The First Amendment right of association has been held to have a penumbra where privacy is protected from governmental intrusion. Griswold v. Connecticut, 381 U.S. 479 (1965).

One of the roots of the right to personal privacy is the Fourth Amendment. Roe v. Wade, 410 U.S. 113 (1973)(hereinafter referred to as Roe). The Supreme Court found protection in the Fourth Amendment from governmental eavesdropping, even for a conversation made from a public telephone booth.

> The Fourth Amendment protects people, not places. What a person normally exposes to the public even in his home or office is not a subject of the Fourth Amendment protection ... but what he seeks to preserve as private even in an area accessible to the public may be constitutionally protected. Katz v. U.S., 389 U.S. 347, 351 (1969).

The Fifth Amendment respects the innermost feelings and thoughts of an individual and protects the compulsory production of an individual's papers. Bellis v. U.S., 417 U.S. 85 (1974). The United States Supreme Court has also recognized a right of privacy inherent in the Ninth Amendment. Griswold, supra.

The right to privacy has been divided into two spheres. The first line of privacy cases recognized the right to decisional privacy. This right has been used to protect a person's right to decisions regarding his or her own body; contraceptive use and information; the right to live with other family members; and the right to choose one's reading material in one's own home. See Griswold, supra; Eisenstadt v. Baird, 405 U.S. 453 (1972); Roe, supra; Carey, supra; Moore v. City of East Cleveland, 431 U.S. 494 (1977); Stanley, supra.

The second line of cases can be identified as protecting disclosural privacy - the right to control information about oneself. Disclosural privacy is intricately linked to decisional privacy. Both aspects of privacy are involved in the case at bar.

> ...Yet, though decisional autonomy and disclosural privacy are distinct enough in concept, they unquestionably are related, and the decisional autonomy cases enlighten this one. Those cases teach that, in constitutional analysis, the forms and occasions of intimate association are not to be elevated over the inviolate intimacies of the person. To so elevate relationships at the expense of personhood would create new pretexts to replace the old one of property, which was discarded at some trouble. Intimate relationships are not protected because those relationships are constitutional norms of life, but because they involve 'matters so fundamentally affecting a person' that government intrusion tends to debase personhood. Intimate relationships are not themselves the core of the right of privacy, either in its aspect of decisional autonomy or that of disclosural privacy. At the core is the inviolability of personhood. Harless, supra at 91-92.

Appellants' "interest in avoiding disclosure of personal matters" Whalen v. Roe, 429 U.S. 589, 599 (1977)(hereinafter referred to as Whalen), is invaded by the Public Records Act. Appellants' right to decisional privacy, "the independence in making certain kinds of important decisions" Id. at 599, 600, is also invaded by this statute. Information in the file about psychiatric or other medical treatment may result in a tenant's refusal to seek further treatment. A tenant's

fear that information in her file will reveal an abortion might prevent that tenant from exercising her right to have an abortion. Information in the file concerning the expenditure of time or money on organizational activity, where disclosure of this information inhibits that participation, violates the right of decisional privacy. The tenant application requires the name of one's physician. An applicant with the problem of impotency might hesitate to seek treatment from a specialist on sex problems for fear that the physician's name and attendant specialty would be known to the public. The result of the decision not to seek treatment might be that the sexual problem would remain and the marital relationship would continue to suffer. The question on "church" on the application might chill a tenant's participation in an unpopular religion. Of not the least concern, the information contained in a file might cause embarrassment to a previous tenant who had left public housing and was attempting to begin a new life.

Appellants submit that nearly all the information contained in the tenant files and applications has both disclosural and decisional privacy implications. Thus, most of the information, if revealed, will violate fundamental rights of privacy, both disclosural and decisional, as guaranteed by the Federal and Florida Constitutions. Other information contained in said files, e.g. financial

> ... might itself involve the kind of crucial decision-making protected by the Constitution. Alternatively, financial disclosure might have such a strong

> impact on making familial decisions which are clearly within the privacy right, that it must be prohibited to protect those choices. Plante v. Gonzalez, 575 F. 2d 1119, 1130 (5th Cir. 1978) (hereinafter referred to as Plante.)

Even if, after evaluation and analysis, said information does not come within the decisional branch of the right to privacy, financial and other information certainly is within the disclosural branch of the right to privacy, and thus must be balanced against the state's interest in its disclosure. Plante at 1132-1135.

Finally, the revelation of even the names of persons who either live or who have applied to live in public housing could cause those persons and their families great embarrassment.

> For even the facially least sensitive information recorded which seemingly does no more than identify the prospects, receives greater import from the context: these persons were not identified for a statistical abstract or for other purposes insignificant to their privacy interests; they were identified ... [As being public housing tenants or applicants]. Harless, supra at 96.

The damage that might result from the public disclosure of the identities of the tenants must be analyzed in light of both constitutional and common law requirements of privacy.

> Privacy of personal matters is an interest in and of itself, protected constitutionally, as discussed above, and at common law. Plante at 1135.

Appellants have applied for public housing because it is the only source of safe, decent, low income housing available to them. The choice between safe and decent housing, or housing that is not safe and not decent, is no choice at all. The economic circumstances of the appellants have forced them into public housing. The information given by Appellants was requested from them solely because of their need to apply for public housing. This detailed information is not requested from someone seeking to rent in the private sector. The information they were forced to supply reveals personal and confidential information about themselves which causes them humiliation and embarrassment when released to the general public.

> When the Federal Government creates, finances and retains control over a housing project in which the tenants have a substantial financial or property interest, the constitutional rights of due process and privacy obtain. Pennypack Woods Home Ownership Assn. v. Dahlberg, 4429 Jan. term, 1974 (C.P. Phila. County May 31, 1978); 47 L.W. 2058 (July 1978)(hereinafter referred to as Pennypack Woods).

It is unthinkable to believe that a person, merely because of his poverty, gives up any expectation of personal privacy. Even as public a personage as an ex-president is entitled to personal privacy, Nixon, infra.

C. Appellants Expected And Had A Right To Expect That The Information They Provided Would Not Be Disclosed To The General Public.

In Nixon v. Administrator of General Services, 433 U.S. 425 (1977), it was held that since President Nixon had "legitimate expectations of privacy", his presidential papers and tapes concerning his "personal life unrelated to acts done in his public capacity" were constitutionally protected from release to the general public. Id. at 458-459. The Court apparently used two criteria to invoke the privacy doctrine. First, the Claimant must exhibit an actual or subjective expectation that the information would not be disclosed; and second, that his expectation was one that society recognizes as legitimate or reasonable.

Appellants considered the information they gave to be confidential and they fully expected that the information they revealed would be protected as confidential. In light of the confidential and personal nature of the information, it was certainly reasonable that Appellants believed and desired that the confidentiality of such information be preserved. This was reasonable by any standard, for at least four reasons. First, "much of the information recorded was highly personal and sensitive, and public revelation of it would be offensive and objectionable to a reasonable man of ordinary sensibilities." Harless at 96. Second, even Appellee Housing Authority considered this information to be confidential and protected it from general public rummaging until July 19, 1977. Third, Appellants did not somehow shed their cloak of personal privacy merely by donning the mantle of public housing tenants. Pennypack Woods, supra. Fourth, certain

information contained in Appellants' files concerning their family relationships, intimate medical information, marital relationships, child rearing and education are specifically recognized as being within the zone of privacy "implicit in the concept of ordered liberty." Roe, supra, at 152-153.

Thus Appellants meet the two-pronged Nixon test. Appellants exhibited an actual expectation of privacy; and that expectation was reasonable. The fact that the Appellants, to secure public housing, disclosed this information to a governmental agency does not somehow waive their privacy from the general public. As the Court stated in Harless:

> Yet, the prospects' privacy interests are not thereby obliterated, for 'privacy is not just an absence of information abroad about ourselves; it is a feeling of security in control over that information.' That was the dispositive theme of both Katz and Sunbeam, which held that an individual's selective disclosure of information to another, who might repeat it, does not of itself imply consent that the conversation be 'broadcast to the world' or 'transmitted by photograph or recorded in full living color and hi-fi to the public at large.' Id. at 95.

The Court in Harless went on to hold:

> The prospects' expectation of disclosural privacy was also reasonable by objective standards. Much of the information recorded was highly personal and sensitive, and public revelation of it would be offensive and objectionable

to a reasonable man of ordinary sensibilities. Id. at 95.

POINT II

APPELLANTS CANNOT BE DENIED THEIR CONSTITUTIONALLY GUARANTEED RIGHT TO PRIVACY MERELY BECAUSE THEY HAVE EXERCISED THEIR FEDERALLY GUARANTEED RIGHT TO PUBLIC HOUSING.

Forcing Appellants to make their most intimate and personal information available for public perusal, solely because they have exercised their federally guaranteed right, after meeting eligibility criteria, to public housing (42 U.S.C. Section 1401 et seq.), denies them due process of law as guaranteed by the 14th Amendment to the United States Constitution. Situations in which persons are faced with excerising competing rights are not unique. In Garrity v. New Jersey, 385 U.S. 493 (1967), it was held that forcing a police officer to choose between self-incrimination and job forfeiture was a form of compulsion prohibited by the 5th and 14th Amendments. Another balancing of rights was considered in Wyman v. James, 400 U.S. 309 (1971). Here, James' right to public welfare benefits was weighed against her right to be secured against unreasonable searches and seizures. In analyzing whether home visits required by New York Social Welfare laws were reasonable, the Court stated:

> The means employed by the New York agency are significant. Mrs. James received written notice several days in advance of the intended home visit. The date was specified. Section 134(a) of the New York Social Welfare Law, effective

> April 1, 1967, ..., sets the tone. Privacy is emphasized. The applicant-recipient is made primary source of information as to eligibility. Outside informational sources, other than public records, are to be consulted only with the beneficiary's consent. Id. at 320, 321.

Hence, in prior cases of competing constitutional rights and correlative protections, the U.S. Supreme Court has held that a state's interests in regulating people's rights to benefits, whether employment or public assistance, must be subordinated to the individual's rights guaranteed by the Bill of Rights. A law or regulation which requires that the exercise of one right be entirely abandoned before the other may be exercised violates the Due Process Clause of the 14th Amendment to the Constitution of the United States. All the rights of an individual must be fully honored. Pennypack Woods, supra.

POINT III

THE FLORIDA CONSTITUTIONAL GUARANTEES OF PRIVACY PROTECT PUBLIC HOUSING TENANTS FROM GENERAL PUBLIC RUMMAGING.

Florida Constitutional law recognizes decisional and disclosural privacy. The landmark case is the "remarkably prescient Cason v. Baskin, 20 So. 2d 243 (Fla. 1945) which traced the right of privacy to the "life and liberty" protection of the [Florida] Declaration of Rights." Harless at 93. Examples abound. In English v. McCrary, 348 So. 2d 293 (Fla. 1977), this Court recognized that it is within the discretion of a trial judge to close to the public what would

otherwise be a matter of public record. The right of a person to have his name removed from an election ballot was recognized as an aspect of privacy. Battaglia v. Adams, 164 So. 2d 195 (Fla. 1964). In Markham v. Markham, 265 So. 2d 59 (Fla. 1st D.C.A. 1972), affirmed, 272 So. 2d 813 (Fla. 1973), this Court affirmed the suppression of wiretap evidence of a wife's private phone conversations, recognizing that her privacy claim was premised upon her fundamental right, as an individual, to privacy.

The very recent Harless decision is the most comprehensive analysis of the right to privacy ever published in Florida. Judge Smith's "exhaustive and well reasoned opinion" [3] questions whether the application to head a municipal utility, and notes regarding an applicant, are constitutionally exempted from the Public Records Act; and answers the question affirmatively. In Harless, the applicants for the directorship of the Jacksonville Electric Utility, a public agency, were interviewed by a consulting firm. The consulting firm made certain evaluations and notes on the individual applicants. The Court held, after a challenge to make these evaluations and notes open

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[3] Harless at 99 (Boyer, Acting C.J., concurring opinion)

to public view pursuant to Chapter 119, Florida Statutes, that the applicant had a constitutional right to privacy in a disclosural sense. The Court defined the issue as:

> ...whether as a matter of constitional law, the prospects are protected against general disclosure, for the edification of the public, of public records so constituted. Id. at 90.

In arriving at its decision based upon both the Florida and Federal Constitutions, Judge Smith, for the Court, discussed the constitutional right to privacy in Florida:

> The Florida Supreme Court's decision in Shevin v. Sunbeam Television Corp., 351 So. 2d 723 (Fla. 1977), was concerned with a statutory, not a constitutional, claim of privacy. Yet that decision similarly traces the right of disclosural privacy to its source in the essential integrity of personhood. The Court upheld, against a First Amendment challenge, a Florida statute which requires consent of all parties to private interception of their communication. ... "A different rule could have a most pernicious affect upon the dignity of man." (Cited therein). These words are consonant with the constitutional decisions of the United States Supreme Court, particularly Katz, and with Markham's analysis of Article 1, Section 12 of the Florida Constitution. Thus the Florida Constitution expresses the theme that disclosural privacy - the personal right of some control over the broadcast of intimate information concerning the self - is an aspect of personhood which is to be protected, as are others, as fundamental. Harless at 94.

In balancing the fundamental privacy interests of the applicants against the public interest in the information sought, the Court held:

> Florida has no compelling or overriding interest in exposing, for the edification of the public, the information in the consultants' papers. Harless at 97.

The Appellants' right to privacy is stronger than the right of the applicants in Harless in that those applicants were voluntarily seeking a position of power which would affect the lives of the citizenry. The Court in Harless held that the names, and any identifying characteristics, of the applicants were constitutionally protected from public disclosure. Appellants are in a much more vulnerable position. It is not only their names, but also the intimate, personal and confidential information in their files that is exposed to public viewing. The difference in the information submitted by the applicants herein and by the Harless applicants is great. The Harless applicants in their job application and interview attempted to portray themselves in the most favorable possible light. They, not their families, were seeking the job, and what they revealed was limited by the relevancy to the job and their own sense of familial privacy. Appellants, on the other hand, apply for themselves and their families and are therefore forced to reveal intimate and confidential details about their family situation. While the applicants in Harless attempted to portray themselves favorably, as having achieved some degree of success, what is written on the tenant applications, in many cases, is the story of failure, both familial and financial. General public curiosity should not be sufficient cause to indiscriminately pry into these applicants' lives. It is

certainly true that the applicants in Harless had the expectation of confidentiality and the right to have the expectation respected pursuant to the Federal and Florida Constitutions. The rights of Appellants, for the reasons set forth herein, are worthy of the same respect.

POINT IV

THERE IS NO COMPELLING STATE INTEREST IN PUBLIC RUMMAGING OF TENANT FILES.

Even the right to privacy must be sublimated to the state interest in certain circumstances:

> A state interest which is 'compelling' must be held to override even privacy interests of constitutional dimensions, if that public interest cannot be fulfilled by less drastic or intrusive means. The analytical tasks of identifying and balancing 'fundamental' personal interests, 'compelling' public interests and less restrictive alternatives, are, for all their difficulty, firmly rooted in the United States Supreme Court decisions, including the privacy decisions, in Griswold, Eisenstadt, Roe v. Wade, Whalen, Carey and Nixon. Moreover that kind of an analysis is suggested in Florida Supreme Court decisions respecting the constitutional (federal and state) right to privacy. Harless at 96-97.

Applying this analysis, the United States Supreme Court in Whalen, held that a New York statute requiring physicians to submit copies of prescriptions for certain dangerous drugs met constitutional muster after determining that there was a compelling state interest involved in preventing abuse of these drugs and that the statute

was specifically designed to prevent these abuses. The statute, however, was narrowly drawn, and the information imparted was not to the general public, as in the instant case, but to police agencies and included severe penalties for unauthorized disclosure. The Court found that there were numerous safeguards intended to forestall the danger of indiscriminate disclosure and recognized that "the right to collect and use personal data for public purposes is typically accompanied by a concomitant duty to avoid unwarranted disclosures." Id. at 605. The government's duty to protect information in its possession "which is personal in character and potentially embarrassing or harmful if disclosed" is a duty that "arguably has its roots in the Constitution..." Whalen at 605. It is also important to note that in Whalen the disclosure was limited to one specific area of information, certain scheduled dangerous drugs, and did not release personal, financial and other medical data as in the case at bar.

Another recent case where this analysis was used to subrogate a claim of privacy was Plante v. Gonzalez, 575 F. 2d. 1119 (5th Cir. 1978), a challenge by several Florida State Senators to the Sunshine Amendment imposing financial disclosure requirements upon elective state and county officials. The Senators argued that the public disclosure of their personal financial affairs violated their federally protected right to privacy "...derived from the shadows of the Bill

of Rights and made applicable to Florida through the 14th Amendment." Id. at 1123. The Senators, as do Appellants, claimed that both the decisional and disclosural strands of their privacy were violated by the state's action. The Fifth Circuit then analyzed both privacy claims. The Court held that the Senators' decisional privacy claim was not within the scope of the rights involved. The Court, however, found that the disclosural claim of the Senators fell directly within their right to privacy. Id. at 1132. The Court, using a balancing test, held that "something more than mere rationality must be demonstrated. Otherwise, public disclosure requirements such as Florida's could be extended to anyone, in any situation." Plante, supra, at 1134.

Judge Wisdom identified four important state concerns that the District Court found to be significantly advanced by the Sunshine Amendment, to wit:

> The public's 'right to know' an official's interests; deterrence of corruption and conflicting interests; creation of public confidence in Florida's officials; and assistance in detecting and prosecuting officials who have violated the law. Plante at 1134.

These concerns were then analyzed to determine whether they were significantly promoted by the Sunshine Amendment. The Court found the "public's right to know" was promoted by the Amendment in that the voters would be "better able to judge their elective officials and candidates for those positions... It is relevant to the voters

to know what financial interest the candidates have." Id. at 1135. Further, the existence of the reporting requirement would discourage corruption. "The interest in an honest administration is so strong that even small advances are important." Id. at 1135. It was determined that disclosure should help to create public confidence in Florida's government.

None of the Plante justifications apply to public housing tenants. First, the only information which the Senators in Plante were required to reveal was financial. Appellants herein, in their tenant files, in addition to financial information, have been forced to reveal information involving matters relating to marriage, procreation, family relationships, child rearing and education.

Second, the Court in Plante found that even public disclosure of private financial matters raised constitutional issues which must be balanced against the public interest. In balancing the interests, it held that "even in financial matters, public officials usually have less privacy than their private counterparts." Id. at 1136. Appellants are their private counterparts, and are consequently entitled to more privacy than public officials.

Third, the Court did hold that, "financial privacy is a matter of serious concern, deserving strong protection. The public interests supporting public disclosure for these elective officials are even stronger." Id. at 1136. Concomitantly, the public interest supporting public disclosure for non-elective individuals is even weaker.

The Senators in Plante ran for office voluntarily. Public office is a public trust and our public officials will ultimately affect the lives of the general citizenry. The general populace has a direct

closure to accommodate both the public and private interests involved. Harless, at 98. General interest in monitoring public agencies cannot suffice to invade appellants' "personhood."

> When fundamental privacy interests secured by the due process clauses of the U.S. and Florida Constitutions are implicated, however, it is not enough that the statute generally serves a compelling interest in the disclosure of public records. There must be a compelling state interest in the public revelation of the particular information in which the prospects would otherwise enjoy privacy. To override constitutional privacy interests, a countervailing state interest must exist and be compelling at the point where those interests collide. When the public interest is not sufficiently compelling to override constitutional privacy interests in the particular information sought, an intrusive statute 'must be narrowly drawn to express only the legitimate state interest at stake', (Roe v. Wade, 410 U.S. 113, 155) or its general terms must be appropriately narrowed in judicial application. (Citations omitted) Harless at 97.

Section 119.01 et seq. Florida Statutes (1975) is not directed at public housing tenants. The statute is directed at all public records, unless provided by law to be confidential. Appellants have asserted that their records concern their "family status and relationship, income and medical history." They have asserted that the records are of a personal and confidential nature and that their release would cause them humiliation, embarrassment and needless invasion of their privacy. Under these circumstances, the privacy of

and legitimate interest in acquiring an intimate knowledge of those who desire to lead us and who seek power over us. The public elected official's sources of income is highly relevant and gives rise to the overriding state interest recognized in Plante. Appellants, on the other hand, have no desire to so greatly affect our lives. Decent and safe housing at a price they can afford is all they seek.

The need for honesty by public housing tenants is certainly important. However, because of the lesser impact on the lives of the general public, the need to monitor the tenants is consequently less and therefore a less intrusive statutory scheme directed at the specific need is constitutionally mandated.

In looking at the test to be applied, it becomes apparent that there is no state interest to be served in the general public rummaging of tenant files, even if the public were restricted to the financial information in those files. A complaint against a specific tenant can be investigated by the appropriate state agency. While the Public Records Act enables the general populace to monitor the actions of its public agencies, it cannot be used to place public housing tenants in a goldfish bowl, forced to live their lives open to inspection in the minutest detail, upon the whim or caprice of the citizenry. If there is a compelling state interest in the public rummaging of tenant files, the legislature must clearly state what the interest is in order to defeat the privacy rights of the tenants. In appropriate cases, the Courts may and should order selective dis-

the records rises to a fundamental constitutional dimension, and to override Appellants' fundamental constitutional rights, the state must show a compelling interest in the public revelation of the specific information sought in the tenant files. This has never been done.

Once the legislature demonstrates the overriding state interest in the general public rummaging of tenants' files, it must then demonstrate that the statute is as narrowly drawn as possible to "express only the legitimate interest at stake." Roe at 155; Carey at 688. "A statutory exception to the constitutional (federal and state) right to privacy ... must be strictly construed and narrowly limited..." In Re Grand Jury Investigation, 287 So. 2d 43, 47 (Fla. 1973).

As the statute is now interpreted, Appellants by reason only of their poverty, have the most intimate details of their lives, and the lives of their families, subject to the prying eyes of curiosity seekers, creditors, sales solicitors and a whole gamut of other offensive intruders. Once the information is dispersed, there is no limit to its further dispersal. The potential for humiliation and harm to Appellants, and their families, is great. The state's interest in the general public rummaging of public housing tenant files is insignificant, and the invasion of Appellants' right to privacy is too enormous, too broad and too overreaching, to be sustained.

POINT V

PUBLIC POLICY MANDATES THAT PUBLIC HOUSING TENANT FILES BE EXEMPT FROM GENERAL PUBLIC RUMMAGING.

In the landmark case of Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1945), second appeal, 159 Fla. 31, 30 So. 2d 635 (1947), the Florida Supreme Court recognized the common law right of privacy as a distinct right in and of itself the invasion of which will be redressed by the Courts. The right of privacy is defined as "the right to be let alone, the right to live in a community without being held up to the public gaze if you don't want to be held up to the public gaze." Id. at 248. The Court determined that "the time had come for a recognition of this right of privacy as an independent right of the individual." Id. at 248. This Act is directed to the laudable objective of assuring that the people of Florida have the means of knowing what their government is doing. Wisher v. News Press Publishing Co., 310 So. 2d 345 (Fla. 2d DCA 1975), quashed, as modified in New Press Publishing Co. v. Wisher, 345 So. 2d 646 (Fla. 1977) (hereinafter referred to as Wisher). Appellants on the other hand have a right to be let alone and to be protected from unwarranted intrusions.

The conflict over these competing interests has been before the courts of this state in the past. In Lee v. Beach Publishing Company, 127 Fla. 600, 173 So. 440 (1937), this court recognized that

countervailing public policy considerations should be assessed prior to the disclosure of information pursuant to public inquiry. Specifically, the court said:

> The right of inspection does not extend to all public records or documents, for public policy demands that some of them, although of a public nature, must be kept secret and free from common inspection... Lee, supra, at 442.

Indeed, concerns of public policy have continued to hold a special place in the common law of Florida insofar as access to public records containing personal information has been concerned. In Patterson v. Tribune Company, 146 So. 2d 623 (Fla. 2d DCA 1962), the Plaintiff:

> Sued to recover damages for alleged invasion of her right of privacy through publication of progress docket entries reflecting judicial commitment of the Plaintiff as a narcotic. (sic) Id. at 624.

The Defendant newspaper did not have access to the court file or any instruments filed in the cause. Though the operative statute prohibited inspection of records filed in the proceeding, there were no restrictions on access to the Progress Docket, which Defendant newspaper published. The newspaper argued that the Progress Docket was open to public inspection pursuant to the then-operational statutes, Sections 28.19 and 119.01 Florida Statutes. Finding that Plaintiff had a cause of action for an invasion of her right to privacy, in spite of the public nature of the Progress Docket record, the court held:

> Generally public records are subject to the right of inspection and publication; but this right does not apply to all public records since public policy requires that some of them, although of a public nature, be kept secret and free from public inspection. Id. at 626.

In the Wisher case, the Fort Myers New Press obtained a Writ of Mandamus directing the county administrator to allow them to inspect and examine the personnel files of the employees of Lee County. The Second District Court of Appeal, in reversing the Circuit Court, recognized and held that:

> While personnel records are not exempt from Chapter 119 by the specific language, we believe that public policy clearly dictates that they be deemed confidential. Wisher, supra at 349.

The Wisher Court considered the exception in Section 119.07(2)(a) Florida Statutes for records that may be "deemed by law to be confidential", and stated that "it has always been held that right of inspection does not extend to all public records or documents, because public policy requires that some of them be treated as confidential." Id. at 347. The Court observed that:

> The public records act is directed to the laudable objective of assuring that the people have the means of knowing what their government is doing. Yet, the right to know must occasionally be circumscribed when the potential damages far outweigh the possible benefits. In our opinion, to require public disclosure of the personnel files of governmental employees could result in irreparable harm to the public interest and would be against public policy. Wisher, supra at 348.

This Court modified the holding below by releasing only that information which was authored by a public body acting in an open meeting

pursuant to §286.011, Florida Statutes (1975). It is important to note that neither the District Court nor this Court allowed the unlimited access to the files originally sanctioned by the Circuit Court. In the Wisher case, this Court did not decide the issue of whether non-statutory public policy considerations may restrict access to public records, even though the 1975 Amendment changing the language of Section 119.07(2)(a) Florida Statutes (1975), was in effect at the time of this Court's decision.

It is clear that common law policies of non-disclosure were adopted to exempt records from public disclosure to protect confidentiality and to preserve the common law right of privacy of the individuals involved. However, in the recently decided case of Veale v. City of Boca Raton, 353 So. 2d 1194 (Fla. 4th DCA 1977), (hereinafter referred to as Veale), the Court held that the Public Records Act neither recognizes nor permits the judicial creation of exceptions to the Act, in light of the amendment to Section 119.07(2)(a) Florida Statutes (1975). That statute, now reads:

> 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). §119.07(2)(a), Fla. Stat., (1975).

Petitioners submit that the Veale decision[4], to the extent that its

[4] State ex rel Culmer v. Pace, 108 Fla. 496, 159 So. 679 (1935), cited by the Court in Veale, supra, was not decided on the issues of common law public policy exemptions to the Public Records Act to protect confidentiality of records and rights of privacy and therefore is not relevant to the instant case.

holding precludes common law public policy exemptions to the Public Records Act, is wrong and should be overruled by this Court.

First, there is no language in the amended statute, Section 119.07 (2)(a), Florida Statutes (1975), which specifically expresses an intention on the part of the Florida Legislature to exclude public policy exemptions from the Public Records Act. A holding that the Legislature intended, without expressly providing, that tenants' common law right of privacy be nullified because they live in public housing, and that the courts be precluded from protecting such rights created by common law policies of non-disclosure would violate the rule that the common law is not to be changed by doubtful implication.

> No statute is to be construed as altering the common law farther than its words and circumstances import. State v. Egan, 287 So. 2d 1 at 6 (Fla. 1973).

Furthermore, if the statute expressly provided that non-statutory exemptions from the Public Records Act were no longer available, this Court in Wisher, would have been under a duty to follow the law in effect at time of its decision and to allow the newspaper access to all the personnel files they requested.

> [A]n appellate court, in reviewing a judgment on direct appeal, will dispose of the case according to the law prevailing at the time of the appellate disposition and not according to the law prevailing at the time of rendition of the judgment appealed. Florida East Coast Railway Co. v. Rouse, 194 So. 2d 260, 262 (Fla. 1967).

Yet, this Court, did not grant the right of access to all the employee files as requested, although the amended statute, §119.07(2)(a) Fla. Stat. (1975), was the law a year and a half when this court decided Wisher.

Secondly, a holding that the Florida Legislature intended to abolish the common law right of privacy and its enforcement by the courts, by precluding public policy exemptions from the Public Records Act, would violate this Court's holding in Kluger v. White, 281 So. 2d 1 (Fla. 1973):

> [W]here a right of access to the Courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. §2.-01, F.S., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown. Kluger, supra at 4.

It is clear that a common law right of privacy, separate and distinct from any constitutional right of privacy, exists in Florida, the invasion of which constitutes a proper cause of action. Cason v. Baskin, supra; Jacova v. Southern Radio and Television Company, 83 So. 2d 34 (Fla. 1955). It is clear that Section 119.07(2)(a) Florida Statutes (1975), cannot be applied to defeat constitutional rights of privacy.

Yet, if it be assumed that the personal and confidential information here at issue is not encompassed within the zones of privacy protected under the United States or Florida Constitutions, it may still be protected because of Appellants' common law right of privacy, the right to be let alone and to live in their community without being held up to public gaze. Cason v. Baskin, supra. But if this information can be obtained pursuant to the Public Records Act, Petitioners' common law right of privacy would be violated and their right to seek redress for this invasion of their privacy obliterated, thus denying them access to the courts of this state as guaranteed to them by Article I, Section 21, Florida Constitution.

It is equally clear that if the Legislature intended to abolish the common law right of privacy, and the protection of this right by precluding common law public policy exemptions from the Public Records Act, it provided no reasonable alternative to protect rights to redress for an invasion of the right to privacy. The Legislature has not shown an overpowering necessity for abolishing the right of privacy and right to redress, as required by the Kluger decision. As outlined earlier, the purpose of the Public Records Act is to enable persons to know what the government is doing. However, the information contained in tenant files maintained by Respondent reveals nothing concerning the functions and operation of the Housing Authority itself. Instead, the information contained in these files concerns only the personal and confidential family information of tenants. The only purpose served

by revealing this information to any person requesting access to such information is to satisfy the curiosity of persons who, on mere whim or caprice, could pry into these most intimate and personal secrets. Yet, tenants in public housing are not public personages. Information on their lives and families is not of a legitimate public or general interest, which would outweigh their right of privacy conerning this information. See Cason, supra at 251. To interpret Section 119.07(2) (a) Florida Statutes (1975), as precluding common law public policy exemptions to protect this right of privacy, and thereby deny Appellants' their right of privacy solely because they live in public housing, would amount to an aberrant departure from recognized concepts and procedures long held fundamental in this state. The Legislature has shown no justification for such a result.

It is a well-settled rule that courts will not pass upon the constitutionality of a statute if the case may be effectively disposed of on other grounds. Peters v. Brown, 55 So. 2d 334, 335 (Fla. 1951). The case at bar challenges the application of the Public Records Act to the files of tenants in public housing as a violation of their constitutional right of privacy, and a violation of their common law right of privacy and the protection of these rights by public policy exemptions from the Act. Appellants submit that all constitutional privacy issues need not be reached, since the statute is susceptible to the interpretation that certain public records, such as tenant files, must be exempt from the disclosure requirements of the Act,

based on public policy decisions protecting confidential information and the common law right of privacy. This case can be decided on this ground. See, State v. Bruno, 104 So. 2d 588 (Fla. 1958).

CONCLUSION

The Circuit Court erred in dismissing the Complaint without giving Appellants the opportunity to establish their class and prove the injuries alleged. The Public Records Act, as applied to Appellants, invades their protected intimate relationships while serving no compelling state interest. Public housing tenant files are because of public policy and constitutional law, exempt from the Public Records Act. If there is a compelling state interest to be served by the general public rummaging of said files, then the legislature must enact a narrowly drawn statute that serves the state's interests without unnecessarily intruding on Appellants' constitutional rights.

The Circuit Court's Order dismissing Appellants' Complaint must therefore be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29 day of September, 1978, a true and correct copy of the foregoing Initial Brief of Appellants was mailed to:

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