IN THE SUPREME COURT
OF FLORIDA

DEAN FORSBERG and
WALTER FREEMAN,

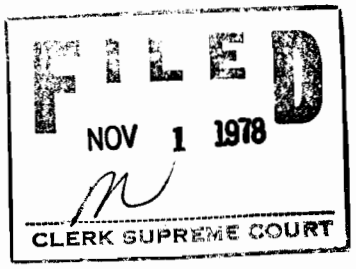
Appellants,

vs.

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

Appellees.

CASE NO. 54,623



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

INITIAL BRIEF OF APPELLEES

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STATEMENT OF THE CASE AND FACTS

Appellees concur in the Statement of the Case filed by Appellants and also concur in the Statement of the Facts to the extent that it does not contain legal conclusions.

Appellees would supplement the Statement of Facts by noting that the Housing Authority was informed by legal counsel for HUD, Mr. Gerald Wright, that the question of access to applications for public housing is a matter governed by State law and no federal statute or regulations govern this question. (R-46)

Additionally, information contained in the files maintained by the Miami Beach Housing Authority included the name, address, sex, age, income, occupation, medical history, next of kin, and social service requests and needs of the applicant. (R-39)

POINT I

THE FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY IS NOT IMPLICATED IN THIS CASE.

Appellants have asserted that Ch. 119, F.S., as applied to their tenant records is violative of their federal constitutional rights to privacy. They attempt to support their position by arguing, inter alia, that public dissemination of the information contained in their records would be humiliating and embarrassing because of its imtimate, highly personal nature. However attractive Appellants' arguments along this line may be from a public policy standpoint, they are addressed to the wrong forum. The Florida Legislature enacted Ch. 119 to open all records of public agencies not specifically provided by law (i.e., by act of the Legislature) to be confidential. It is the Legislature's prerogative, not the court's, to determine in what situation public policy dictates that confidentiality outweigh the public interest in open records. It is quite simply not the Court's function to substitute itw own notion of public policy for that of the Legislature unless a constitutional right would be violated by application of Ch. 119.

Of all the protected rights a citizen enjoys under the federal constitution, perhaps none is more difficult to define than the right of privacy. This is undoubtedly due in part to the fact that there is no express right to privacy

contained in the constitution; rather, it springs from other more specific constitutional guarantees which when read together create "zones of privacy" recognized by the United States Supreme Court. One thing appears clear, however, and that is that the scope of the right is ". . . narrowly confined to matters of marital intimacy, procreation, and the like." Miami Herald Publishing Co. v. Marko, 352 So. 2d 518, 520 n.4 (Fla. 1977), citing Laird v. State, 342 So. 2d 962 (Fla. 1977). The United States Supreme Court has recognized that there exist certain intimate and personal relationships and decisions into which government may not constitutionally intrude. The Supreme Court in Roe v. Wade, 410 U.S. 113 (1973), catalogued the Court's decision defining the constitutional parameters of this prohibition:

> These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325, 82 L. Ed. 288, 58 S. Ct. 149 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942); contraception, Eisenstadt v. Baird, 405 U.S., at 453-454, 31 L. Ed. 2d 349; id., at 460, 463 465, 31 L. Ed. 2d 349 (White, J., concurring in result); family relationships, Prince v. Massachussetts, 321 U.S. 158, 166, 88 L. Ed. 645, 64 S. Ct. 438 (1944); and child rearing

> and education, Pierce v. Society of Sisters, 268 U.S. 510, 535, 69 L. Ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468 (1925), Meyer v. Nebraska, supra.

410 U.S. at 152-153. As this Court observed in Laird, " . . . Justice Blackmun's articulation in Roe v. Wade of the limited scope of the right to privacy remains the current state of the law." Supra, 342 So. 2d at 962.

In this respect, it should be noted initially that Roe v. Wade and the cases articulated by Justice Blackmun therein, involved governmental intrusion into intimate and personal relationships and decisions such as whether or not to conceive or bear children. This line of cases differs substantially from the case sub judice where the statute enacted by the State of Florida does not seek to intrude into intimate marital and familial relationships, but rather to disclose information relevant to a person's application for public housing. The leading Supreme Court decision on governmental disclosure is Paul v. Davis, 424 U.S. 693 (1976). In Paul, respondent brought an action under the Civil Rights Act, 42 U.S.C. §1983, alleging that governmental disclosure of his arrest for shoplifting violated, inter alia, his federal right of privacy. In holding that such defamatory governmental disclosures did not touch upon a constitutional right of privacy, the Supreme Court stated:

While there is no "right of privacy" found in any specific guarantee of the Constitution, the Court has recognized that "zones of privacy" may be created by more specific constitutional guarantees and thereby impose limits upon government power. See Roe v. Wade, 410 U.S. 113, 152-153, 35 L.Ed. 2d 147, 93 S.Ct. 705 (1973). Respondent's case, however, comes within none of these areas. He does not seek to suppress evidence seized in the course of an unreasonable search. See Katz v. United States, 389 U.S. 347, 351, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967); Terry v. Ohio, 392 U.S. 1, 809, 20 L.Ed. 2d 889, 88 S. Ct. 1868 (1968). And our other "right of privacy" cases, while defying categorical description, deal generally with substantive aspects of the Fourteenth Amendment. 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, 82 L.Ed. 288, 58 S.Ct. 149 (1937). The activities detailed as being within this definition were ones very different from that for which respondent claims constitutional protection--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.

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 shiplifting 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 matter. (e.s.)

424 U.S. at 713-714. It is clear from the Court's pronouncement that the federal constitutional guarantee of privacy only inheres when two conditions are present: (1) the government must be intruding upon an individual's freedom of action within (2) a narrowly defined group of relationships that are recognized as within the sphere of privacy.

Subsequent Supreme Court cases have marked no retreat from Paul. Two cases relied upon by Appellant are Whalen v. Roe, 424 U.S. 589 (1977) and Nixon v. Administrator of General Services, 433 U.S. 425 (1977). In Whalen, the Supreme Court rejected the decision of a 3-judge district court holding unconstitutional a New York state statute requiring physicians to identify patients obtaining certain prescription drugs and to record the information in a centralized computer file. The Court specifically rejected expansion of the right to privacy and upheld disclosure. 424 U.S. at 608-9. In his concurring opinion in Whalen, Mr. Justice Stewart specifically set forth the limited nature of the federal constitutional right of privacy:

> In Katz v. United States, 389 U.S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507, the Court made clear that although the Constitution affords protection against certain kinds of government intrusions into personal and private matters, there is no "general constitutional 'right to privacy.' . . . [T]he protection of a person's general right to privacy--his

> right to be let alone by other people--is, like the protection of his property and of his very life, left largely to the law of the individual States." Id., at 350-351, 19 L.Ed. 2d 576, 88 S.Ct. 507 (footnote omitted).
>
> * * *
>
> The first case referred to, Griswold v. Connecticut, 381 U.S. 479, 14 L.Ed. 2d 510, 85 S.Ct. 1678, held that a State cannot constitutionally prohibit a married couple from using contraceptives in the privacy of their home. Although the broad language of the opinion includes a discussion of privacy, . . . the consitutional protection there discovered also related to (1) marriage, . . . (2) privacy in the home, . . . and (3) the right to use contraceptives, ... Whatever the ratio decidendi of Griswold, it does not recognize a general interest in freedom from disclosure of private information. (e.s.)

429 U.S. at 607-9.

In Nixon, the Supreme Court affirmed a three-judge court decision upholding the constitutionality, over challenges of invasion of privacy, of a statute providing that the Administrator of General Services shall take custody of former President Nixon's papers and tapes. The decision in Nixon is essentially based on search and seizure case law, and discusses in part the "legitimate expectation of privacy" notions enumerated in Katz v. United States, 389 U.S. 347 (1967). Nixon was, as was Katz, a governmental intrusion case where the statute provided for the collection of information which, when it was made, was conceded to be the personal property of Mr. Nixon.

As can be seen, both Whalen and Nixon were instances in which the Court flatly refused to expand notions of a federal right to privacy beyond that recognized by its prior decisions. The Fifth Circuit in Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978) likewise upheld disclosure as against a constitutional privacy challenge while recognizing the lack of clear standards in this area. In Plante, the information required to be open was financial records. Also instructive on the question of whether such records are constitutionally protected is California Bankers Association v. Schultz, 416 U.S. 21 (1974) wherein the Court reversed a 3-judge court by declining to expand the federal right of privacy to bank financial records.

Hence, the United States Supreme Court's decision in Paul clearly remains the state of the law as far as a federal constitutional right of privacy is concerned. That decision recognizes that privacy interests beyond the intimate family relationship are matters of state law. 424 U.S. at 711-12. This principle merely reasserts what the Court stated in a search and seizure context in Katz:

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy--his right

> to be let alone by other people--is, like the protection of his property and of his very life, left largely to the law of the individual States. (footnotes omitted)

Cases since Paul can hardly be seen as an invitation by the Supreme Court to lower federal and state courts to expand the federal constitutional right of privacy beyond that recognized in Paul. Lower court attempts to do so have been stuck down. Indeed, in Houchins v. K.Q.E.D., Inc., 46 L.W. 4830, the Supreme Court expressly upheld the state Legislature's power to regulate disclosure of information:

> There is no discernable basis for a constitutional duty to disclose, for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would, under the Court of Appeals' approach, be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems "desirable" or "expedient."

466. L.W. at 4833.

In a closely analogous situation, the Texas Supreme Court in Industrial Foundation of the South v. Texas Inc. v. Accident Board, 540 S.W. 2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977), upheld the Texas Open Records Act in its application to information relating to workmen's compensation claims over federal privacy challenges. The Court first recognized the limited nature of the federal right of privacy:

> . . . It is apparent, however, that the fundamental rights thus far recognized by the Court as deserving protection from governmental interference have been limited to intimate personal relationships or activities, freedoms of the individual to make fundamental choices involving himself, his family, and his relationships with others. It is also apparent that the right of privacy is primarily a restraint upon unwarranted governmental interference or intrusion into those areas deemed to be within the protected "zones of privacy." (e.s.)

Id. at 679. The Court went on to conclude that the Texas Open Records Act did not restrict any claimant in his freedom in such a zone of privacy:

> Thus, the State's right to make available for public inspection information pertaining to an individual does not conflict with the individual's constitutional right of privacy unless the State's action restricts his freedom in a sphere recognized to be within a zone of privacy protected by the Constitution. We turn now to an examination of the information sought by the Foundation to determine whether that information is within a zone of privacy. The data requested identifies the claimant, the nature of his injuries, his employer and his attorney. The information normally does not concern matters relating to marriage, procreation, contraception, family relationships, or child rearing and education, nor would its publication infringe upon a claimant's right of free association. Even though a workman's knowledge that information concerning his claim will be available for public inspection may deter him from exercising his statutory right to file a claim, the general availability of such information would not adversely affect any right thus far recognized to be within a constitutionally protected zone of privacy.

Similarly, the Florida Public Records Law is not an unwarranted intrusion into an individual's freedom to act in the narrow zones of intimate and familial privacy enunciated by the Supreme Court. In light of the above discussion of the present state of the federal constitutional privacy right, this Court should follow the well-reasoned approach of the Texas Supreme Court in Industrial Foundation, and find no federal constitutional violation of the right of privacy unless it finds that Florida has intruded into the individual's right to make decisions in the limited areas recognized as protected.

Measured against this standard, it is clear that there is no violation of the federal constitutional right to privacy in the instant case. Appellants alleged in their complaint, dismissed by the lower court, that if the tenant records are made public they will suffer humiliation and embarrassment as a result of public disclosure about their "income, assets, bank accounts, medical histories and other matters of a personal nature." Quite apart from the fact that no allegations concerning government intrusion are made (the Appellants do not contend that the government's initial collection was unconstitutional), Appellants have not asserted that information concerning "matters relating to marriage, procreation, contraception, family relationships, or child rearing and education." 540 S.W. 2d at 680, has

been made public. It is very likely that any information concerning medical history, abortions, mental health treatment and the like is made confidential by one of the many exceptions to Ch. 119, without reference to which Ch. 119 cannot fairly be read. For instance, §458.16, F.S., protects medical reports from disclosure, §458.22(4)(b) make abortion records confidential, §394.459(9) guarantees confidentiality of mental health clinical records, and §228.093(3)(d) concerns educational records. The lower court's granting the motion to dismiss was proper in the absence of any allegations that information of the protected zones of privacy was required by Florida law to be open. It should perhaps be noted that the records open for public inspection in Industrial Foundation were personal medical records but found by the court not to be within the protected zones of privacy.

In sum, Appellees seek from this Court a vast expansion of the federal constitutional privacy right. This Court should decline the invitation. The United States Supreme Court has repeatedly stated that the limited right of privacy as expressed in Paul is as far as the constitution presently protects. This Court's obligation is to give effect to that pronouncement and if Appellants then wish to seek expansion of the right they may go to the United States Supreme Court for review. There simply is no right presently recognized protecting disclosure of presumably lawfully collected infor-

mation and any right of privacy that does exist is strictly limited to the narrow "zones of privacy" as consistently enunciated by the Supreme Court.

Finally, Appellants assert that they expected confidentiality of the information given and that therefore it may not be disclosed. This assertion is answered by the Fourth District's decision in Browning v. Walton, 751 So. 2d 380 (4th D.C.A. Fla. 1977), wherein the court refused to accept the argument that a public body subject to Ch. 119 could exempt itself from having to comply with the law, stating at 351 So. 2d 380, 381:

> The Appellant seeks to have this court judicially engraft the "self-imposed" exemption to the Public Records Act, Section 119.07(2), Florida Statutes (1975).
>
> This we cannot do. The purpose of this Statute was to open the records so the citizens could discover what their government was doing.

In Egan v. Board of Water Supply, 205 N.Y. 147, 98 N.E. 467, 470 (1912), the New York Court of Appeals considered a similar argument:

> But it is said that the papers sought to be inspected are private and confidential, and hence do not fall within the purview of the statute. As to this argument, it is to be observed, in the first place, that a person who sends a communication to a public officer, relative to the public business, cannot make his communication private and confidential

simply by labeling it such. The law determines its character, not the will of the sender . . . . It is true that a disclosure of the objections . . . may restrain objectors from writing thus freely to similar boards in the future; but if such is a consequence of complying with the plain command of a statute it must be endured. Egan v. Board of Water Supply, 205 N.Y. 147, 98 N.E. 467, 470 (1912). (e.s.)

POINT II

THE TRIAL COURT DID NOT ERR IN HOLDING THAT UNDER FLORIDA LAW A STATE CONSTITUTIONAL RIGHT TO PRIVACY DOES NOT EXIST.

The only case in this state in which a court has squarely held that a right to privacy exists under the 1968 State Constitution is presently before this Court. Harless v. State ex rel. Schellenberg, 360 So.2d 83 (Fla. 1st DCA 1978). The issue of whether a right of informational privacy exists as a matter of state and federal law was certified by the First District to this Court.

Appellees can add little to what has already been briefed in Schellenberg other than to note that this Court previously in Laird v. State, 342 So.2d 962 (Fla. 1977), noted that a state right of privacy does not exist in Florida. Notwithstanding this statement by this Court, the First District proceeded to create a new constitutional right of privacy or personhood on what it perceived as "themes" in the 1968 Constitution. The danger of the judiciary taking upon itself such authority and creating new and specific constitutional rights out of general constitutional provisions was cogently summarized by Justice White in Moore v. City of East Cleveland, infra, and does not require repetition here.

The Attorney General submits that if the Public Records Law, or for that matter the Government in the Sunshine Law, §286.011, F.S., contains unwritten constitutional privacy exceptions, it should be the federal courts which so hold and not this Court. It is fundamental that this Court has a primary duty to uphold the validity of duly enacted state statutes against constitutional attack. Any doubt regarding the validity of a state statute must be resolved in favor of constitutionality. To create a new state constitutional right in order to invalidate a state statute which was enacted and amended for the benefit of the public is, to the best knowledge of this office, unprecedented in the state.

While Appellees concede that dictum exists in Whalen and Nixon which could give the impression that the United States Supreme Court might at some time in the future expand the federal right of privacy to cover dissemination of public records, there is absolutely no legitimate authority to support a state right of privacy as this Court has previously acknowledged in Laird. For the judiciary to create a state constitutional right to privacy out of tort cases and statutes is not constitutional interpretation but rather legislative usurpation.

POINT III

SINCE NO GENERAL OR SPECIAL LAW OF THE FLORIDA LEGISLATURE MAKES TENANT HOUSING FILES CONFIDENTIAL, SUCH RECORDS ARE REQUIRED TO BE OPEN TO PUBLIC INSPECTION PURSUANT TO §119.07(1), F.S.

Section 119.07(1), F.S., states:

> (1) Every person who has custody of public records shall permit the records to be inspected and examined by any person desiring to do so, at reasonable times, under reasonable conditions, and under supervision by the custodian of the records or his designee. The custodian shall furnish copies or certified copies of the records upon payment of fees as prescribed by law or, if fees are not prescribed by law, upon payment of the actual cost of duplication of the copies. Unless otherwise provided by law, the fees to be charged for duplication of public records shall be collected, deposited, and accounted for in the manner prescribed for other operating funds of the agency.

Section 119.07(2)(a), F.S., permits exceptions to be created to the mandatory inspection requirement set forth above as follows:

> (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).

This statute, which was enacted in 1967, and amended in 1975, means exactly what it says--that exceptions to §119.07(1), F.S., either exist in general or special law or they do not exist at all. This interpretation of §119.07(2)(a), F.S., has been recognized by at least two appellate courts which have recently considered this issue. In Veale v. City of Boca Raton, 353 So.2d 1194 (4th D.C.A.), cert. denied, 360 So.2d 1247 (Fla. 1978), Judge Schwartz discussed at length the argument advanced in the instant case by the Appellants and concluded that the judiciary no longer possessed the authority to create policy exemptions to §119.07(1), F.S., in order to make public records secret. Similarly, in Wait v. Florida Power and Light Co., 353 So.2d 1265 (1st D.C.A. 1978), the First District held that §119.07 (2)(a), F.S.:

> . . . exempts only those records expressly provided by general or special law to be confidential.

The Attorney General submits that since 1967, the Legislature has possessed the sole and exclusive power to create exceptions from the right of inspection of public records which it also created as part of the same act. The 1975 amendments to Chapter 119, F.S., make it as clear as possible that the Legislature considers the questions of access to public records of agencies which are under the dominion and control of the Legislature to be a legislative and not a judicial or executive function.

Interestingly, this Court in State ex rel. Cummer v. Pace,

159 So. 679 (Fla. 1935) declined to create policy exemptions to the then existing public records law , even though the judiciary arguably possessed such a right under the existing statutes.[1]

Appellants' argument that the common-law right to privacy exists in Florida is not disputed by the Attorney General. However, Appellants fail to recognize that if a document is made a public record by the Florida Legislature, it is not actionable as being an invasion of privacy. As stated by Dean Prosser, dissemination of certain information can be said to be actionable as an invasion of privacy only if the facts disclosed to the public are private facts and not public ones. Prosser, Handbook of the Law of Torts (4th Ed. 1970). Further, Florida's tort privacy cases have uniformly held that no cause of action for invasion of privacy exists when the matter is one of public record. See, e.g., Cason v. Baskin, 20 So.2d 243, 251-253 (Fla. 1944); Jacova v. Southern Radio & Television Radio Corp., 83 So.2d 34, 36 (Fla. 1955); Harms v. Miami Daily News, 127 So.2d 715 (3d DCA 1961). As summarized in Harms, at 717:

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[1]The reason for this is simple; no definition of "public record" existed until 1967 and this Court could have utilized a common law definition which would have permitted public policy exemptions.

> As was observed in the Baskin opinions, the right of privacy has its limitations. Society has its rights. The right of privacy must be accommodated to freedom of speech and of the press and to the right of the general public to the dissemination of information. As otherwise stated, the right of privacy does not forbid the publication of information that is of public benefit, and the right does not exist as to persons and events in which the public has a rightful interest. . . .[T]he two principal limitations placed on the right of privacy are publications of public records and publication of matters of legitimate or public interest. 127 So.2d at 717 (e.s.)

It has been stated that "manifestly an individual cannot claim a right to privacy with regard to that which cannot . . . by operation of law remain private." Metter v. Los Angeles Examiner, 95 P.2d 491, 495 (Cal. Dist. Ct. App. 1939). To say that no right of privacy exists as to those things which are matters of public record is meaningless without reference to the definition of public records established by the Legislature and the extent to which such records are required to be disclosed or are made confidential. The Florida Legislature has defined public records as "all documents [etc.]. . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency," agency being defined to include essentially any public agency or entity "acting on behalf of any public agency." Section 119.011(1), F.S. The

Legislature has further determined that all such records must be open to public disclosure except those which are "provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law . . . ." Section 119.07(2)(a), F.S. (e.s.) Appellees submit that the Legislature's unequivocal mandate in this regard establishing the definition of public records open to public inspection, thereby delineates the public records defense to an action for invasion of privacy. It would be erroneous to interchange the concepts and construe the right to privacy as a defense to the disclosure requirement under Ch. 119, F.S.

Moreover, it is highly questionable whether a state could constitutionally make actionable on tort privacy grounds a document which by operation of state law is an open, public record. In Cox Broadcasting Corp. v. Cohn, 410 U.S. 469 (1975), the United States Supreme Court held that under the First and Fourteenth Amendments to the United States Constitution, the states were prohibited from making actionable on tort privacy grounds, documents or proceedings which under state law were required to be open to the public. In so holding, the Court recognized the fundamental conflict between two competing interests which are involved in such situations as follows:

> These are impressive credentials for a right of privacy, but we should recognize that we do not have at issue here an action

> for the invasion of privacy involving the appropriation of one's name or photograph, a physical or other tangible intrusion into a private area, or a publication of otherwise private information that is also false although perhaps not defamatory. The version of the privacy tort now before us--termed in Georgia "the tort of public disclosure," 231 Ga., at 60, 200 SE2d at 130--is that in which the plaintiff claims the right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities. Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent and the appellants urge upon us the broad holding that the press may not be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be to reputation or individual sensibilities. (e.s.) 410 U.S. 469, 489.

The Court at the same time recognized the fundamental importance of the public's right of access to information about government:

> In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the

> news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. (e.s.)
> 410 U.S. 469, 491-492,

The Supreme Court in Cox noted further at 494, that §652B, Comment C of the Restatement of Torts provides that "there is no liability for the examination of a public record concerning the plaintiff or of documents which the plaintiff is required to keep and make available for public inspection." According to this draft,

> . . . ascertaining and publishing the contents of public records are simply not within the reach of these kinds of privacy actions. Thus, even the prevailing law of invasion of privacy recognizes that the interests in privacy fade when the information involved already appears on the public record. The conclusion is compelling when veiled in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press.
> 410 U.S. 469, 494-495.

The Supreme Court cited at 410 U.S. 469, 494 n.25, numerous cases throughout the country which have held that matters of public record are not actionable as an invasion of privacy.

The Supreme Court pointedly suggested at 410 U.S. 469, 496, that the appropriate forum in which to resolve the conflict between privacy and interests of the public to know and the press to publish was in the state's political institutions and not the courts.

The Attorney General is in full agreement with the United States Supreme Court's views in this regard and submits that the Legislature has made such a decision, and accordingly, that this Court should reject efforts to circumvent the clear holding of Cox by the back door. If the Appellants in this case can not constitutionally maintain a cause of action for invasion of privacy for the publication of information concerning their tenant files, it follows that they should not be permitted to now assert an invasion of privacy as grounds for closing the records in the first instance in the face of a statute making such documents open to the public and the press.

It seems clear that the cases which are presently before this Court[2] or pending in lower courts[3] which urge this Court to create judicial exemptions to Florida's open-government laws on constitutional privacy grounds are actually requesting this Court to perform a task which requires the individual justices to decide in each case when such a right is asserted which competing societal

[2]State ex rel. Schellenberg v. Harless, supra.

[3]Wisher v. Ft. Myers News-Press, Case No. 78-631, ordered stayed by the District Court of Appeal, Second District on July 14, 1978, pending resolution of Schellenberg, supra; and W. R. Tolar v. School Board of Liberty County, Case No. JJ-179, filed Sept. 13, 1978, petition for rehearing pending; finding that a constitutional privacy exception exists under the Government-in-the-Sunshine Law, §286.011, F.S.;

right should prevail. In the area of privacy, the United States Supreme Court has demonstrated an extreme reluctance to expand privacy rights since its landmark decision in Griswold. The reasons underlying such apprehension were summarized by Justice White in Moore v. City of East Cleveland, 431 U.S. 531, 544-5 (1977), a case which involved the federal right to privacy, as follows:

> Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments. This is not to suggest, at this point, that any of these cases should be overruled, or that the process by which they were decided was illegitimate or even unacceptable, but only to underline Mr. Justice Black's constant reminder to his colleagues that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable. And no one was more sensitive than Mr. Justice Harlan to any suggestion that his approach to the Due Process Clause would lead to judges "roaming at large in the constitutional field." Griswold v. Connecticut, supra, at 502, 14 L Ed 2d 510, 85 S Ct 1678. No one proceeded with more caution than he did when the validity of state or federal legislation was challenged in the name of the Due Process Clause.

News Press Publishing Co. v. Carlson, et al., case no. 78-2904 CA (20th Jud. Cir., Lee County), rejecting a claim that the right to privacy formulated in Schellenberg is an exception to the Government-in-the-Sunshine-Law, supra.

> This is surely the preferred approach. That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the board, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.

Similarly, Justice Rehnquist, writing his views of privacy for the Kansas Law Review, 23 Kan. L. Rev. 1 (1974), echoed the same sentiments:

> In concluding this discussion let me observe that I have tried to suggest several shortcomings that appear to me to characterize some of the current discussions about claims to increased privacy. The first shortcoming is at least in part a definitional one-widely divergent claims, which upon analysis

> have very little in common with one another, are lumped under the umbrella of "privacy." While this may be done in the belief that if they can remain under this umbrella their chances of being accepted en masse will be improved by the "good" connotation the word privacy presently has, that is not a sufficient reason for dispensing with analysis of each claim on an individual basis. The second shortcoming seems to me to be a failure to recognize the extent to which many claims of privacy, if accepted, would be established at the expense of other competing values, such as the interest in effective law enforcement, the interest in a well informed citizenry, and the interest in efficient expenditure of public funds.
>
> * * *
>
> I have, finally, tried to point out why it may be thought preferable that those who champion the right Justice Brandeis described as "the right to be let alone" direct their attack to the repeal of existing laws on the books or to opposition to enactment of additional laws. Under this approach the issue may be joined and the conflicts resolved without any unintended sacrifice of other values.

Most recently, in Houchins v. KQED, 46 U.S.L.W. 4830 (June 26, 1978), the Court through Chief Justice Burger, again stressed that the issue of access to information in the possession and control of government should be left to the political processes of the individual states.

> There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would . . . be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems "desirable" or "expedient.". . .
>
> The First Amendment is "neither a Freedom of Information Act nor an Official Secrets Act." Stewart, Or the Press, 26 Hast. L.J. 631, 636 (1975). The guarantees of "freedom of speech" and "of the press" only "establish the contest [for information] not its resolution . . . For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society. Ibid.

Mr. Justice Stewart, concurring in Houchins, flatly stated that

> [f]orces and factors other than the Constitution must determine what government held data are to be made available to the public. (e.s.)

It is submitted that the extreme reluctance which the United States Supreme Court has demonstrated in the area of informational privacy is based upon sound concepts of separation of powers and the practical experiences that the Court has had in dealing with this issue. The Supreme Court obviously understands the complexity of the issues as well as the changing societal norms which would affect where the right of informational privacy should end and the right of public and

press should begin. This is not the type of right which is conducive to inclusion in the constitution, for by its very nature it is and should be subject to competing societal values. As the needs of society change, the Legislature should be permitted the option of opening or closing government documents to meet such needs. The Supreme Court has stated rather clearly that it believes the issue of access to government information and the issues associated with it are essentially legislative questions which should be appropriately resolved in a legislative forum after consideration by the people's elected representative of the competing interests which are involved. It is urged that this Court carefully consider whether it wishes to become involved in what the United States Supreme Court has thus far avoided, and to give to this Court the constitutional supervision of particular legislative decisions without clear authority in the state or federal constitution for such action.

POINT IV

THE LOWER COURT DID NOT ERR IN DISMISSING APPELLANTS' COMPLAINT FOR CLASS ACTION RELIEF ON PRIVACY GROUNDS SINCE THE RIGHT OF PRIVACY, BOTH CONSTITUTIONAL AND TORT, IS A PERSONAL RIGHT OF THE INDIVIDUAL WHICH CANNOT BE ASSERTED FOR OR ON BEHALF OF ANOTHER.

Appellants filed in the lower court a pleading entitled "Class Action Complaint for Declaratory and Injunctive Relief" and based said complaint on the state and federal constitutional and common-law right of privacy. Appellees submit that the lower court correctly dismissed this complaint because under existing Florida law, a class action cannot be brought on the basis of a privacy claim.

In Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962), the court construing Florida law stated at 12:

> It is settled that the right of privacy is personal and does not extend to members of the family unless they are brought into unjustifiable publicity, here not alleged, and then the right is in them. Prosser on Torts, supra, p. 641; Prosser, Privacy, 48 Cal.L.Rev. 383. . . .

The general principle has been stated that the right of privacy is a purely personal one and that the Plaintiff must show an invasion of his own right of privacy before he can recover. 62 Am.Jur.2d, Privacy at 692. Also see, Metter v. Los Angeles Examiner, 95 P.2d 491 (Cal.App. 1939); Maritote v. Desilu Productions, 345 F.2d 418 (7th Cir. 1965) cert.denied

382 U.S. 883; Rosemont Enterprises v. Random House, 294 NYS2d 122, Aff'd. 301 NYS2d 948; Young v. That Was the Week That Was, 423 F.2d 265 (6th Cir. 1970); Hickman v. East Baton Rouge Parish, 314 So.2d 846 (La.App. 1975).

Accordingly, Appellants complaint is fatally defective insofar as it attempts to permit the Appellants to assert the "privacy rights" of a class. This is impossible under existing law and the trial court, therefore, correctly dismissed Appellants' complaint.

POINT V

THE LOWER COURT DID NOT ERR IN DISMISSING APPELLANTS' COMPLAINT SINCE THE AMENDED COMPLAINT FAILED TO ALLEGE THE EXISTENCE OF ANY STATE STATUTE MAKING THE INFORMATION COLLECTED BY THE HOUSING AUTHORITY CONFIDENTIAL.

Initially, it is important to note to this Court the procedural posture of the instant case. Appellants filed for class action relief against the City of Miami Beach Housing Authority alleging violations of their constitutional and common law right to privacy. Nowhere in the class action complaint do Appellants allege that any of the information contained in the tenant files is confidential pursuant to any applicable state statute.

The information which the record reflects is contained in the tenant files includes the applicants'

> name, address, sex, age, income, occupation, medical history, next of kin, social service requests and needs. (R. 39)

Although the Appellants brief and complaint refers to "personal and confidential" information concerning their family status and relationship, income, expenses, assets, employment and medical history, it should be apparent that this is a legal

conclusion and not a factual allegation. Whether any of this information is confidential is for the courts to determine and not the parties.

Similarly, on the record before this Court, Appellants' version of what might be contained in the files is inappropriate. This Court can only consider what has been set forth in the complaint and the record and not what may or may not exist.

The Attorney General submits that since the Appellants failed to allege that any of the information set forth in the complaint is statutorily confidential, the trial court correctly dismissed the complaint. It very well could be that in seeking relief on a constitutional basis, Appellants have simply chosen the wrong issue to litigate. For example, §458.16, F.S., prohibits release of medical treatment records of any practitioner of the healing sciences without the written consent of the patient. Section 458.22(4)(b), F.S., requires abortion information to be kept confidential as does §394.459(9), F.S., which involves records of persons treated under the "Baker Act." Similarly §384.10, F.S., makes records of cases of venereal disease confidential. Records concerning the custody and adoption of children are confidential pursuant to §363.022(2)(j), F.S. Section 228.093(3)(d), F.S., makes confidential all educational records kept with respect to a pupil. However, in failing

to allege that any of the information contained in the files of the Authority was obtained in violation of any of these statutes and/or that any of these or other similar statutes are applicable to the records in question, Appellants have placed this Court in the position of deciding the question on a constitutional basis.

Appellants arguably would have been entitled to relief if any of the information contained in the files of the two individual plaintiffs before the Court was required by statute to be kept confidential. However, since this was not alleged, the trial court correctly dismissed the complaint.

CONCLUSION

Based upon the foregoing authorities, appellees submit that the trial court correctly dismissed appellants' Complaint and, accordingly, the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of November, 1978, a true and correct copy of the foregoing Initial Brief of Appellees was mailed to:

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