IN THE SUPREME COURT
OF FLORIDA

CASE NO. 54,623

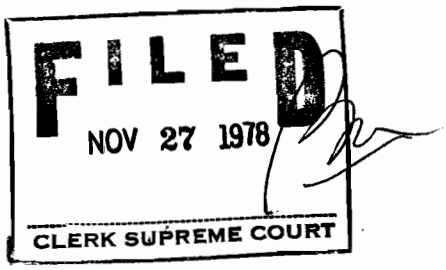
DEAN FORSBERG and
WALTER FREEMAN,

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.

REPLY BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Although the facts as set forth by Appellants are undisputed, they have been assiduously avoided by both Appellees and Intervenors in their analyses of the existing law on the issues herein. Appellants have no desire to belabor the facts as previously set forth; however, because these writers have been unable to find any reported case in which there is such an egregious public invasion into intimate and confidential personal familial details, we find repetition necessary. The facts before this Court are that public housing provided to Appellants the only safe, sanitary and decent housing available to them and that, as a condition of obtaining such housing, they furnished, in confidence, information of a personal and confidential nature concerning family status and relationship, expenses, assets, employment, medical history and social services requests and needs the release of which would cause them humiliation and embarrassment and would invade their privacy. (R-3,4)(A-3,4).

ARGUMENT

POINT I

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

Fifty years ago, Justice Brandeis wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect....They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive of rights and right most valued by civilized men.[1]

The tenants have alleged that both privacy strands of their right to be let alone have been invaded by the Public Records Act. Appellees and Intervenors (hereinafter referred to as Appellees unless there is a need to distinguish between them) do not directly confront the tenants' claim that their right to decisional privacy concerning familial and marital relationships have been interfered with by said Act. As to the disclosural privacy right, Appellees inexplicably contend that there is no federal constitutional right of disclosural privacy, or at least that no such right extends beyond information about an individual's intimate familial marital relationships. There are two major problems with this analysis.

First, Appellees have totally ignored the fact before this Court that the public rummaging through information regarding

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[1] Olmstead v. United States, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting).

intimate personal and familial details is precisely the issue herein.

Second, Appellees have either ignored or misread the decisions which clearly hold that there is a federal right of disclosural privacy that goes beyond such matters as marriage, procreation, contraception, family relationships, child rearing and education. An analysis of the cases previously cited by Appellants and Appellees demonstrates the truth of this assertion. Paul v. Davis, 424 U.S. 693 (1976), is cited by Appellees as the leading Supreme Court decision on governmental disclosure. Paul concerned governmental disclosure of the fact of Mr. Davis' arrest for shoplifting. Other than the fact of that arrest, there was no disclosure of any personal detail concerning the life of Mr. Davis or that of his family. While Appellants agree with the observation of the three dissenting justices that the Paul decision "must surely be a short-lived aberration",[2] to the extent that Paul arguably limits the right of disclosural privacy to those areas set forth in Roe v. Wade[3], it has been receded from in more recent decisions. As one well known commentator wrote:

> The second of Professor Kurland's categories shows that constitutionally protected privacy will evolve as pressure on and regulation of the individual by our complex society increases.

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[2] Id. at 735 (Dissent).

[3] 410 U.S. 113, 152-153 (1973).

> At the time Professor Kurland wrote his article, no Supreme Court opinion had found a 'right of an individual not to have his private affairs made public by the government.' But during 1977 the Supreme Court twice acknowledged this privacy interest. [Author here cites to Whalen v. Roe, 429 U.S. 589 (1977), and Nixon v. Administrator of General Services, 433 U.S. 429 (1972), in footnote 10].[4]

This will be more fully discussed below.

Houchins v. KQED, Inc., 46 U.S. L.W. 4830 (1978), is not a privacy case, has no language that even arguably relates to governmental disclosure of personal information and in no way limits the expansion of the individual's right of privacy.

The case of Zablocki v. Redhail, 54 L.Ed.2d 618 (1978), affirms the assertion that a certain Wisconsin statute interfered with a citizen's decisional privacy right to marry. Said case in no way limits the constitutional right of privacy.

The Supreme Court of the United States, in Whalen v. Roe[5] and Nixon v. The Administrator of General Services[6], and

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[4] Thomson, Parker & Sanford Bohrer, "CON: A Case for Rejection of Article I § 21", 52 The Florida Bar Journal, 613 and N. 10 (Oct.,1978).

[5] 429 U.S. 589 (1977).

[6] 433 U.S. 425 (1977).

the Fifth Circuit, in Plante v. Gonzalez[7], have both found a constitutional right "in avoiding disclosure of personal matters." Whalen at 599. The constitutional right of disclosural privacy discussed in those decisions is taken beyond those boundaries arguably set by Paul. Appellants have discussed Whalen, Nixon and Plante in detail in their main brief and rely on their analysis therein. Some comments on the Attorney General's analysis, however, is necessary. In an attempt to demonstrate that subsequent Supreme Court cases have marked "no retreat from Paul," the Attorney General states that the Court specifically rejected expansion of the right to privacy and upheld disclosure. Although it is not made clear in the brief, the support for this assertion is not found in the majority opinion of seven justices, but in Mr. Justice Stewart's sole concurring opinion. Concurring and dissenting opinions obviously represent only the views of those justices signing them. Mr. Justice Brennan, in his concurring opinion in Whalen, stated "broad dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests." Id. at 606. However, we must look to the majority opinion to find the reasoning, focus and direction of the Court. In Whalen the Court signaled its

[7] 545 F. 2d 1119 (5th Cir. 1978).

direction in the following statement:

> A final word about issues we have not decided. We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces and enforcement of the criminal laws, all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. Whalen, supra at 605, 606 (Emphasis supplied).

In Nixon, the Court held

> [W]hen government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity. Id. at 457.

The tenants are no more public officials (or even public personages) by residing in public housing as their only source of safe, sanitary and decent housing, than is a wife by filing for divorce as the only means by which she can dissolve her marriage. Time, Inc. v. Firestone, 424 U.S. 448 (1976). In

that case, the United States Supreme Court ruled that filing a divorce action does not make one a public figure. In looking for the direction of the Court in Nixon, it is interesting to note that while there were seven separate opinions filed, all the justices were in agreement that the President had a constitutional right to prevent public disclosure of personal papers. The majority of the justices felt that

> the Act's sensitivity to appellant's legitimate privacy interests, ... the unblemished record of the archivists for discretion, and the likelihood that the regulations to be promulgated by the Administrator will further moot appellant's fears that his materials will be reviewed by 'a host of persons'. Id. at 465.

Mr. Justice Rehnquist, who wrote the majority opinion in Paul, dissented in Nixon on the basis of separation of powers, arguing that nothing should be made public. Mr. Justice Rehnquist, however, recognized here Mr. Nixon's individual right of privacy in his person papers but felt that his privacy interest when enhanced by executive privilege heightened this right to allow him to keep from inspection papers which are not purely personal. Id. at 545, N. 1.

Intimate personal and familial information collected by the state for even legitimate state purposes can constitute an interference with "Roe" defined rights where the state's

interest is not compelling and the safeguards cannot adequately protect familial privacy. In Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973), the District Court of Pensylvania found that a questionnaire that would explore details of school children's family composition and relationships impermissibly interfered with fundamental family relationships and child rearing, thereby violating the right of privacy under the United States Constitution. Thus, the Court held that disclosure of this type of information would constitute interference with a relationship within those bounds of privacy deemed fundamental.

As discussed in our main brief, the Fifth Circuit in Plante found a constitutional right to prevent the disclosure of an individual's financial information, but that because of the strong state interests, expressed by a narrowly drawn statute directed specifically at the state's concerns, and the public nature of the political aspirants and office holders, the Court held that in balancing the interests, the state's rights must prevail over the individual's constitutional rights.

It is therefore apparent that, despite Appellees' contentions, there does exist a federal constitutional right to prevent public disclosure via state action of personal matters.

POINT II

FLORIDA LAW GUARANTEES OF PRIVACY PROTECT PUBLIC HOUSING TENANT FILES FROM GENERAL PUBLIC RUMMAGING.

The tenants have explored the state right to privacy rather extensively in their main brief but would respond to Appellees with the following observations. Appellees' reliance on Laird v. State, 342 So. 2d 962 (Fla. 1977), is misplaced. In Laird, this Court had no occasion to consider the issue of disclosural privacy. That case involved a claim that Defendants' right of decisional autonomy included the right to possess marijuana (an illegal substance) in his home. This Court in Laird never had to consider a question such as, if Laird, were a public housing tenant, would the general public have the right, under the Public Records Act, to see a letter in Laird's file, from a neighbor, accusing him of being a drug addict?

Every appellate court in Florida has upheld individual privay from disclosure. The individual's right to prevent disclosure of personal information was considered by the Fourth District Court of Appeal in Springer v. Greer, 341 So. 2d 212 (Fla. 4th D.C.A. 1977)[9], two Plaintiffs sought discovery of extensive information about prescriptions for addictive drugs written by Respondent's physician over a period of several years. They sought the prescription records of five pharmacists,

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[9] See also, Patterson v. Tribune, 146 So. 2d 623 (Fla. 2d D.C.A. 1962).

as well as the names and addresses of all persons for whom the Respondent had prescribed the named drugs. The Court ordered disclosure of the total number of prescriptions written, but not the identities of the patients. It felt that the trial judge's authority under the discovery rules should be adequate to enable him "to protect against any undue invasion of the privacy of Respondent's other patients." Id. at 214. In Argonaut Insurance Company v. Peralta, 358 So. 2d 232 (Fla. 3d D.C.A. 1978), the Third District held that the trial court erred in ordering production of medical records and photographs of persons not parties to the action. The trial court had ordered that the patients' names and addresses be deleted from the records and that their faces on the photographs be blanked out. The Third District held that this did not go far enough to protect those persons who were not parties to the action and thus held it was error to order production of the medical records and photographs of those persons, even taking into account the attempts to safeguard their privacy. The First District's protection of individual privacy in Harless is discussed extensively in our main brief.

Appellee-Intervenor has devoted four pages of its brief to the decision of the Texas Supreme Court in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W. 2d 668 (Tex. 1976), cert. denied 430 U.S. 931 (1976). This case was decided prior to the United States Supreme Court's decisions

in Whalen and Nixon and the Fifth Circuit's decision in Plante. The Texas court obviously could only rule on whether "... the general availability of such information would not adversely affect any [federal] right thus far recognized to be within a constitutionally protected zone of privacy". Id. at 681. One can only speculate as to how the Texas Court would rule in light of Whalen, Nixon and Plante, and thus, on the Federal privacy right, its persuasive value on this Court is nil.

The Texas Court's analysis of the common law right to privacy, however, is so fine that the tenants join with Intervenor in asking this court to follow its "well reasoned approach." Industrial Foundation involved a public records act very similar to our own.

> Texas' Open Records Act ("the Act") became effective on June 14, 1973. Eight days thereafter, the Industrial Foundation of the South ("the Foundation"), a non-profit corporation comprised of approximately 282 member companies who employ workmen in the southwestern part of the United States, requested the Industrial Accident Board ("the Board") to furnish them the following items of information from every claim for workmen's compensation filed with the Board: the file number, the claimant's name and social security number, the name of claimant's employer, the nature of the injury, and the name of claimant's attorney, if any. Id. at 672.

The Court, in holding that in some instances a common-law right of privacy outweighs the public's right to know, reasoned as follows:

> While the Open Records Act has declared the policy of this State to be that all "public information" kept by government is of legitimate public concern, the Legislature has also recognized in Section 3(a)(1) that, in some instances, the individual's interest in confidentiality may outweigh the public's interest in disclosure. There may be circumstances in which the special nature of the information makes it of legitimate concern to the public even though the information is of a highly private and embarrassing nature. In general, however, the public will have no legitimate interest in such highly private facts about private citizens. Unless, therefore, the person requesting information of such a nature from the governmental unit can show special circumstances which make such private facts a matter of legitimate public concern, we believe that the information should be excepted from the mandatory disclosure provisions of the Act as information deemed confidential by a common-law right of privacy under Section 3(a)(1). Id. at 685.

Industrial Foundation also is helpful in analyzing Intervenor's conclusion on page 23 of its Brief that "If Appellants in this case cannot constitutionally maintain a cause of action for invasion of privacy for publication of information concerning their tenant files[10], 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

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[10] Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).

to the press." The Court saw the same privacy problem that our Attorney General did but concluded that the state now had an even greater responsibility to protect the privacy interest, it held:

> The Court thus held that the State may not protect an individual's privacy interests by recognizing a cause of action in tort for giving publicity to highly private facts, if those facts are a matter of public record.
>
> It therefore appears that, if the State wishes to protect a citizen's privacy interest in matters recorded in documents kept by the State, it must do so by restricting the availability of those documents to the public rather than by imposing sactions on those who would publicize such matters to which they have a right of access. Id. at 684.

In light of Florida's long history of protection of informational privacy, it is difficult to understand how one could declare that such a right does not exist in this state or that the courts, as discussed in our main brief, cannot enforce this right.

POINT III

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

The Tenants explored this issue quite sufficiently in their main brief; however, we do respond to Appellees' contention that the state interest in seeing that housing goes to people who are most needy and that government is open to the

people and that there is no corrupting of public officials, by stating that the state's interest is not of such a compelling nature that it would justify stripping public housing tenants bare so that the general public can rummage through the personal details of their lives. The Public Records Act was essentially promulgated so the public would have a way of monitoring the acts of its governmental decision-makers. Appellees have failed to recognize the distinction between those decision-makers and persons, such as the tenants, who are mere pawns in this governmental-public chess game. The further a person is from the decision making process, the lesser the public's interest is in his personal life. This interest becomes even more attenuated when one considers those public housing applicants who have not been accepted for housing and have not even received any governmental benefits.

Appellees, other than stating those general reasons for looking into governmental records, have asserted no compelling state interest in seeing tenants' personal intimate records concerning their family status, relationship or medical history. Appellees totally ignore the second requirement, that they demonstrate that the statute is as narrowly drawn as possible to "express only the legitimate interest at stake." Roe at 155. The requirement that the state use the least intrusive possible means in invading individual privacy rights cannot be overemphasized. Appellees' apparent willingness to support the use of a blunderbuss,

where a pea shooter would be sufficient, demonstrates their insensitivity to this constitutional principle.

CONCLUSION

Appellants stand on the conclusion in their main brief that the Public Records Act, as applied to Appellants, invades their protected intimate relationships while serving no compelling state interest and that public housing tenant-applicant files are exempt from the Public Records Act, both constitutionally and on public policy grounds. If there is a compelling state interest to be served by allowing any type of public access to said files, then the legislature is required to 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.

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellants was mailed to: Hon. Robert Shevin, Attorney General, State of Florida, Department of Legal Affairs, Civil Division, 725 South Calhoun Street, Tallahassee, Florida 32304 and Joseph A. Wanick, Esq., City Attorney, Attorney for Appellees, 1700 Convention Center Drive Miami Beach, Florida 33139 this 22nd day of November, 1978.

Respectfully submitted,

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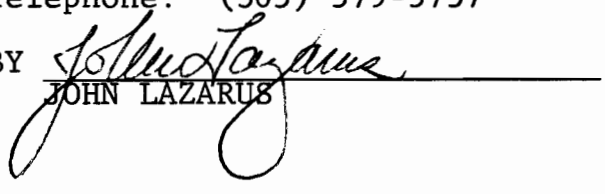
BY 
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