IN THE SUPREME COURT OF FLORIDA

DYER MICHEL, as Administrator and Custodian of the records of the MARION COUNTY HOSPITAL DISTRICT, d/b/a MUNROE REGIONAL MEDICAL CENTER,

Petitioner,

v

LEROY DOUGLAS,

Respondent.

CASE NO. 61,870
FIFTH DISTRICT COURT
OF APPEAL NO. 80-612

BRIEF OF AMICUS CURIAE

ON PETITION FOR CERTIORARI FROM THE
FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

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STATEMENT OF THE CASE AND OF THE FACTS

Amicus Curiae accepts and adopts the Statement of the Case and of the Facts as they appear in the Initial Brief of Petitioner.

ARGUMENT

CERTIFIED QUESTION I

ARE EMPLOYEE RECORDS, KEPT AS PART OF A TAX-SUPPORTED HOSPITAL'S PERMANENT FILES AND RECORDS, GENERALLY "PUBLIC RECORDS" WITHIN THE SCOPE OF CHAPTER 119?

"Public records" are defined in §119.011(1), Florida Statutes (1981), to encompass

> ... all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other materials, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

In Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So.2d 633, 640 (Fla. 1980), this Court determined that the foregoing definition of "public records" includes "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."

On page 5 of its Initial Brief, the Petitioner Hospital recognized that the accepted definitions of "public records" cover virtually everything an agency can possess, including the personnel records which are the subject of this Petition for Certiorari. Certified Question I should be answered in the affirmative, in that employee records kept as part of a tax

supported hospital's permanent file and records are "public records" within the scope of Chapter 119, as defined within the statute and by this Court.

CERTIFIED QUESTION II

ARE THE HOSPITAL'S EMPLOYEE RECORDS EXEMPTED FROM CHAPTER 119 BY §119.07(3)(a) OR BY §119.07(3)(f)?

The Hospital's employee records are not exempted from Chapter 119 either by §119.07(3)(a) or by §119.07(3)(f).

Section 119.07(3)(a) exempts from mandatory public exposure all public records which "are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law." In Wait v. Florida Power and Light Company, 372 So.2d 420 (Fla. 1979), this Court held that §119.07(2)(a), Florida Statutes (1975), exempted from the Public Records Act only those public records which are provided by statutory law to be confidential or which are expressly exempted by general or special law. 372 So.2d at 425. Section 119.07(2)(a) has been renumbered, without material alteration, and exists today as §119.07(3)(a).

News-Press Publishing Company, Inc. v. Gadd, 388 So.2d 276 (Fla.2d DCA 1980), relying upon this Court's decision and Wait determined that all documents falling within the scope of the Public Records Law are subject to public disclosure unless specifically exempted by an act of the Legislature and, absent such a statutory exemption, a court is not free to consider public policy questions regarding such disclosure.

The Petitioner Hospital argues that it has been granted an exemption from the Public Records Law for its personnel files. The Hospital can point to no specific provision in general or special law which exempts its personnel files. Rather, the Hospital suggests that Chapter 65-1905, Laws of Florida (1965), establishing Petitioner as a Special Tax District, and requiring Petitioner to make available for public inspection all minutes, records and books of account maintained by the Trustees, creates an exemption for Petitioner's personnel files under Chapter 119. Petitioner suggests that since the special act authorized public revelation of certain records, it must have intended to prohibit disclosure of all other records.

There are two significant flaws in Petitioner's argument. First, the obtuse reference in the 1969 Special Law mandating that the proceedings and meetings of the Board of Trustees be open to the public would not appear to be the type of "express" or "specific" exemption to the Public Records Law described by this Court in Wait or by the First District Court of Appeal in News-Press Publishing.

Second, the provision of Chapter 65-1905, Laws of Florida (1965) falls within Section 5 of that Act. Section 5 deals only with the powers and organization of the Board of Trustees of the Marion County Hospital District. Since the Sunshine Law requiring public bodies to hold open meetings had not been

enacted in 1965, the legislative requirement of the Board of Trustees hold open meetings and maintain public records was more likely a reflection of a legislative policy favoring open government and public disclosure than an attempt by the Legislature to shelter certain documents. Further, when Section 5 is read in conjunction with the entire Act, it appears that Section 5 applies only to the records of the Board of Trustees, and not those of the hospital in general. Therefore, even in the unlikely event that the legislative mandate to disclose certain records is determined to be a legislative exemption from the Public Records Law, such exemption only applies to the records of the Board of Trustees, which do not include the personnel files here in dispute.

Section 119.07(3)(f) is equally inapplicable to the Petitioner Hospital. Subsections d, e, f, g, h, i, j and k of §119.07(3) all pertain to criminal intelligence gathering records, and provide exemptions for such records under the Public Records Act. Subsection (f) exempts from disclosure "Any information revealing survellience technique or procedures or personnel." Couched between the exemption for the identity of confidential informants [§119.07(3)(e)] and the exemption for information revealing undercover personnel of any criminal justice agency [§119.07(3)(g)], it is doubtful that subsection 119.07(3)(f) was meant to exempt from public disclosure the records of the Petitioner Hospital. The lower court correctly

determined that §119.07(3)(f) and its grammatical structure refute any argument that the Legislature intended a general exemption for all types of personnel records.

Certified Question II must be answered in the negative. In the absence of a general or special law which expressly prohibits inspection of the Petitioner Hospital's records §119.07(3)(a) is not applicable to these proceedings. Additionally, §119.07(3)(f) exempts from public disclosure only specific files, records and information relating to the criminal justice system. Amicus therefore urges this Court to respond to Certified Question II in the negative.

CERTIFIED QUESTION III

SHOULD THE ACCESS TO THE PERSONNEL RECORDS UNDER CHAPTER 119 BE BARRED BECAUSE IT CONSTITUTUES AN INVASION OF THE EMPLOYEE'S FEDERALLY OR STATE PROTECTED RIGHT OF PRIVACY WHERE THE RECORD MAY CONTAIN HARMFUL OR DAMAGING INFORMATION?

The third question certified for review by this Court must also be answered in the negative. Access to personnel records under Chapter 119 does not constitute an invasion of an employee's federally or state protected right of privacy, whether or not the record contains harmful or damaging information.

Petitioner argues that each of its employees has a federally protected right to privacy, and that disclosure of the employee's personnel files under Chapter 119 would not only violate the employees right to privacy, but would also deprive that employee of due process and equal protection, as well as expose the Petitioner Hospital to the risk of being sued in federal court by the employee.

Amicus submits that to the extent a public employee has a privacy right not to have public records relating to him disclosed under Chapter 119, it is a common law privilege which is not included as an exemption to the Public Records Act. In Wait v. Florida Power and Light Company, supra, this Court determined that the Legislature intended to exempt only those public records made confidential by statutory law and not those

which were held confidential under the common law. The Court stated:

> If the common law privileges are to be included as exemptions, it is up to the Legislature, and not this Court, to amend the statute.

372 So.2d at 424.

This Court considered the federal right of privacy in Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., supra, and concluded that the Federal Constitution protects privacy interests in only three (3) catergories of cases:

> While there is no right of privacy explicitely enunciated in the Bill of Rights, the Supreme Court has construed the Federal Constitution to protect certain privacy interests. These protected interests can be said to comprise the Federal Constitutional right of privacy. This right of privacy cannot be characterized as a general right because its application has been strictly limited. It has been characterized as consisting of three protected interests: an individual's interest in being secure from unwarranted governmental survellience intrusion into his private affairs; a person's interest in decisional autonomy on personally intimate matters; and an individual's interest in protecting against the disclosure of personal matters.

379 So.2d at 636. It is clear from the quoted material that the first two categories are not relevant to the present case. Furthermore, this Court went on to discuss the third category--that dealing with "personal matters"--and determined that it is

too newly recognized and undefined as a category to provide a specific right to nondisclosure under the Public Records Act. Therefore, we are left with an exemption yet to be created.

It has been the consistent opinion of the Attorney General of the State of Florida that "personnel records" of employees paid from public funds or otherwise subject to legislative control are subject to the Public Records Law. For example, the Attorney General has advised that records of salaries paid to Assistant State Attorneys are open to public inspection: AGO 073-30; that personnel records of the Tampa Bay Area Rapid Transit Authority are subject to disclosure: AGO 075-9; and that applications for the position Municipal Department Head are public records subject to disclosure until and unless judicially determined to the contrary: AGO 077-48. Additionally, the Attorney General has advised that personnel records of civil service employees may not be maintained under two separate headings in such a manner that some records are subject to disclosure while others are not: AGO 073-51.

The opinions of the Attorney General have been consistent with decisions of Court, for example Wait v. Florida Power and Light Company, supra and Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., supra, in that they promote the announced legislative policy on public records. Section 119.01, Florida Statutes (1981), states, "It is the policy of this state that all

state, county, and municipal records shall at all times be open for a personal inspection by any person." The thrust and intent of the Public Records Law is obviously to promote rather than inhibit open government and disclosure. Nothing in the record before this Court or in the law cited to this Court warrants a decision to carve out, or "legislate", an exception for personnel records of any kind.

With regard to any state created right of privacy, the lower court correctly pointed out that in Shevin v. Bryon, Harless, Schaffer, Reid & Associates, supra, a majority of this Court held that there was no state right of privacy regarding disclosure of private matters under the Public Records Act. The common law "right of privacy" recognized in Cason v. Baskin, 20 So.2d 243 (Fla. 1944), would not shelter personnel files under this Court's reasoning in Wait v. Florida Power & Light Company, supra, which held that only those public records made confidential by statutory law, and not common law, are exempted from Chapter 119.

Finally, it is significant that the November 4, 1980 constitutional amendment creating a right of privacy in Florida recognized the significance of the public's right to access to governmental records. Article I, Section 23, Florida Constitution, provides:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This

> section shall not be construed to limit the public's right of access to public records and meetings as provided by law. [Emphasis supplied].

In light of the foregoing discussion Amicus submits that Certified Question III should be answered in the negative.

CONCLUSION

Employee records which are kept as part of a tax-supported Hospital's permanent files and records are "public records" within the scope of Chapter 119, Florida Statutes, and the answer to the first Certified Question should be in the affirmative. Neither §119.07(3)(a) nor §119.07(3)(f), Florida Statutes, exempts the Petitioner Hospital's employee records from the disclosure provisions of Chapter 119, and disclosure of such records would not violate any federally or state protected right of privacy. Consequently, Certified Questions II and III should be answered in the negative.

Respectfully submitted,

JIM SMITH
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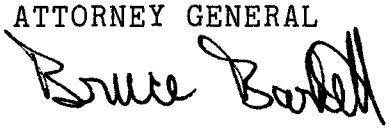

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae has been furnished by United States Mail to WILLIAM G. O'NEILL and JAMES A. CORNELIUS, Counsel for Petitioner, 822 E. Silver Springs Boulevard, P.O. Box 253, Ocala, Florida, 32678; JOHN B. FULLER and BRYCE W. ACKERMAN, Counsel for Respondent, 121 N.W. 3rd Street, Ocala, Florida, 32670; W. E. BISHOP, JR., Counsel for Amicus Curiae, Bishop & Behnke, P.O. Box 2105, Ocala, Florida, 32678 this 5 day of May, 1982.

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