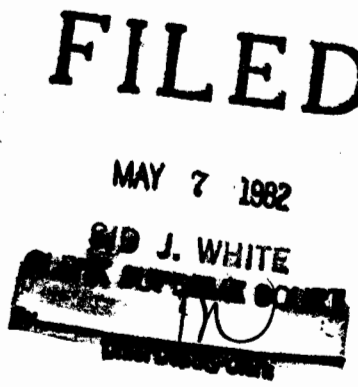
IN THE SUPREME COURT OF FLORIDA

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



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

Petitioner,

vs.

LEROY DOUGLAS,

Respondent.

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

ABBREVIATIONS AND DESIGNATIONS

The Record on Appeal in this case shall be referred to as "R", followed by the appropriate page number. The Transcript of the proceedings in the Circuit Court on May 14, 1980 shall be referred to as "T", followed by the appropriate page number. The Appendix which is attached to this brief shall be referred to as "A", followed by the appropriate page number.

Leroy Douglas, who was the Petitioner in the trial Court and who is the Appellant in the Fifth District Court of Appeal, shall be referred to as "Douglas". Dyer Michel, who is the administrator and custodian of the records of the Marion County Hospital District, was the Defendant in the trial Court and the Appellee in the Fifth District Court of Appeal, shall be referred to as "Michel". The employees represented as Amicus Curiae shall be referred to as "Amicus Curiae".

STATEMENT OF THE CASE

These are proceedings to review the decision of the Fifth District Court of Appeal which reversed a Final Order entered by the Honorable Wallace E. Sturgis, Jr., Circuit Court Judge for the Fifth Judicial Circuit, Marion County, Florida, denying a Petition for a Writ of Mandamus to compel Dyer Michel, as Administrator of Munroe Regional Medical Center, to permit Leroy Douglas to examine and inspect public records pursuant to Florida Statutes Chapter 119. On rehearing, the Fifth District Court of Appeal certified three questions as being of great public importance.

STATEMENT OF THE FACTS

The Respondent, Leroy Douglas, is a citizen of Marion County, Florida. (R, 1). The Petitioner, Dyer Michel, is the Administrator and Custodian of the records of the Marion County Hospital District, d/b/a Munroe Regional Medical Center. (T, 3). The parties are in agreement that Michel as Custodian of the records of the Munroe Regional Medical Center, has a duty pursuant to Chapter 119, Florida Statutes, to permit examination, inspection and copying of all public records in his custody. (R, 1, 7).

On or about April 24, 1980, Douglas requested that Michel, as Custodian of the records of Munroe Regional Medical Center, allow him to inspect and/or copy certain employment records, (specifically employment applications).(T, 3). The records which Douglas requested to examine were permanent records within Michel's custody as the Administrator of the Munroe Regional Medical Center. (T, 4). Michel refused Douglas' request to inspect, examine and/or copy the records, and at this point continues to refuse. (T, 4). As a result of Michel's refusal, Douglas was forced to file a Petition for Writ of Mandamus in order to enforce his rights pursuant to Chapter 119, Florida Statutes.

A hearing on Appellant's Petition for Writ of Mandamus was held on May 14, 1980, before the Honorable Wallace E. Sturgis, Jr., Circuit Court Judge for the Fifth Judicial Circuit, Marion County, Florida. (T, 1). After considering the stipulations of the parties,

the testimony presented by Michel and the arguments presented by counsel for Douglas, the trial Court denied the Petition for Writ of Mandamus, without any findings or showings that the subject records were exempt or outside the purview of Chapter 119, Florida Statutes. (R, 20).

A R G U M E N T

All of the issues involved in this appeal and the questions certified by the Fifth District Court of appeal as being of great public importance have been recently considered and resolved by this Court in Shevin v. Byron, Harless, Shaffer, Reid and Associates, Inc., 379 So2d 633 (Fla. 1980). The Shevin case involved public access to papers prepared by a consultant who was screening potential applicants for the position of managing director of the Jacksonville Electric Authority. The papers included resumes, memoranda, travel vouchers and psychological evaluations, including candidates candid reflections on their own capabilities and attributes. The Court reviewed the constitutional questions and determined that the only privacy right applicable was that of the right of disclosural privacy which has been alluded to by the U.S. Supreme Court in the cases of Whalen v. Roe , 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), and Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). In deciding the Shevin case, this Court analyzed that the U.S. Supreme Court had not given any substance to the right of disclosural privacy and until additional guidelines are laid down by that Court, the right to disclosural privacy didn't exist under the facts of the Shevin case. The facts of the present case and the records which Douglas seeks to examine are more clearly within the purview of Chapter 119 than the facts and records which were involved in the Shevin case and which were determined to be public records

and open for inspection. In Shevin the records involved were once removed from the public agency in that they were gathered and maintained by a consultant hired by the public agency and concerned applicants who were not yet, and in the vast majority of the cases, never became employees of the agency. In the present case, the records are maintained directly by the hospital district and involve employees of the hospital district. Therefore, this Court's opinion in Shevin that the right to disclosural privacy didn't exist is applicable to the present case. Neither the Petitioner nor Amicus Curiae has cited any authority, state or federal, which better defines, or in any way expands the right to disclosural privacy or provides additional guidelines as to the application of such a right. They have therefore failed to demonstrate any compelling reasons why this Court should recede from its opinion in the Shevin case.

I.

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

§119.011(1), Florida Statutes, (1979), defines public records as follows:

> "Public Records" means all documents, papers, letters maps, books, tapes, photographs, film, sound recordings, or other material, 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, supra, this Court construed the above statutory definition of public records as follows, at 640:

> A public record for the purposes of §119.011(1) is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.

This Court excluded from the definition of public records any materials which were prepared as drafts or notes in the preparation of permanent records and which were not actually the final record maintained by the agency. The Court went on to say that the question of whether records are permanent records, as opposed to drafts or notes which are not intended as final evidence of the knowledge to be recorded, would have to be determined on a case by case basis. This case by case analysis has absolutely no application in the present case in that the parties are in agreement and have stipulated that the material requested by Douglas was a permanent part of the records maintained by Michel as Administrator of the hospital district. Therefore, Petitioner and Amicus Curiae misconstrue the Shevin opinion, when they argue that the case by case analysis contained therein is applicable to the present case.

The records which Douglas has requested to examine are employment applications and permanent employment records, all of which were prepared in connection with the official operation of the hospital and are clearly intended to perpetuate, communicate or formalize the knowledge contained therein, within the above definition. (T, 3,4). Therefore, the records Douglas has requested are clearly within the statutory definition of public records as

stated by this Court in the Shevin case and are open for public examination, unless exempt under §119.07(3), Florida Statutes, (1979), or under general or special laws.

II

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

Exemptions from the Public Records Act are found within Florida Statutes §119.07(3)(a) which provides as follows:

> 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, shall be exempt from the provisions of sub-section (1).

In 1975 the Legislature amended this provision by substituting "all public records which are presently provided by law to be confidential" for "all public records which are presently deemed by law to be confidential". Ch. 75-225 (Laws of Florida)[emphasis added]. In Wait v. Florida Power & Light Company, 372 So2d 420, (Fla. 1979) this Court held that by enacting the above amendment the Legislature showed an intention to limit the exemptions for public records to those made confidential by express statutory law as opposed to judicially created or common law privileges. Therefore in the present case, in order for the records requested by the Appellant to be exempt from public inspection, there must be a statutory exemption.

Michel and Amicus Curiae contend that Chapter 65-1905(5), Laws of Florida, creates an exemption from the Public Records Act

for the employees personnel records from the Marion County Hospital District. Chapter 65-1905(5) provides as follows:

> The trustee shall cause true and accurate minutes and records to be kept of all business transacted by them and shall keep full, true and complete books of accounts and minutes, which minutes, and records books of accounts, shall at reasonable times be open and subject to inspection by the residents of the district...(A, 4)

A complete examination of Chapter 65-1905 indicates that section 5 of the Act deals only with the powers and organization of the Board of Trustee of the Marion County Hospital District. This section merely demonstrates a legislative intent that the proceedings and meetings of the Board of Trustees be open to the public. It must be recognized that at the time Chapter 65-1905 was enacted Florida had not yet passed the Sunshine Law requiring public bodies to hold open meetings. The requirements of Chapter 65-1905(5) that the hospital hold open meetings and maintain public records appears to be a precursor to the Sunshine Law. An examination of the enactment of the Florida Sunshine Law, Chapter 67-356, Laws of Florida, reveals that the language of this section is substantially similar to that of Chapter 65-1905(5) and is obviously intended to achieve the same purpose. (A, 7).

That Chapter 65-1905(5) applies only to the proceedings of the Board of Trustees of the hospital district is made clear by the fact that section 6 of the same Act deals with the authorization of the Board of Trustees to operate a hospital district. (A, 5). This is further exemplified by the fact that §37 of the same Act is a provision dealing with the hospital records and demonstrates that the Legislature recognized differences between the records of

the hospital and the records of the Board, a distinction not made in §5. (A, 6). Clearly, just because the Legislature has specifically mentioned certain records in Chapter 65-1905(5), Laws of Florida, which are open to public examination, this does not create an exemption by implication or innuendo. This argument ignores the Supreme Court's opinion in Wait v. Florida Power & Light Company, 372 So2d 420 (Fla. 1979) which holds that all records are open for examination under Chapter 119 unless expressly exempted from the Act. At the time Chapter 65-1905, Laws of Florida, was enacted, the Public Records Act, Chapter 119, Florida Statutes, was already in effect and therefore unless Chapter 65-1905 contained an express exemption for the personnel records of the hospital district, no exemption can be created by implication.

The argument that §119.07(3)(f), Florida Statutes, exempts hospital personnel records is without merit. §119.07(3) (f) reads as follows:

> Any information revealing surveillance techniques or procedures or personnel is exempt from provisions of (1).

This section is plainly designed to protect the secrecy of ongoing surveillance and investigations and has no application whatsoever to the personnel records of the county hospital district. This Court has recognized that the above exemption to the Public Records Act was added as an amendment in 1979 and was designed to protect investigative police reports. Rose v. D'Alessandro, 380 So2d 419 (Fla. 1980).

III

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

This question was recently reviewed in depth by this Court in Shevin v. Byron, Harless, et al, supra. In Shevin this Court reviewed the federal constitutional questions and determined that the only possible privacy right applicable to this case was that of the right of disclosural privacy or confidentiality which has been alluded to by the U.S. Supreme Court in the cases of Whalen v. Roe, supra and Nixon v. Administrator of General Services, supra. This Court correctly rejected the argument that public access to the personnel files of public employees was protected by the constitutional right first expressed in the case of Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), which is known as "Decisional Autonomy" in that disclosure of personnel files does not directly and significantly affect decisions concerning intimate, personal and family matters. Likewise, this Court correctly analyzed that the protections afforded by the Fourth Amendment to the U.S. Constitution involving unreasonable governmental searches and seizures would not be available to provide any right of privacy in connection with personnel files. The U.S. Supreme Court has analyzed both the right of decisional autonomy and the rights resulting from the Fourth Amendment and given the states direction and guidelines by which to apply those rights. As a result of these guidelines, this Court was able to determine whether the information involved in the Shevin case was protected from

public examination by the interests of Decisional Autonomy or the Fourth Amendment. The U.S. Supreme Court has done nothing more than allude to an interest of disclosural privacy or confidentiality and has provided no guidelines or directions in its application. In fact, Mr. Justice Stewart in his concurring opinion in Whalen v. Roe citing Katz v. U.S., 389 U.S. 347, 88 S.Ct. 507 (1967) reiterated that there "is no general constitutional right to privacy-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 life left largely to the law of the individual states." Therefore, outside of the factual situations of the Nixon case and the Whalen v. Roe case (which facts have absolutely no relation to the present case) the U.S. Supreme Court has provided no substance to the interests of disclosural privacy or confidentiality alluded to in those cases. This was the determination of the Shevin case and neither Michel nor Amicus Curiae has cited this Court to any case or cases subsequent to the Nixon or Whalen cases which would provide this Court with additional guidelines or provide a basis from which to recede from the Shevin opinion.

Assuming arguendo that individual citizens do have some constitutionally protected interest in confidentiality or disclosural privacy, it would be outweighed in this case by the public's right to know. The employees of the hospital district are public employees who receive monies collected from the citizens of the state as taxes. Public employment is a privilege

and not a right. The information gathered in these files which Respondent has not been allowed to examine is presumably, logically related to the employee's qualifications and abilities to perform their job. The public as the employer of these individuals, certainly has a right to review the qualifications and abilities of its employees. Any information contained in these files which is not logically and reasonably related to these individuals' qualifications, abilities or performance should not be in these files and the violation of the employees' rights would have occurred upon the entry of the unnecessary and damaging material in the file, and not upon the public's examination of that material. The public must be given the opportunity to determine whether its employees are qualified, able and properly performing in their employment. In the present case, Michel has unreasonably asserted that every item contained in the hospital's personnel files is unavailable for inspection by the public. Michel made no offer to provide portions of the files which he in his opinion deemed open for public inspection, nor did the trial Judge review the files in camera to determine whether any of the materials contained therein would be open to public inspection. There was absolutely no evaluation of the material involved to determine whether the public interest was outweighed by the individual interest.

Until the U.S. Supreme Court establishes that there is a substantive right to disclosural privacy arising out of a provision or provisions of the U.S. Constitution and gives even minimum guidelines as to the extent of such a right, it would be exceedingly

tenuous to hold a public agency liable under Title 42, U.S.C. §1983, based upon a release of public records pursuant to the Public Records Act, especially in light of the legitimate public interest. Further, even assuming arguendo that the Public Records Act does violate a public employee's rights to disclosural privacy, it would not be the hospital which has caused this violation but the State of Florida in that it is not a hospital resolution or act but rather a state statute which has occasioned the violation. The State of Florida has directed all of its agencies and boards to allow inspections of all records maintained and therefore any abuse of governmental authority is on a state level and not on a local level. Further, Michel as the public Administrator, is not subject to personal liability for his actions in compliance with statutory provisions, in the absence of bad faith. Owen v. City of Independence, Missouri, 448 U.S. 622, 100 S.Ct. 2502 (1980) at Page 1419.

Michel's argument that the release of personnel records will deprive hospital employees of due process and equal protection of the law was rejected by the Fifth District Court of Appeal and not certified to the Supreme Court. This argument is not supported by the statutes relied upon by Michel to create suspect classes. The exemptions for employee personnel records of credit union employees contained in §657.061(3)(a) Florida Statutes, (1979) and the exemption for The Department of Banking Employees found in §658.10(3)(a)

Florida Statutes, (1979) were repealed by Chapter 80-258(5) Laws of Florida and Chapter 80-260 §151, Laws of Florida, respectively, and are therefore inapplicable to Michel's argument.

There are limited exemptions for employees of the educational system found in §231.29(3) and §240.25(3) and §240.337, Florida Statutes (1979). These statutes provide exemptions from the Public Records Act only for the assessment files or evaluation records of educational employees. §231.29(2), Florida Statutes (1979) provides for procedures for assessing the performance of district school system personnel. That section provides that each individual shall be assessed annually, that a written record of each assessment be made, that the individual be informed of the criteria and procedure to be used, and that the written report of the assessment be shown to the individual and discussed by the person responsible for preparing the report. Sub-section 3 therein provides that the assessment file of each individual shall be open to inspection only by the School Board, the Superintendent, the principal, the individual himself, and such other persons as the teacher or Superintendent may authorize in writing. When read in context, sub-section 3 clearly provides exemption for only the assessment file of each individual and not the entire personnel file. The legislative intent that this be the case is evident from the legislative history of the statute. Prior to 1967 §231.29(1), Florida Statutes, (1965) provided as follows:

> The County Superintendent shall be responsibile for the records of each person employed in this county.

> The file of each person shall be open to inspection only by the County Board, the County Superintendent, the principal, the person himself, by such other persons as he may authorize in writing.(A, 9).

In 1967 this statute was amended to read substantially as it does today. Chapter 67-369, Laws of Florida.(A, 11) Clearly, prior to 1969 this statute provided for confidentiality of the entire file and the amendment in 1967 reflects the Legislature's intent to limit this exemption. It should be noted that this statute was amended in the same year that Florida created its Government in the Sunshine Law, a period in which the Legislature was seeking to open up the process of government to public scrutiny. §240.25(3), Florida Statutes, (1979) applies to employees of the university system and §240.337, Florida Statutes, (1979) applies to employees of the community colleges and both reflect the same limitations and content as the statute concerning district school board employees. The Florida Legislature, therefore, has not created two distinct classes of public employees, one whose personnel records are open to public inspection, and one whose records are not. The Legislature's merely created a limited exemption for the evaluation or assessment records of employees of public educational facilities, and no exemption has been created for the entire personnel record of these employees.

This exemption for the evaluation of assessment files of public education employees has a reasonable basis. District school boards are required to annually review the performance of their

personnel. §231.29(2), Florida Statutes, (1979). Community colleges are required to evaluate their personnel annually pursuant to the provisions of Florida Administrative Code Rule 6A-14.47. This section is enacted pursuant to the statutory authority of §240.325, Florida Statutes, (1979). Florida's universities also evaluate their personnel on an annual basis pursuant to the provisions of Florida's Administrative Code Rule 6C-5.05(1)(a). This section is promulgated pursuant to the provisions of §240.245, Florida Statutes, (1979). Where the Florida Legislature has statutorily provided for annual assessments or evaluations of instructional or institutional personnel, or where it could reasonably forsee that the Board of Education would make provisions for annual assessments or evaluations, the Legislature provided such assessment or evaluation file should remain confidential. In the case of Ortwein v. Mackey, 511 F.2d 696 (5th Cir. 1975) it was held that so long as the evaluation files were confidential then there would be no violation of an employee's liberty interest by the mere presence of derogotory information in those files. In the Ortwein case, the Court determined that §239.78, Florida Statutes, (1975), the predecessor to today's §240.253 protected the employee's liberty interest by preventing disclosure of derogotory comments maintained in his evaluation file. This was held to discharge the necessity for a hearing at which a non-tenured employee might contest the basis for his discharge. Provided that the derogotory statements

in the employee's evaluation file were not untrue, the employee would have no basis to challenge them as a deprivation of a constitutionally protected liberty interest. Therefore, the Legislature has a legitimate interest in avoiding multiple hearings to determine the validity of entries into an employee's assessment and evaluation file where such entries are statutorily required to be made. This is a reasonable basis to support the confidentiality of such assessment files. No such statutory requirement for annual evaluation of hospital employees exists. Therefore, there is no reason for the legislature to provide confidentiality of hospital employee assessments or evaluations.

The U.S. Supreme Court has recognized that "the equal protection guaranteed by the Fourteenth Amendment does not take from the states all powers of classification". Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). In addition, the Court has held that "when the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." Id. It is also recognized that the effect of such legislation on society is a legislative and not a judicial responsibility. Id. The Court further held that: "A court is called upon only to measure the basic validity of the legislative classification", when assessing an equal protection challenge. When no other independent right is at stake and "when there is no reason to infer antipathy, it is presumed that even improvident decisions will eventually be rectified by the democratic process." Id. Therefore, in the present case

because there is a valid and reasonable basis upon which to differentiate between the public employees in question, there is no violation of the equal protection clause of the Fourteenth Amendment of the U.S. Constitution.

In the event some of the personnel records of the hospital district contain untrue or defamatory information, it is conceivable that the hospital district could be held liable for its publication. However, any violation of the employee's interest or rights would have occurred at the time the untrue or defamatory information was entered into the permanent personnel record and not at the time of examination by the public pursuant to the Public Records Act. Employees have the right to protect against the entry of untrue and defamatory information into the personnel records by requesting an administrative hearing to determine the accuracy of the entry. Ortwein v. Mackey, supra.

Finally, Michel's reliance upon the case of Cason v. Baskin, 20 So2d 243 (Fla. 1945) to establish a state constitutional right to privacy is misplaced. Cason v. Baskin at best creates or establishes the common law tort of invasion of privacy in Florida. Michel may contend that he will be subjected to liability for the common law tort of invasion of privacy if he permits inspection of these records without prior employee consent. This simply is not the case however. As stated in Prossers Law of Torts, §117 (Fourth Edition, 1971), there are four (4) forms of the tort of invasion of privacy. These are intrusion, disclosure, false light, and appropriation. The only one of these

four which possibly could be applicable to the facts in this case would be disclosure. Although this form is the closest to being applicable it does not fit the factual circumstances of this case. In order for disclosure to apply, the facts must be private, not public ones. This, as explained by Prosser, means that facts which are a matter of public record and open to the public will not support a cause of action for their further publication. In addition, this tort requires that the matter disclosed be offensive or objectionable to a reasonable man of ordinary sensibilities. Florida recognizes that the fact that the information disclosed was contained in public records is a defense to this action. Harms v. Miami Daily News, Inc., 127 So2d 715 (Fla. 3d DCA 1961). The Legislature has included county hospital district personnel files within the definition of public records and therefore, any disclosure of them by the administrator of the hospital would clearly fall within the defense of public records.

Michel and Amicus Curiae have failed to establish that the personnel files of the Marion County Hospital District are protected from examination by the public by any provisions of the federal or state constitutions and therefore, certified question III should be answered in the negative.

C O N C L U S I O N

Based upon the foregoing arguments it is respectfully submitted that there is no constitutional right, statutory exemption or other grounds which would remove the employee personnel records of the Marion County Hospital District from the requirements of Chapter 119, Florida Statutes. Therefore, the Respondent respectfully requests that this Court affirm the decision of the Fifth District Court of Appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William G. O'Neill, Esquire and James A. Cornelius, Esquire, P.O. Box 853, Ocala, Florida 32678, attorneys for Petitioner, and W.E. Bishop, Jr., Esquire, and John C. Moore, Esquire, P.O. Box 1385, Ocala, Florida 32678, attorneys for Amicus Curiae, and Bruce Barkett, Esquire, Attorney General's Office, State of Florida, Room 1501, The Capitol, Tallahassee, Florida 32301, by mail, this 5th day of May, 1982.

Of Counsel