IN THE SUPREME COURT OF FLORIDA

THE TRIBUNE COMPANY,

Petitioner,

v.

NORMAN CANNELLA, etc., et al.,

Respondents.

Case No. 64,450
District Court of Appeal
Second District No. 82-1635

DePERTE, ROBERT, et al.,

Petitioners,

v.

TRIBUNE COMPANY

Respondent.

Case No. 64,453
District Court of Appeal
Second District No. 82-1635

BRIEF FOR AMICI CURIAE

TIMES PUBLISHING COMPANY AND
THE MIAMI HERALD PUBLISHING COMPANY

GEORGE K. RAHDERT, ESQUIRE
Rahdert, Anderson & Richardson
P. O. Box 960
St. Petersburg, FL 33731
(813) 823-4191

RICHARD J. OVELMEN, ESQUIRE
General Counsel
The Miami Herald Publishing Company
One Herald Plaza
Miami, Florida 33101

Attorneys for Amici Curiae

STATEMENT OF INTEREST OF AMICI CURIAE

Times Publishing Company publishes the St. Petersburg Times and the Evening Independent in St. Petersburg, Florida. Combined daily circulation exceeds 288,000 and, together, both papers employ more than 140 reporters and editors.

The Miami Herald Publishing Company publishes The Miami Herald, a daily newspaper with an average daily circulation of approximately 418,000 and an average Sunday circulation of 516,000.

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CITATIONS OF AUTHORITY

STATEMENT OF FACTS, STATEMENT OF THE CASE AND STATEMENT OF JURISDICTION

The amici curiae accept the statement of facts, statement of the case and statement of jurisdiction as set forth by the Tribune Company.

I.

THE ARCHIVES AND HISTORY ACT, CHAPTER 267, FLA. STAT. (1981) PREEMPTS ALL LOCAL AGENCY REGULATION CONCERNING THE AVAILABILITY OF PUBLIC RECORDS

An examination of the legislative history of Chapter 267 Fla. Stats. (1981), clearly demonstrates that this statute preempts local regulation regarding public records and is an exclusive mandate for establishing uniform "...management methods relating to the creation, utilization, maintenance, retention, preservation and disposal of records." Section 267.051(1)(a), Fla. Stats. (1981). As further set forth in the Public Records Act, the Division of Archives shall have the duty of giving "...advice and assistance to public officials in the solution of their problems of preserving, creating, filing and making available the public records in their custody..." Section 119.09, Fla. Stats. (1981) [emphasis supplied].

While the clear language of Chapter 119 and Chapter 267, Fla. Stats. (1981), demonstrates the exclusive authority of the Division of Archives to regulate logistical details in making public records available, the legislative history of these two enactments presents an even more compelling demonstration of preemption. The acts were introduced simultaneously, by the same Senators, and proceeded through legislative review and enactment in an essentially identical manner.

The two acts in question bear the common introduction date of April 4, 1967. See 1967 Journal of the Senate, State of Florida 97 and 1967 Journal of the House of Representatives, State of Florida. [Exhibit 1]. Both Bills were introduced by

the same four senators (Hollahan, Griffin, Thomas and Horne) and proceeded together through similar legislative review by the Urban affairs and Local Government subsection of the Committees on Government Reorganization. Journal of the Senate, supra. Finally, the two bills were passed by the full Senate only ten days apart. Journal of the Senate, supra at 163, 261. Passage in the House was separated by 12 days. Journal of the House of Representatives, supra at 370, 611.

The legislative intent expressed during the formulation of these two bills and the statutory language itself establish that Chapters 119 and 267, must be read together as preempting any local legislative determination attempting to govern access to public records. Work drafts of the two bills were presented to the Subcommittee on Data Processing and Records Management of the Government Reorganization and Efficiency Committee on March 24, 1966. Those present included Senators George Hollahan and Robert Williams, and staff member Jaffry. According to the Subcommittee Minutes at 3 [Exhibit 2]:

> Senator Williams presented to the Subcommittee work drafts of the two bills concerning records management which the Subcommittee asked the staff to prepare. . . . The first Bill reviewed was a bill relating to Public Records. Senator Williams explained that this bill is the act, if passed, which would put into the Statutes the information about public records that would be needed in order to make the second bill operate or have any effect.

These two companion enactments are both premised on nearly identical definitions of the two critical terms: "public records" and "agency." See Sections 119.011(1), (2), and 267.021(2), (3), Fla. Stats. (1981). At its March, 1966 meeting,

the Subcommittee reviewing this legislation discussed these definitions:

> Senator Hollahan moved that the Sub-committee adopt as the language for both of the bills the all inclusive definition of the word "record" as contained in that Section, with the removal of the exception clause. The motion was seconded and passed. Mr. Jaffry suggested that the definition of the word "agency" as contained in the bill creating a [State Archives and Records Management] Commission also be included in the Bill relating to public records.

Subcommittee Minutes at 5.

Not only did the companion legislation proceed from a common beginning through a common course in the legislature with identical definitional provisions, but the end result remains closely interrelated to this day. The Archives and History Act gives the Division of Archives the exclusive authority to regulate access to public records:

> The division shall adopt such rules as deemed necessary to carry out its duties and responsibilities under this chapter, which rules shall be binding on all agencies and persons affected thereby. The willful violation of any rules and regulations adopted by the division shall constitute a misdemeanor.

Section 267.031(4), Fla. Stats. (1981) [Emphasis supplied].

Section 267.051(1) (a), Fla. Stats., provides:

> It is the duty and responsibility of the division to establish and administer a records management program, including the operation of a records center or centers directed to the application of efficient and economical management methods relating to the creation, utilization, maintenance, retention, preservation and disposal of records.

Similarly, the Public Records Act exclusively recognizes the authority of the Division of Archives to advise on the logistics of making public records available:

> The Division of Archives, History and Records Management of the Department of State shall have the right to examine into the condition of public records and shall give advice and assistance to public officials in the solution of their problems of preserving, creating, filing and making available the public records in their custody. . .

Section 119.09, Fla. Stats., (1981) [emphasis supplied].

Based in part on this legislative history, and also on the clear expression of statute, the Attorney General has likewise concluded that the Division of Archives bears the exclusive authority to make rules for access to public records. In 1975 the Attorney General noted that "when Chapter 119 is read in conjunction with Chapter 267, it becomes readily apparent that state control regarding access, maintenance, management, retention, preservation and disposal of public records is exclusive and, hence, these areas are not proper subjects of attempted local regulation or local legislation." 1975 Op. Att'y. Gen. Fla. 75-50 (Feb. 27, 1975) [Exhibit 3].

The actions of the local agencies herein demonstrate an attempt to circumvent the exclusive State authority reposed in the Division of Archives to make uniform rules of access to public records, applicable on a predictable basis throughout the State. The agencies have thus undertaken local regulation or legislation which is forbidden by the Legislature's intent as expressed by the companion legislation of Chapters 119 and 267.

II.

LOCALLY LEGISLATED DELAYS IN ACCESS TO PUBLIC RECORDS WILL LEAD TO A LACK OF STATEWIDE UNIFORMITY IN VIOLATION OF THE PURPOSE AND INTENT OF CHAPTER 119, FLA. STATS. (1981)

A local rule imposing a fixed-time delay before access will be permitted is just as invalid as a locally-created exemption to Chapter 119. Florida courts consistently have disallowed locally-enacted exceptions to the Public Records Act, as well as judicially-created exceptions to the disclosure requirements of that statute.

Before 1975 it was not clear whether the Legislature's power to create exemptions to the Public Records Act was exclusive. Some suggested that judicial and common-law exemptions might exist in addition to statutory exemptions. However, this speculation conclusively ended with the extensive revision of Chapter 119 in 1975 and the amendment of Section 119.07(3)(a) which now provides that public records

> 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 disclosure. [emphasis supplied]. Recognizing the clear legislative intent inherent in the amendment of Section 119.07, the Fourth District Court of Appeal noted that the amendment was specifically intended to "preclude judicially created exemptions" to the Public Records Law. State ex rel. Veale v. City of Boca Raton, 353 So.2d 1194, 1196 (Fla. 4th DCA 1977). This Court later summarized that legislative intent, stating that

> in enacting §119.07(2) Florida Statutes, (1975), the legislature intended to exempt those public records made confidential by statutory law and not those documents which are confidential or privileged only as a result of the judicially created privileges of attorney-client and work product. 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.

Wait v. Florida Power & Light Co., 372 So.2d 420, 424 (Fla. 1979).

In subsequent Florida decisions addressing the issue of whether the Florida Legislature has retained the exclusive power to create exemptions to the Public Records Act the courts have been unanimous in their support and application of the standard set out in Wait by the Florida Supreme Court. The Fourth District Court of Appeal has noted on several occasions that "only the Legislature can create exceptions to the Public Records Act...", Morgan v. State ex rel. Shevin, 383 So.2d 744, 746 (Fla. 4th DCA 1980); that "all governmental records are open for public inspection and copying unless specifically exempted," Satz v. Gore Newspapers Company, 395 So.2d 1274, 1275 (Fla. 4th DCA 1981) [emphasis supplied]; and that "any exemption from the Public Records Act must originate in the legislature and not by judicial decision...," Satz v. Blankenship, 407 So.2d 396, 398, n.4 (Fla. 4th DCA 1981) [emphasis supplied].

Two recent Florida cases give strong support for the proposition that rules, regulations or policies followed by the local agencies here are invalid exemptions to the Public Records Act. In Douglas v. Michel, 410 So.2d 936 (Fla. 5th DCA 1982), cert. pending, the Fifth District addressed the issue of whether

an administrative rule promulgated by the Board of Trustees of a publicly funded hospital could exempt personnel records. The Munroe Regional Medical Center was created by Special Act of the Florida Legislature in 1965. The special act creating the hospital authority gave the Trustees the power to enact general rules for the operation of the hospital. Pursuant to that general grant of power the Trustees adopted a rule providing for "strict confidentiality for its employee personnel files." Id. at 938. Subsequent to the special act and promulgation of that administrative rule Chapter 119 was extensively amended to provide that only the Legislature may create exemptions to the Public Records Law. The Douglas court refused to keep the hospital's personnel records secret, holding that "clearly a policy adopted by a governmental agency cannot exempt it from the application of a general law." Id. at 938.

The second recent case which supports the Tribune Company's position is that of Gadd v. News-Press Publishing Co., Inc., 412 So.2d 984 (Fla. 2d DCA 1982). In Gadd the respondent hospital claimed that it was bound by statute to comply with the rules of the Joint Commission of Accreditation of Hospitals (JCAH); that the JCAH standards required confidentiality for records; and that therefore the hospital was required by statute to maintain its records in confidentiality. The Second District rejected the hospital's claim that the required compliance with the JCAH standards had created an exemption "provided by law" and also rejected the hospital's argument that §768.40(4), Fla. Stats., dealing with negligence and medical malpractice actions required

confidentiality, noting that "we are prohibited by the holding and reasoning of Wait from enlarging that statute [§768.40(2)] by interpretation to provide an exemption from Chapter 119." Id. at 895.[1/]

The rule announced by the two-vote majority of the Second District Court of Appeal in Roberts v. News-Press Publishing Co., 409 So.2d 1089 (Fla. 2d DCA 1982) amounted to a judicial endorsement of a locally created exemption to the public Records Act, in contradiction to the rule announced earlier in Gadd. Rather than basing its opinion on the strict provision of the Act, the Second District engaged in a legislative determination of preferred public policy objectives, by its ruling that:

> ...we do find that an enlargement of the Wait statement is warranted....We conclude that a temporary delay in the right of access to personnel records, in order to allow an employee a reasonable time to determine whether to assert any existing right of exemption or confidentiality, seems only logical and reasonable.

1/ See also Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W. 2d 668 (Tex. 1976), a case frequently cited in Florida due to the parallel relationship between The Public Records Act and the earlier Texas Open Records Act. See e.g., State ex rel. Veale v. City of Boca Raton 353 So.2d 1194, 1197 (Fla. 4th DCA 1978). In prohibiting the Texas Indistrial Accident Board from making agency rules limiting disclosure, the Texas Supreme Court ruled

> [w]hile a rule may have the force and effect of a statute in other contexts, we do not believe that a governmental agency may bring its information within exception 3(a)(1) by the promulgation of a rule. To imply such authority merely from general rule-making powers would be to allow the agency to circumvent the very purpose of the Open Records Act. [emphasis supplied].

Id. at 1094-1095 [emphasis supplied].

Once again, in the case at bar, the Second District has allowed forbidden "policy" reasons to ratify a locally-generated rule regarding access to public records.

> ...We therefore agree with Roberts that it is only reasonable to allow an affected employee a reasonable opportunity, once his or her personnel file has been requested, to review that file for the purpose of determining whether to assert a right to exemption or confidentiality....
>
> ...However, in accordance with the limitation on delay set forth in Section 119.11, we now hold that an agency shall have no longer than forty eight hours to comply with a Public Records Act request.

Tribune Co. v. Cannella, No. 82-1635, slip op. at 17 (Fla. 2d DCA Sept. 30, 1983).

Accordingly, the majority opinions in Roberts and in the case below violate this Court's long established rule of construction that Chapter 119 reserves to the Legislature the exclusive authority to vary requirements for a disclosure of public records.

III.

DELAYS IN ACCESS TO REQUESTED PUBLIC RECORDS MUST NOT EXTEND BEYOND A PERIOD NEEDED BY OFFICIALS TO PHOTOCOPY SUCH DOCUMENTS OR OTHERWISE PROTECT THEM FROM POSSIBLE DESTRUCTION

In Wait, supra, 372 So.2d at 425, this Court interpreted the "reasonable time, under reasonable conditions" clause of Section 119.07 to require prompt access to public records during regular business hours:

> It is clear to us that this statutory phrase refers not to conditions which must be fulfilled before review is permitted, but to reasonable regulations that would permit the custodian of the records to protect them from alteration, damage or destruction and also to ensure that the person reviewing the records is not subjected to physical constraints designed to preclude review.

Judge Scheb, dissenting in Roberts , supra, 409 So.2d at 1096, followed this interpretation.

Indeed, it is to be noted that the "reasonable time, under reasonable conditions" clause cuts two ways. On behalf of the public agencies, this clause has been construed to allow records custodians to assure orderly copying of records free of the risk of alteration, damage or destruction. But it is also to be noted that the clause is not merely for the convenience of the bureaucracy, and reasonableness has been required to insure that the rights of those reviewing records are not precluded by the policies and practices of government agencies. It is respectfully submitted that a 48-hour rule will effectively preclude public review of records, particularly where the records pertain to fast breaking news.

In another context this Court has recognized the simple axiom that where access to government information sought by the press and public is delayed, "news delayed is news denied." Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 910 (Fla. 1976).

State policy also dictates that Chapter 119, Florida Statutes, be construed liberally to afford the greatest possible access to records. In City of Miami Beach v. Berns, 245 S.2d 30, 40 (Fla. 1971), the Court said:

> We are persuaded to apply the rule that a statute enacted for the public benefit should be construed liberally in favor of the public even though it contains a penal provision. In this posture a reasonable construction should be applied giving full measure to every effort to effectuate the legislative intent.

Accord, Wolfson v. State, 344 So.2d 611, 613 (Fla. 2d DCA 1977).

The Second District, in its opinion below, found justification for its 48-hour delay rule in §119.11(2), Fla. Stats. (1981), which provides that an agency shall comply with court-ordered records inspections within 48 hours unless the court orders otherwise or unless the appellate court stays the order. Apparently the Second District viewed this section as the Legislature's assessment of what constitutes a "reasonable" time within which to comply. Such a view misapprehends the statute.

Clearly, § 119.11(2) allows the agency time to seek emergency appellate review: specifically, 48 hours. To assume that 48 hours is a reasonable delay period for any records request, as the Second District has done, is to ignore the obvious meaning and purpose of the specific, narrow delay allowed by § 119.11(2).

Moreover, the blanket approval of a 48-hour delay will result in "news denied" as described in McIntosh, supra. The statute already allows for excising of exempt information, where appropriate, and for copying of records, neither of which tasks alone or together results in more than a short delay. To expand that short delay into an automatic 48 hours in the case of police incident reports, for example, is to move back every news deadline two days, with a concomitant loss of immediacy of reporting to the public.

A close analysis reveals that the Second District's holding is in no way restricted to the particular facts. The holding is applicable to delay any request for any public record, a result unwarranted and unsupported by the clear statutory language of Chapter 119.

More importantly, by opening the Pandora's Box of judicially determining "reasonable" exceptions to the Public Records Act, the courts of Florida will be open for a protracted legislative session to examine every manner of assertedly reasonable reasons for nondisclosure.

IV.

ANY JUDICIALLY-RECOGNIZED EXCEPTION TO THE PUBLIC RECORDS LAW WILL CREATE A NEW FLOOR FOR MINIMAL COMPLIANCE, FROM WHICH FURTHER DELAYS WILL BE VENTURED, RESULTING IN INCREASED UNCERTAINTY, AND INCREASED LITIGATION

Dissenting in Roberts v. News-Press Publishing Co., 409 So.2d 1089, 1096 (Fla. 2d DCA 1982), Chief Judge Scheb recognized the probable effect of locally-adopted rules of access to public records:

> If a 24-hour delay in Lee County is permissible, longer delays in other counties could be upheld. This would lead to a lack of uniform accessibility to public records. Moreover, it would have a chilling effect on the right of the press to promptly examine public records.

This same logic applies with equal force now to the City of Tampa's 48-hour delay.

The recent experience of the amici curiae verfies Chief Judge Scheb's prediction. Every exception to the Public Records Law will be fully exploited by public agencies. Any small exception or variation announced by the courts will establish a new floor for minimal compliance, fully promoted by the next Continuing Legal Education program on local government laws, if not by the next newsletter of government associations or lobbies.

A perfect example of this tendency can be seen in the actions of the Pinellas County unified Personnel Board. Amicus curiae Times Publishing engaged in protracted litigation to open the personnel records of this agency, resulting in a February 4, 1983 decision of the Second District affirming the Circuit Court's decision that these were fully available public records. Pinellas County Unified Personnel Board et al. v. State

of Florida ex rel. Times Publishing Company, Nos. 82-345 and 82-1370 (Fla. 2d DCA, 1983). Even before the mandate of the appellate court issued, the Personal Board took full advantage of the Roberts decision, parroting its terms and applying a 24-hour waiting period as a matter of policy established by the Personnel Board's counsel, even before the Board itself could meet to adopt this policy. [See Exhibit 4].

Nor is such agency conduct unusual. Amicus curiae Times Publishing is currently litigating a mandamus action against the Sarasota County Sheriff's Department, contesting among other issues routine delays of three days to three weeks in gaining access to public records. The experiences of amici curiae suggest that wholehearted commitment to Chapter 119 has not been embraced by most public agencies.

If this unsettling process is permitted, in the end the press will be inhibited from carrying out its most vital function: providing timely information to the citizenry about the daily business of its own government. As Justice Boyd wrote in Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 910 (Fla. 1976):

> "It is a cherished and almost sacred right of each citizen to be informed about current events on a timely basis so each can exercise his discretion in determining the destiny and security of himself, other people and the nation. News delayed is news denied. To be useful to the public, news events must be reported when they occur.

V.

DELAYS IN ACCESS TO PUBLIC RECORDS MAY IN RARE CASES LEAD TO MISCHIEF IN THEIR PRESERVATION AND DESTRUCTION, AND WILL UNDOUBTEDLY UNDERMINE PUBLIC CONFIDENCE IN THE INTEGRITY OF PUBLIC RECORDS

The amici curiae have had unhappy experience with the destruction of public records pending a records request, in violation of the dictates of the Public Records Act and the rules of the Division of Archives. If the authority of the Division of Archives is undermined by greater local discretion (and confusion), and if a substantial period of delay is tolerated, any tendency to prematurely eliminate public records will be exacerbated.

In a previous matter the amicus curiae Times Publishing requested inspection of the public records of the Pinellas County Sheriff's Department on April 25, 1980. A meeting to discuss this request was scheduled for April 30. However, on the evening of April 29, the Chief of Operations (then a candidate for Sheriff) shredded a quantity of public records sufficient to fill five large garbage bags, necessitating a mandamus and injunction action to enjoin such practices. Eventually, in State of Florida ex rel. Times Publishing Co. v. The Pinellas County Sheriff's Department, 7 Med. L. Rptr. 1091 (Pin. Co. Cir. Ct. No. 80-5416-17, Feb. 2, 1981) the Circuit Court enjoined the Sheriff's Department from "shredding, mutilating, defacing or otherwise destroying" public records, further finding that the Department's policies "caused irreparable harm to the public's right to information concerning its official agencies." [See Exhibit 5].

This experience, hopefully rare in its occurence, is made possible by allowing broad local latitude in delaying the availability of public records. But even more important than preventing the rare instance of such conduct, it is imperative to avoid the appearance of impropriety. A uniform standard of reasonable and prompt access serves this end.

CONCLUSION

A local agency rule delaying the availability of public records violates Florida law and policy in a number of respects. Most fundamentally, a 48 hour delay provision contradicts the policy and presumption of open government, expressed by the rule of construction that a statute enacted for the benefit of the public should be construed liberally. Any other construction will validate all manner of locally legislated exemptions to the public records law, and will violate the Division of Archives' exclusive authority to establish logistics in making public records available to the public. The Second District's opinion is due to be reversed.

Respectfully submitted,

GEORGE K. RAHDERT, ESQUIRE
Rahdert, Anderson & Richardson
P. O. Box 960
St. Petersburg, FL 33731
(813) 823-4191

RICHARD J. OVELMEN, ESQUIRE
General Counsel
The Miami Herald Publishing Company
One Herald Plaza
Miami, Florida 33101

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail this 21 day of November, 1983, to: GREGG THOMAS, ESQUIRE, Holland & Knight, P. O. Box 1288, Tampa, Florida 33602; SANFORD L. BOHRER, ESQUIRE of Thomson Zeder Bohrer Werth Adorno & Razook, 10 Florida Southeast Bank Building, Miami, Florida 33131; NORMAN CANELLA, Chief Assistant State Attorney, State Attorney's Office, Fifth Floor, Hillsborough County Courthouse Annex, Tampa, Florida 33602; SALVATORE TERRITO, Assistant City Attorney, Fifth Floor, City Hall, 315 East Kennedy Boulevard, Tampa, Florida 33601; ERIC J. TAYLOR, Assistant Attorney General, Department of Legal Affairs, Civil Division, The Capitol, Suite 1501, Tallahassee, Florida 32301; EDWINA J. DURYEA, ESQUIRE, Stull and Heidt, P.A. 602 South Boulevard, Tampa, Florida 33606; and THE HONORABLE DANIEL E. GALLAGHER, Circuit Judge, Hillsborough County Courthouse, Room 375, Tampa, Florida 33602.

GEORGE K. RAHDERT, ESQUIRE