IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,450

ON REVIEW OF A CERTIFIED QUESTION
OF GREAT PUBLIC IMPORTANCE FROM
THE SECOND DISTRICT COURT OF APPEAL

THE TRIBUNE COMPANY,

Petitioner,

v.

NORMAN CANNELLA, CHIEF ASSISTANT STATE ATTORNEY, CYNTHIA SONTAG, DIRECTOR OF ADMINISTRATION OF THE CITY OF TAMPA, ROBERT DePERTE, ROBERT JONES, and ROY PIERCE,

Respondents.

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and 64,453

ROBERT DePERTE, ROBERT JONES, and ROY PIERCE,

Petitioners,

v.

THE TRIBUNE COMPANY,

Respondent.

CROSS-REPLY BRIEF OF DePERTE, JONES and PIERCE

February 6, 1984

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INTRODUCTION

Throughout this Cross-Reply Brief, ROBERT DePERTE, ROBERT JONES and ROY PIERCE, are referred to as "the Officers". The Officers' Initial Brief is referred to herein as "Officers' Br." Petitioner-Respondent, The Tribune Company, is referred to herein as " The Tribune", and The Tribune's Reply Brief is referred to herein as "The Tribune's Reply Br." Sections 119.01, et. seq. Florida Statutes (1981), are referred to herein as "the Public Records Act".

ARGUMENT

I. THE TRIBUNE HAS IMPROPERLY CHARACTERIZED THE FEDERAL CONSTITUTIONAL RIGHT OF DISCLOSURAL PRIVACY AND MISTATED THE OFFICERS' POSITION IN REGARD THERETO.

In its Reply Brief, The Tribune presented the position of the Officers as being "that a body of case law may develop recognizing that public employees have a federal constitutional right of disclosural privacy..." and "...if a delay period is not afforded prior to Public Records Act disclosure, this body of case law will be unable to develop, and the Officers' potential right to privacy will be left unprotected". (Emphasis added). The Tribune's Reply Br. 2. As stated by The Tribune, it would appear that the Officers are asking this Court to require delay based on the possibility that they may, someday, have a federal constitutional right of disclosural privacy worth protecting. This could not be further from the Officers' true position and the state of the law.

In fact, the federal constitutional right of disclosural privacy is not "potential" but actual, and provides protection to the Officers as citizens of the United States. Officers' Br. 8-13. Furthermore, the purpose of the delay period prior to disclosure is not to progress the state of the law as an end in

itself, but to provide adequate protection for the existing right. Naturally, incidental to such protection will be further development as to the parameters of the right under various sets of circumstances.

For the sake of brevity, the Officers will not reiterate the findings of the courts in Whalen v. Roe, 429 U.S. 589 (1976), Nixon v. Administrator of General Services, 433 U.S. 425 (1977), DuPlantier v. United States, 606 F. 2d 654 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981), Plante v. Gonzalez, 575 F. 2d 1119 (5th Cir. 1978), and Fadjo v. Coon, 633 F. 2d 1172 (5th Cir. 1981). Suffice it to say that in each of these cases, the court went to considerable length to protect the same right that The Tribune characterizes as nonexistent. See Officers' Br. 8-13. In disregard of Whalen, Nixon, DuPlantier and Plante, however, The Tribune asserts that the Officers rely solely on a "single statement" by the Fifth Circuit in Fadjo. The Tribune's Reply Br. 5. The "single statement" referred to by The Tribune was elicited from the court by the argument that Fadjo's privacy could not have been invaded because the information disclosed was a public record under the Public Records Act. The court responded: "It is clear that the legislature cannot authorize by statute an unconstitutional invasion of privacy". 633 F.2d at 1176, n.3. While The Tribune posits that

the court's response was "unremarkable", it is worthy of remark in that by so responding the court recognized that all information disclosed to government is not necessarily constitutionally disclosable to the public at large, even though this is exactly what the Public Records Act may appear to countenance, and what The Tribune asks this Court to mandate and the Officers to accept.

On the other hand, in stating that there is no federal constitutional right of disclosural privacy protecting public employees from disclosure to the public of their private matters, The Tribune has been forced to rely solely on cases dealing with financial disclosure or cases decided prior to the pronouncements of the Supreme Court of the United States of America in Whalen and Nixon. See The Tribune's Reply Br. 5. As pointed out in the Officers' Initial Brief, The Tribune is mistaken in equating the disclosure of financial information with the disclosure of all government compiled information about a public employee. Officers' Br. 15. The financial disclosure cases do, however, demonstrate the Officers' assertion that case law has evolved (and will continue to evolve) defining what disclosure, and about whom, will be constitutionally permissible under a given set of circumstances.

Moreover, in relying on DuPlantier and Plante for the proposition that public disclosure of information about police

officers, firemen and public building janitors is the same as public disclosure about senators and judges, and that such individuals have no disclosural privacy right, The Tribune has twice erred. Firstly, the public interest in disclosure about these various public servants differs because of their actual effect on and ability to affect the government, as does their expectation of privacy. Regardless of the fact that a clerk or fireman may be aware that government information about him is potentially available to the public, as a practical matter, he certainly does not expect to be a "public figure" and subject to the same scrutiny as a senator.

Secondly, in Plante, the court specifically stated that public office does not deprive an individual of constitutional protection of his privacy right. 575 F.2d at 1135-1136. Were it otherwise, the individual holding that most public of all public offices, the Presidency, would not have been afforded the protections the Court found necessary in Nixon.

II. A MANDATORY AND AUTOMATIC DELAY PRIOR TO THE RELEASE OF PUBLIC EMPLOYEE PERSONNEL RECORDS IS REQUIRED TO PROVIDE ADEQUATE PROTECTION OF THE EMPLOYEE'S FEDERAL CONSTITUTIONAL RIGHT OF DISCLOSURAL PRIVACY.

In its Reply Brief, The Tribune criticized the Officers for dealing in the "abstract". The Tribune's Reply Br. 9. The Officers assert, however, that The Tribune offers this Court the

much more dangerous position of dealing in absolutes. This Court should not be called upon, in one fell swoop, to decide each and every dimension of the federal constitutional right of disclosural privacy. Yet, The Tribune asks this Court to hold that no police officer has any constitutional right of disclosural privacy that could, under any circumstances, outweigh the interest in disclosure.

It is not difficult, however, to think of many examples where an officer's right of disclosural privacy would outweigh the public interest in disclosure. One such example is the situation where a criminal or other individual with a grudge against a police officer requests personal information about the officer for an evil purpose. If the release of the information were not delayed pending notification of the officer and his opportuity to object, who would guard his rights?

The example furnished above also reinforces and illustrates why objections prior to the request may not be properly considered before the request is made. As stated by the Officers in their Brief, the individual affected is capable of making a determination of the propriety of disclosure only upon disclosure to him of the request. Officers' Br. 19-20. Just as the relevancy of evidence may not be properly decided prior to trial, the relevancy of information pursuant to a request may not be

decided prior to the request. In this connection the case of Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983), cert. denied, 52 U.S.L.W. 3461 (1983), which related again to financial disclosure should be noted. It is cited by The Tribune for the proposition that pre-request objections adequately protect the individual. However, the law reviewed by the Barry court provided that objections to disclosure were to be adjudicated only after a specific request was made. Consequently, notification of the employee and delay are required.

The Tribune argues that delay pending notification of the employee and his opportunity to object is a "drastic and crippling remedy". In fact, however, The Tribune's scheme, i.e., would cripple the public's "first line of defense", the employing agency, in gathering critical information about public servants, it employs. It would also defeat the purpose of the Public Records Act by creating both public records and "secret" records, inaccessible to the public no matter what the request or the relevancy of the "secret" information.

Moreover, the Barry court found the cases of Montgomery County v. Walsh, 274 Md. 502, 336 A.2d 97 (1975), appeal dismissed, 424 U.S. 901 (1976), Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911 (1974), appeal dismissed, 417 U.S. 902 (1974), and Stein v. Howlett, 52 Ill. 2d 570, 289 N.E. 2d 409

(1972), appeal dismissed, 412 U.S. 925 (1973), which were cited by The Tribune throughout its Initial Brief and Reply Brief, to be both inapplicable to the issues and outdated in that they were decided prior to Whalen and Nixon. 712 F.2d at 1558.

In Barry, the court also recognized that all the information the government collects about an individual is not necessarily properly subject to disclosure, stating: "The adverse effect of public disclosure on privacy interests is considerably greater than the effect of disclosure to the [government]; at the same time, the [government's] interest in public disclosure is weaker in significant respects than its interest in obtaining financial information for internal review". 712 F.2d at 1561. As The Tribune would have it applied, no such distinction would be made pursuant to the Public Records Act.

The Tribune has cited no case ruling either that there is no federal constitutional right of disclosural privacy or that the right does not protect public employees. Nor can it do so.

The federal constitutional right of disclosural privacy has been firmly established in such cases as Whalen, Nixon, Plante, DuPlantier and Fadjo, and the Public Records Act must be applied in a manner consistent with the right so established. This Court is not called upon to settle all questions concerning public disclosure of information about public

servants, but to recognize the reality of the individual's federal constitutional right of disclosural privacy and provide it adequate opportunity for protection.

CONCLUSION

For the foregoing reasons, in addition to those set forth in the Officers' Initial Brief, this Court should require such delay as is necessary to notify the affected individual of the request of his personnel records. Subsequent to notification, the forty-eight (48) hour delay imposed by the Second District Court of Appeal would then be sufficient for the individual affected to make his objections, if any, based upon his privacy right. The burden, then, would be for the requesting party to show that the interest in disclosure overcomes and outweighs the individual's privacy right.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Cross-Reply Brief of Robert DePerte, Robert Jones and Roy Pierce, Respondents - Petitioners has been furnished by United States Mail to Luis G. Figueroa, Esquire, Assistant City Attorney, counsel for Cynthia Sontag, 5th Floor, City Hall, 315 E. Kennedy Boulevard, Tampa, Florida 33602; Eric J. Taylor, Esquire, Assistant Attorney General, counsel for Norman Cannella, Department of Legal Affairs, The Capitol-Suite 1501, Tallahassee, Florida 32301; Sanford L. Bohrer, Paul & Thomson, 1300 Southeast Bank Building, Miami, Florida 33131; Richard J. Ovelmen, Esquire, General Counsel, The Miami Herald Publishing Company, One Herald Plaza, Miami, Florida 33101; George K. Rahdert, Esquire, and Patricia F. Anderson, Esquire, Rahdert, Anderson & Richardson, Post Office Box 960, St. Petersburg, Florida 33731; Steven Carta, Esquire, Carta & Ringsmuth, Post Office Box 2446, Fort Myers, Florida 33902-2446; and to Julian Clarkson, Esquire, Gregg D. Thomas, Esquire, Steven L. Brannock, Esquire, Mike Piscitelli, Esquire, Holland & Knight, Post Office Box 1288, Tampa, Florida 33601, Attorneys for The Tribune Company, this 6th day of February, 1984.

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