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.

and 64,453

ROBERT DePERTE, ROBERT JONES, and ROY PIERCE,

Petitioners,

v.

THE TRIBUNE COMPANY,

Respondent.

INITIAL BRIEF OF THE TRIBUNE COMPANY

November 21, 1983

Julian Clarkson
Gregg D. Thomas
Steven L. Brannock
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INTRODUCTION

In this brief petitioner-respondent The Tribune Company is referred to as The Tribune; respondents-petitioners Robert DePerte, Robert Jones, and Roy Pierce are referred to as the officers or the police officers; respondent Cynthia Sontag, Director of Administration of the City of Tampa, is referred to as Sontag or the City; respondent Chief Assistant State Attorney, Norman Cannella, is referred to as Cannella. "Petition" refers to The Tribune Company's emergency petition for writ of certiorari filed in the Second District Court of Appeal and the "Reply" refers to The Tribune Company's reply to the responses to its emergency petition for writ of certiorari. "Exhibit" refers to the exhibits filed with The Tribune's Petition and Reply.

STATEMENT OF THE FACTS AND THE CASE

The Tribune seeks review of a decision of the Second District Court of Appeal, en banc, holding that a custodial agency may impose a mandatory delay in the disclosure of non-exempt public records of up to 48 hours after a request for those records is made. The permissibility of that mandatory delay period has been certified to this Court as a question of great public importance. The Tribune Company v. Cannella, 8 Fla.L.W. 2409, 2412 (Fla. 2d DCA Sept. 30, 1983).

This case arose out of a records request made pursuant to the Florida Public Records Act, Sections 119.01 et seq., Florida Statutes (1981) (the "Act"), by Carl Crothers, a reporter for The Tribune Company, a daily newspaper formerly published by The Tribune.[1] Crothers was seeking information for an article about the shooting death of John Emmanuel Riley. Exhibit 2 at ¶¶ 1, 2. On June 30, 1982, at about 11:00 p.m., three Tampa Police

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[1] The Tampa Times ceased publication on August 14, 1982.

Department officers had attempted to arrest Riley, who was shot and killed during the incident. Exhibit 1.

At 9:15 a.m. the next day, Crothers requested the personnel records of the three officers involved in the Riley shooting, Robert DePerte, Robert Jones, and Roy Pierce, including any materials concerning either prior disciplinary action or excessive use of force by the officers. The request was directed to respondent Cynthia Sontag, director of administration of the City of Tampa. Sontag refused to comply with the request. Exhibit 2. Explaining the denial, Sontag cited a policy adopted by the City of Tampa of postponing compliance with the Public Records Act for a period of seven days to permit notification by mail of the employee whose personnel records were requested.[2] Exhibits 2, 5.

That afternoon, The Tribune filed a petition for a writ of mandamus against Sontag seeking to compel production of the personnel records requested. In its petition, The Tribune directly attacked the delay policy of the City of Tampa as inconsistent

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[2] During the course of the litigation, an executive order of the City of Tampa reduced the mandatory delay period to three days. Exhibit 26.

with the statutory mandate of the Public Records Act. At an emergency hearing convened the next morning, July 2, 1982, Hillsborough County Circuit Judge Daniel Gallagher denied the petition for mandamus.[3] Exhibit 6 at 10-12.

On July 8, 1982, upon the expiration of the seven-day delay period imposed by the City, The Tribune renewed its Public

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[3] In the interest of brevity and clarity, The Tribune's factual statement is limited to only those facts most relevant to the delay issues certified to this Court. However, other obstacles not currently being reviewed by this Court blocked The Tribune's access to the records. At the hearing before Judge Gallagher, The Tribune learned that the records of the three officers had been transferred from Sontag to the State Attorney's office after Crothers' Public Records Act request was made. Exhibit 6 at 7-8. In part, the circuit court denied The Tribune's petition for mandamus because Sontag no longer had custody of the records. Exhibit 6 at 10-11, 13-15. Later that same afternoon, July 2, 1982, The Tribune filed a petition for mandamus against respondent Norman Cannella, Chief Assistant State Attorney, seeking custody of the records now in Cannella's hands. Exhibit 21. In a hearing convened July 6, 1982, Judge Gallagher ruled that the records sought by The Tribune were exempt from disclosure under the Act as criminal investigative and intelligence information within the meaning of Section 119.07(2)(d), Florida Statutes (1981). Exhibit 7. Cannella had argued that the records were exempted by the ongoing investigation of the three officers even though The Tampa Tribune had requested only historical personnel information, all of which was public prior to the shooting incident. Exhibit 8 at 14-16. The en banc decision of the Second District Court of Appeal condemned the action by Sontag and the State Attorney as an improper "shell game" and held that the records were not exempt as either criminal intelligence or investigative information. 8 Fla.L.W. 2409, 2411-2 (Fla. 2d DCA Sept. 30, 1983).

[4] The State Attorney's investigation of the shooting incident also concluded on July 8, 1982, removing the obstacle to disclosure placed by the circuit court's erroneous interpretation of the criminal intelligence and investigative information exemptions. Exhibit 9; Exhibit 10 at ¶ 2.

Records Act request.[4] Exhibits 9, 10. Counsel for the City informed The Tribune that the records would not be produced until Monday, July 12, to allow the department time to excise certain exempt information from the records and to allow time for the officers to make objections on the basis of any federal right of privacy. Exhibit 10 at ¶¶ 2, 3. A reporter returned to the City Attorney's office at 10:00 a.m. on Monday, July 12, 1982, and was told to return at 2:00 p.m. Upon returning shortly after 2:00 p.m., the reporter was told that the circuit court had held a hearing and entered a temporary restraining order forbidding release of the records. Exhibit 10 at ¶ 3; Exhibit 11.

That day the three officers had commenced an action to enjoin permanently any disclosure of their personnel files by the City. An ex parte proceeding was held the same day with the city attorney and counsel for the officers present. The Tribune received no notice of the filing of the action or of the hearing. Exhibit 11; Exhibit 16 at 5-6. Citing the privacy rights of the three officers, Judge Gallagher entered a temporary restraining order forbidding release of the personnel records until Friday, July 16, at 3:15 p.m. at which time the court scheduled a hearing to determine whether the restraining order should be continued. Exhibit 11.

Frustrated once again in its attempt to gain access to the public records it sought, The Tribune immediately filed an emergency petition for a writ of certiorari with the Second District Court of Appeal seeking emergency review of the trial court's orders preventing disclosure of the records.

On Friday, July 16, 1982, shortly before the scheduled state court hearing on their privacy claims, the three officers filed a complaint in the United States District Court for the Middle District of Florida seeking an order permanently enjoining the City's disclosure of their personnel records. Exhibit 12. The complaint was grounded solely upon the officers' claim that the release of their files would violate their constitutional right to privacy. Id., at ¶ 1. The claim was virtually identical to the privacy claim already pleaded in the officers' state court action. Compare Exhibit 11 with Exhibit 12.

Judge Krentzman of the Middle District granted ex parte the officers' motion for a temporary restraining order prohibiting the release of the personnel records. Exhibit 13. Counsel for The Tribune learned of the federal court's action only upon arriving at Judge Gallagher's chambers later that afternoon for the scheduled state court hearing. At that hearing, Judge Gallagher deferred ruling on the extension of the temporary restraining order imposed by his court pending action by Judge Krentzman. Exhibit 16 at 11.

On Monday, July 19, 1982, Judge Krentzman granted The Tribune's motion to intervene in the officers' federal court action and on July 22, 1982, dissolved the federal temporary restraining order, holding that the officers did not have a reasonable likelihood of success on the merits of their privacy claim. Exhibit 17. Immediately upon learning of the removal of the federal obstacle to the disclosure of the records, The Tribune renewed its Public Records Act request to Sontag. She refused to release the

records once again, asserting that there was some doubt whether the temporary restraining order issued by Judge Gallagher was still in effect (despite the fact that it was set to expire by its own terms on July 16, 1982, Exhibit 11, and despite the fact that under Florida law, such orders automatically expire in ten (10) days. Rule 1.610, Fla.R.Civ.P. Exhibit 18 at 3-5.

At a hearing convened July 23, 1982, Judge Gallagher made it clear that the state temporary restraining order was no longer in effect. Exhibit 18 at 23. There being no further legal obstacles to the release of the records, The Tribune renewed its petition for a writ of mandamus against Sontag. The court refused to act on the petition on the ground that the pendency of the certiorari proceeding in the Second District Court of Appeal prohibited it from doing so. Exhibit 18 at 21-22. Unprotected by any restraining order, the City then released the records sought by The Tribune. 8 Fla.L.W. at 2410.

Because of the importance of the issues before the court, the Second District Court of Appeal proceeding continued. Responding to The Tribune's petition, the three officers relied upon Roberts v. News-Press Publishing Co., Inc., 409 So.2d 1089 (Fla. 2d DCA 1982), petition denied 418 So.2d 1280 (Fla. 1982), to support the mandatory seven-day delay rule. Roberts held that a similar 24-hour mandatory delay of the release of personnel records was justified to protect any potential privacy right of the employee whose records were requested. 409 So.2d at 1094-95. The Tribune argued that any such delay in the release of public records was

unjustified and statutorily forbidden and asked the district court to recede from Roberts. Reply at 12-13.

Oral argument on all the issues presented by The Tribune's emergency petition for certiorari initially occurred before a three judge panel. A majority of that panel felt that Roberts should be revisited. 8 Fla.L.W. at 2115-6 (Danahy, J., dissenting). Accordingly, the district court issued an order, on its own motion, setting an en banc hearing of the court to address the following issue:

> IS ANY DELAY IN RELEASING PERSONNEL RECORDS PURSUANT TO THE PUBLIC RECORDS ACT, CHAPTER 119, FLORIDA STATUTES (1981), REASONABLE AND PERMISSIBLE?

The district court, en banc, issued its ruling on September 30, 1983.[5] By a five to four vote, the Roberts decision was reaffirmed. In that portion of its decision relevant to this proceeding, the court held that, although the officers had no right to privacy in their personnel records, a custodial agency may impose an automatic and mandatory delay in the disclosure of nonexempt public records for up to 48 hours

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[5] This case was the first in the history of the Second District Court of Appeal heard en banc.

[6] Despite the fact that the records were released before the court ruled on the emergency petition for certiorari, the district court agreed that the challenged actions were "capable of repetition, yet evading review," and thus, not moot. Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed. 2d 532 (1975). Obviously, the propriety of the seven-day delay period could never be fully litigated prior to its expiration. See, Weinstein v. Bradford, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975).

after a request for those records is made.[6] 8 Fla.L.W. at 2411. The following two questions of great public importance were certified to this Court:

1. MAY DISCLOSURE OF NONEXEMPT PUBLIC RECORDS AUTOMATICALLY BE DELAYED FOR A SPECIFIC PERIOD OF TIME FOR ANY REASON?

2. IF THE ANSWER TO THE FIRST QUESTION IS YES, WHAT IS THE MAXIMUM PERMISSIBLE DELAY PERIOD, AND FOR WHAT PURPOSE OR PURPOSES MAY THE DELAY PERIOD BE INVOKED?

ARGUMENT

This petition presents issues of far reaching importance to the continued viability of the Florida Public Records Act. The decision of this Court will determine whether the Act remains a useful tool for the citizens of Florida in obtaining timely information about their government or whether the Act is reduced to a hollow shell, too costly, time consuming and difficult for the average citizen to enforce. The danger is posed by the Second District Court of Appeal's erroneous construction of the Public Records Act in a manner inimical to its purpose. The court (based upon it interpretation of public policy) engrafted by judicial legislation a provision onto the Act permitting records custodians to automatically delay the release of personnel records to allow public employees to assert privacy rights in their records. As history shows, the delay will serve only to obstruct and prevent, or at least seriously delay, disclosure of public records under the Act.

The district court erred. The statute neither permits mandatory delay periods nor allows the courts to engraft such periods onto the Act as a matter of public policy. Moreover, even if this Court wished to create a new Florida or federal constitutional right of disclosural privacy, the mandatory delay imposed by five members of the district court is neither necessary nor appropriate to protect the privacy interests of public employees. The employees' privacy rights in their personnel records (to the extent such rights even exist) cannot be viewed in a vacuum. Rather, they must be balanced against the public's

compelling interest in timely access to information directly reflecting on the performance and qualifications of those whose salaries they pay.

The questions certified to this Court ask if Public Records Act disclosure may be delayed for any reason. The facts giving rise to this petition concern only the clash between the privacy rights of public employees and the Public Records Act. The Tribune's brief will be restricted to whether an automatic delay period for the purpose of protecting the public employee's right of privacy is permissible under the Public Records Act either as a matter of public policy or as a matter of constitutional law.

I. THE DISTRICT COURT ERRED WHEN IT CONSTRUED THE PUBLIC RECORDS ACT TO PERMIT MANDATORY AND AUTOMATIC DELAY IN THE DISCLOSURE OF NON EXEMPT PUBLIC RECORDS.

The district court decision anomalously reached two contradictory conclusions. Following the mandate of Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980), the district court unanimously held that the officers had no right to privacy in their personnel records. 8 Fla.L.W. at 2412. Yet, it held that the Act could be construed to permit a mandatory delay to allow public employees to assert this non-existent right. Although its analysis is couched as statutory construction, in reality the court was improperly legislating a public policy exception to disclosure based upon its own conception of reasonableness. The plain language of the statute leaves no doubt that personnel records are public records and that their release may not be automatically delayed.

A. Personnel Records Of Police Officers, Just As Those Of Any Other Public Employee, Are Public Records

There was no serious doubt in any of the proceedings below concerning whether the personnel records of the three policemen were public records, "at all times...open for a personal inspection by any person." § 119.01, Fla. Stat. (1981). According to the district court: "It is beyond peradventure that personnel files of city or county employees are public records." 8 Fla.L.W. at 2411. The public nature of personnel records was definitively settled by two decisions of this Court overturning two district court of appeal decisions that had blocked access to personnel records. In News-Press Publishing Co. v. Wisher, 345 So.2d 646 (Fla. 1977), this Court held that the public was entitled to access to a written reprimand placed in the file of a public employee. Although this Court declined to address the broad question of access to personnel files in general, the decision clearly recognized the public's significant interest in access to files detailing the job performance of public employees. Id. at 647-48.

Any doubt about the reach of the Wisher decision was erased by this Court's subsequent decision in Shevin, holding that files of applicants to county employment positions were public records. Those applications contained virtually the same information that would be contained in any personnel file:

> These and other papers, accumulated during the course of its search, identified the prospects and recorded their addresses, current positions in the utility field, biographical data, and comments by the prospects on their personalities, personal strengths and

> weaknesses, aspirations, work and living habits, and families.

379 So.2d at 635. This Court rejected arguments that statutory, public policy, or constitutional considerations exempted these records from disclosure. Id. See also, Douglas v. Michel, 410 So.2d 936 (Fla. 5th DCA 1982),(personnel files of hospital employees are not exempt public records); Roberts v. News-Press Publishing Co., 409 So.2d 1089 (Fla. 2d DCA 1982), petition denied 418 So.2d 1280 (Fla. 1982)(personnel files of county employees are public records); Mills v. Doyle, 407 So.2d 348 (Fla. 4th DCA 1981) (grievance record contained in teacher personnel records are public records).

There is no reason to analyze police personnel records any differently. State ex rel. Times Publishing Company v. Pinellas County Sheriff's Department, 7 Med.L.Rptr. 1097 (Fla. 6th Cir. 1971); See Snyder, "Discovery of Police Personnel Files in Criminal Proceedings," 53 Fla. B.J. 119 (1979). If anything, the policy of public disclosure applies with greater force in the case of police personnel files because of the literal life and death power held by members of the police force. The citizenry must have an effective right to review the performance of those they place in such an office of trust:

> The public has the right to full disclosure of the conduct of its police officers in order to determine whether these officers of government are appropriately discharging their assigned duties and responsibilities.

8 Fla.L.W. at 2411; See Miami Herald Publishing Co. v. Marko, 352 So.2d 518 (Fla. 1977).[7]

B. Permissibility Of A Mandatory Delay Period Cannot Be Inferred From The Plain Language Of The Statute

As the district court itself recognized, there is no specific statutory provision in the Public Records Act giving a public agency the right to impose a mandatory delay period upon public records disclosure. 8 Fla.L.W. at 2411. On the contrary, the Act states with specificity: "all state, county, and municipal records shall at all times be open for a personal inspection by any person." § 119.01, Fla. Stat. (1981).

Only two provisions within the Act can arguably modify the express requirement that records be open at all times. Section 119.07(1)(a) provides that every person who has custody of public records "shall permit the records to be inspected and examined by any person desiring to do so, at reasonable times, [and] under

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[7] Apparently, these interpretations accord with the legislature's intent. Recent actions by the legislature have exempted portions of police personnel files. Chapter 83-136 Laws of Florida (1983); § 119.07(3)(K), Fla. Stat. (1982 Supp.). Aware of judicial decisions concerning the public nature of personnel files, Walsingham v. State, 250 So.2d 857 (Fla. 1971), the legislature could have exempted police personnel records entirely. Of course, it did not. It must be assumed that what it did not specifically exempt, it intended to remain public. See, Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 4th DCA 1976) (expressio unius est exclusio alterius).

reasonable conditions..." The Second District Court of Appeal decision in Roberts v. News-Press Publishing Company, Inc., seized upon this language to approve a twenty-four hour delay imposed by the Lee County Commission prior to the release of personnel records. The Roberts court decided it was "reasonable" to permit the delay to allow the employee to be notified and to assert any privacy concerns. 409 So.2d at 1094-95. However, Roberts directly contradicted the unequivocal holding of this Court:

> It is clear to us that this statutory phrase [at reasonable times, and under reasonable conditions] 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 restraints designed to preclude review.

Wait v. Florida Power and Light Co., 372 So.2d 420, 425 (Fla. 1979).[8] Roberts attempted to distinguish Wait by ruling that Wait forbade preconditions that denied, rather than "merely" delayed, disclosure. This interpretation ignores the obvious in-

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[8] In his advisory role, the attorney general of Florida has taken an identical position -- reasonable conditions "do not include anything that would hamper or frustrate, directly or indirectly, a person's right to inspecting and copying." Office of the Attorney General, Florida Open Government Laws Manual 43 (1982). See also 1975 Op. Att'y Gen Fla 075-50 February 27, 1975). No condition is more frustrating to the news media than unreasonable delay. See note 10, infra. Release of the extremely newsworthy information sought in this case was delay for three weeks.

tent expressed throughout the Act that timely disclosure is as important as full disclosure. § 119.01, Fla. Stat. (1981). See Gannett Company v. Goldtrap, 302 So.2d 174 (Fla. 2d DCA 1974).

The intent of the reasonable terms and conditions language is obvious. Immediate disclosure is sometimes necessarily effected by administrative and practical factors. It is certainly unreasonable, for example, for a member of the public to request the immediate production of 500 personnel records. Likewise, it is unreasonable to expect normal requests to be processed after the close of the agency's business hours. But it is just as unreasonable to impose arbitrary and automatic delays unrelated to the custodian's ability to gather and turn over the specific records requested. 8 Fla.L.W. at 2415 (Danahy, J., dissenting).

The legislature's use of the "reasonable times and conditions" language was designed to provide the flexibility necessary to respond to a multitude of different types of public records' requests. The legislative intent was to insure a case by case analysis which is totally inconsistent with the mandatory and automatic delay period established by the district court. The inflexibility in the district court's forty-eight hours' rule should be just as troublesome for the City in the production of large numbers of records as it is for the media to have to wait two days for the production of three personnel files.

Perhaps recognizing the inherent infirmity of Roberts, the district court receded from express reliance upon the reasonable

terms and conditions language of Section 119.07(1)(a). Rather, it relied upon Section 119.11(2) to authorize the delay. That section provides:

> Whenever a court orders an agency to open its records for inspection in accordance with this chapter, the agency shall comply with such order within 48 hours, unless otherwise provided by the court issuing such order, or unless the appellate court issues a stay order within such 48 hour period.

§ 119.11(2) Fla. Stat. (1981)(emphasis added). The irony, of course, is obvious. The district court has cited a provision which requires the courts to expedite Public Records Act proceedings to support mandatory disclosural delays. The statute has been turned upon its head.

The unambiguous intent of Section 119.11(2) is to avoid delay of records disclosure when the agency wishes to appeal an adverse judgment in the trial court. In the usual civil action when a public agency is unsuccessful before a lower court, it may receive a stay of the lower court's order automatically simply by filing a notice of appeal. Rule 9.310(b)(2), Fla.R.App.P. The people of Florida, through their legislature, have determined that such automatic delays are completely unacceptable when the appeal is taken from a trial court order requiring the disclosure of public records. Thus, a stay is granted only if the appellate court rules that there is a significant probability of damage if the records are disclosed. §§ 119.11(1) and (3), Fla. Stat.

(1981).[9] The custodial agency has only 48 hours to file its notice of appeal, brief the stay issues, and receive a ruling from the appellate court. Nowhere else in the entire body of Florida statutory law is such a heavy burden placed upon those who wish to delay the effective ruling of a trial court. This procedure is totally consistent with Florida's long history of open government.[10]

The Act (and the procedural rules applicable to the Act) is replete with additional legislative indicia that timely disclosure is of the essence.[11] For example, Section 119.11(1) provides that whenever a citizen must resort to litigation to pry

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[9] Section 119.11(2) conflicts with Florida Rule of Appellate Procedure 9.310(b)(2) which provides that a notice of appeal filed by a state agency operates as an automatic stay pending review. This Court resolved that conflict by holding that a stay pending review is a matter of procedure. Thus, the stay provision in Section 9.310 takes precedence over Section 119.11(2). Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979). This ruling does not detract from the intent evidenced by the legislature in adopting Section 119.11(2). Carson v. Miller, 370 So.2d 10 (Fla. 1979).

[10] Florida has adopted a policy of openness in government unequaled by any other state. In re Petition of Post-Newsweek Stations, 370 So.2d 764 (Fla. 1979). To achieve that end, Florida courts have held that the Act must be liberally construed to effect its disclosural provisions. Wolfson v. Florida, 344 So.2d 611, 613 (Fla. 2d DCA 1977). See Board of Public Instruction of Broward County v. Doran, 224 So.2d 693, 699 (Fla. 1969) ("Statutes enacted for the public benefit should be interpreted most favorably to the public.").

[11] Disclosure, even complete disclosure, is meaningless if it is delayed. As this Court has stated so succinctly, access to timely information is "a cherished, almost sacred right of each citizen..." State ex rel Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 910 (Fla. 1976). To be useful, information must be reported on a timely basis. "News delayed is news denied." Id.

a public record from the custodial agency "the court shall set an immediate hearing, giving the case priority over pending cases." Stronger, less equivocal language could not have been used. "Immediate" does not mean forty-eight hours. Florida Rule of Appellate Procedure 9.100 provides for immediate review by the appropriate district court of appeal of any order excluding the press or public from access to any judicial records. To engraft delay procedures onto other provisions in the Act renders these timeliness provisions meaningless and improperly introduces disharmony into the statute. Woodgate Development Corp. v. Hamilton Investment Trust, 351 So.2d 14 (Fla. 1977).

Although the Act is amended nearly annually, 8 Fla.L.W. at 2414, (Lehan, J., concurring in part, dissenting in part), the legislature has not seen fit to impose privacy delay periods in disclosure even though it has been clear since at least 1980 that access to personnel records could not be denied. Such inaction is telling.[12] Williams v. Jones, 326 So.2d 425 (Fla. 1975), appeal dismissed, 429 U.S. 803, 97 S.Ct. 34, 50 L.Ed.2d 63 (1976) (legislature is presumed to be aware of statutory interpretations of state's highest court). Clearly, if the Florida legislature had wished to provide for pre-disclosure review by interested

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[12] The legislature has been quick to act in other contexts. For example, when courts began construing the Act to permit public policy exemptions to disclosure, the legislature amended the statute to forbid such non-statutory exemptions. Wait, 372 So.2d at 424. See Rose v. D'Alessandro, 380 So.2d 419, 419-20 (Fla. 1980).

private parties, it could have added a delay procedure in the statutory scheme.

If the Florida legislature felt that release of public employee personnel files was an invasion of privacy, it could have easily adopted a procedure to rectify that problem. No such procedure, however, has been adopted.[13] The absence of such a mechanism indicates that the legislature, in balancing the privacy interests of the public employees against public access delays, has favored expedited disclosure.[14]

C. The District Court Of Appeal Erred When It Engrafted A Delay Provision Onto The Statute As A Matter Of Public Policy

After rejecting the existence of the constitutional right of privacy, the district court stated:

> 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. The public has a right to know and have access

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[13] As was cogently pointed out by the dissent, local rules imposing delays or other statutory preconditions upon public records disclosure have been pre-empted by the State's comprehensive and pervasive legislative scheme. 8 Fla.L.W. at 2412-13 (Lehan, J., concurring in part, dissenting in part). According to Judge Lehan, the legislature's requirement that records be open at all times forecloses local regulation of differing time-requirements. Id.

[14] Florida decisions holding that no Florida or federal constitutional right of privacy exists to impede the release of state personnel records indicate that the legislature has balanced its interests wisely. See Shevin, 379 So.2d at 638-39.

> to pertinent records. On the other hand, the employee should be accorded a modicum of protection if for no other reason than one of fairness and equal treatment.

8 Fla.L.W. at 2411 (emphasis added).

The court has substituted its conception of "fairness and equal treatment" for the legislature's. This it may not do. No proposition is more well established in the case law construing the Public Records Act than the edict that contravening public policy considerations may not alter the clear language of the Act. For example, in Wait v. Florida Power and Light Co., 372 So.2d 420 (Fla. 1979), this Court clearly stated that the requirements of the Act were to be followed to the letter. Despite the great deference given to the confidentiality of communications between attorneys and clients, this Court rejected the judicial creation of an attorney-client or work product exemption from the Act:

> 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.

Thus, the Act exempts from public disclosure only those public records that are provided by law to be confidential, or which are expressly exempted by general or special law. § 119.07(3)(a), Fla. Stat. (1982 Supp.); Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980). The courts are not free to balance the relative significance of the public's interest in disclosure with the damage to an individual or institution resulting from such disclosure. News-Press Publishing Co. v. Gadd, 388 So.2d

276, 278 (Fla. 2d DCA 1980) later app., 412 So.2d 894 (Fla. 2d DCA 1982); petition denied, 419 So.2d 1197 (Fla. 1982). These public policy issues are more properly addressed to the legislature. Douglas v. Michel, 410 So.2d at 940.

The instant case is not the first time that public policy or privacy considerations have troubled the district courts. In Wisher v. News-Press Publishing Co., 310 So.2d 345 (Fla. 2d DCA 1975), quashed 345 So.2d 646 (Fla. 1977), a newspaper sought to view the personnel file of a Lee County government official who had received a written reprimand. The request, like the instant request, was a perfect demonstration of the goals sought to be preserved by the Act -- the public sought vital evaluative materials concerning the professional conduct of one of its employees. Despite the Act's "laudable objective of assuring that people have the means of knowing what their government is doing," the court held that the employee's privacy interest in this evaluative material outweighed the policy of disclosure. 310 So.2d at 349.

This Court reversed the Second District Court of Appeal in Wisher just as it should reverse the instant decision. The district court's determination of public policy in the case below is no more relevant than it was in Wisher. The legislature has weighed those interests in the balance and has determined that expedited public disclosure issues weigh more heavily. Purely on the basis of statutory construction and interpretation, the district court's decision in this case should be reversed.

II. NO CONSTITUTIONAL RIGHT OF DISCLOSURAL PRIVACY PROTECTS THE RELEASE OF PUBLIC RECORDS

This case does not present, and this Court need not reach, the difficult issue of whether the Supreme Court of the United States has ever or will ever recognize a constitutional right of disclosural privacy. Supreme Court precedent and decisions interpreting that precedent indicate that such a right probably does exist under certain limited circumstances. This case presents only the narrow issue of whether there is a right of disclosural privacy in personnel records that are maintained as a necessary condition of public employment. Limited properly, the case is easy to resolve -- no Florida or federal court has ever recognized that a public employee has a constitutional right to withhold his personnel files from his employers, the tax paying public.

A. Federal Courts Have Not Recognized A Constitutional Right Of Privacy In A Public Employee's Personnel File

The proper starting point is this Court's comprehensive analysis of Florida and federal privacy law in Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980). Shevin's review of federal precedent revealed that the United States Supreme Court has characterized the constitutional right of privacy as having three strands. First, there is every citizen's right to be secure against arbitrary governmental surveillance and intrusion into his or her private affairs. This privacy interest is rooted in the Fourth Amendment's protection against search and seizure. E.g., Terry v. Ohio, 392 U.S. 1, 88

S.Ct. 1868, 20 L.Ed 2d 889 (1968). The second strand relates to each citizen's right to make personal and intimate decisions free from governmental interference. E.g., Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973).

These first two strands of the right of privacy do not impact upon public records disclosure. See e.g. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed. 2d 405 (1976). Statutory discovery of information voluntarily placed in the public domain cannot be analogous to an intrusion into one's home. See Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed. 2d 867 (1977); Barry v. City of New York, 712 F.2d 1554, 1564 (2d Cir. 1983). Neither does it unduly impact on the employee's right of decisional autonomy. Plante v. Gonzalez, 575 F.2d 1119, 1129-31 (5th Cir. 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979). Disclosure laws, unlike laws banning contraception, miscegenation, or abortion, do not impact upon the individual's right to make personal decisions. 575 F.2d at 1130. See Whalen v. Roe, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876, 51 L.Ed. 2d 64, 73 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed. 2d 788 (1976).

Thus, if the constitutional right of privacy protects the release of personnel records, it must come from the third strand, which has been characterized as "the individual's interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. at 599, 97 S.Ct. at 876, 51 L.Ed 2d at 73. Although numerous courts have stated that this third strand, conveniently

labeled here "disclosural privacy," may exist to protect against the disclosure of certain information on rare occasions, the scope of that right has remained abstract. Seldom has it been recognized in a specific factual context and never has it been recognized by a federal court to block the disclosure of personnel records under a state public records act.[15]

The United States Supreme Court has rejected the application of a disclosural privacy right in each of the three cases in which it has recognized the right in the abstract. In Whalen v. Roe, petitioners challenged the constitutionality of a New York statute that required the New York State Department of Health to computerize the names and addresses of prescription drug patients using "schedule 2" class drugs. The Court held that the statutory benefits from disclosure outweighed the minimal risks that any patient's privacy would be compromised. Significantly, the case recognizes that certain state interests may outweigh even the patient's right to privacy in his or her medical records. In Nixon v. Administrator of General Services, 433 U.S.

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[15] In fact, the Supreme Court has dismissed for lack of a substantial federal question three appeals from state court decisions upholding disclosure laws. Montgomery County v. Walsh, 336 A.2d 97 (Md. 1975), appeal dismissed, 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed. 2d 306 (1976); Fritz v. Gorton, 517 P.2d 911 (Wash. 1974), appeal dismissed, 417 U.S. 902, 94 S.Ct. 2596, 41 L.Ed. 2d 208 (1974); Stein v. Howlett, 289 N.E. 2d 409 (Ill. 1972), appeal dismissed, 412 U.S. 925, 93 S.Ct. 2750, 37 L.Ed. 2d 152 (1973). These dismissals are dispositions on the merits. Mandel v. Bradley, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed. 2d 199, 204-05 (1977).

425, 97 S.Ct. 2777, 53 L.Ed 2d 867 (1977), Richard Nixon's privacy interest in preventing limited disclosure of personal files of an intimate nature[16] was outweighed by the public interest articulated in the federal statute under review.

The third case rejecting the application of the right of disclosural privacy, however, deals directly with public disclosure of personal and embarrassing information. In Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed 2d 405 (1976), the Court held that no federal constitutional right of privacy protected the petitioner from the publication of the fact of his arrest. Clearly no right of privacy prevented the state from publicizing the record of an official act:

> Rights found in this guaranty of personal privacy must be limited to those which are "fundamental" or "implicit in the concept of ordered liberty... [such as] matters relating to marriage, procreation, contraception, family relationships, and child rearing and education."

424 U.S. at 713, 47 L.Ed. 2d at 421.

When courts have been forced to balance the amorphous rights of privacy articulated by the Supreme Court against the public's right to review the conduct of its governing officials, the right of privacy has yielded to the public interest. In Plante v.

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[16] The material included extremely private communications between Nixon and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files. 433 U.S. at 459, 53 L.Ed. 2d at 901.

Gonzalez, five Florida state senators asked the Fifth Circuit to declare unconstitutional an amendment to the state constitution requiring certain elected officials to make detailed public disclosure of their personal finances. The senators contended that this exercise of the public's right to know violated their constitutional right to privacy. The challenge was rejected. The public's important interest in reviewing and regulating the conduct of its governmental officials outweighed even the significant personal intrusion presented by the requirement of comprehensive financial disclosure. 575 F.2d at 1134. For the same reasons, a financial disclosure law applying to Article III judges withstood a similar attack. Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979), cert. denied, 449 U.S. 1076, 101 S.Ct. 854, 66 L.Ed.2d 798 (1981).

This right of the public to relevant information concerning those who govern them is not limited to elected officials. No principled distinction can be made between persons in elected positions, appointive positions, civil service policy-making positions or non-policy making public employees. Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983). All those who voluntarily place themselves in a position of public trust must remain answerable to those taxpayers that employ them. Thus, in Barry the Second Circuit upheld a New York Financial Disclosure Law that applied to public employees such as policemen and firemen. According to the court:

> We do not think that the right of privacy protects public employees from the release of financial information that is related to their employment or indicative of a possible conflict of interest.

712 F.2d at 1562.

The interests in public disclosure served by the disclosure laws outlined in Duplantier, Barry, and Plante are identical to the interests served by the Florida Public Records Act. If the public is to participate in government, it must be informed as to the conduct and activities of its governmental officials. The interest is compelling: "an informed public is essential to the nation's success." Barry, 712 F.2d at 1560. Access to personnel files can ensure that the public is not paying the salaries of those who are incompetent, unqualified, or corrupt. Id., 1560-61.

Indeed, the information sought in personnel files is far less personal than the financial statements required by Plante, Barry, and Duplantier, and is much more directly related to the evaluative process. Personnel files will contain vital information needed to assess the job performance of any public official. As this Court and others have recognized on numerous occasions, the release of materials, even embarrassing materials, directly impacting on an employee's job performance, job qualifications, or job skills presents no constitutional invasion. Miami Herald Publishing Company v. Marko, 352 So.2d 518 (Fla. 1977); Mills v. Doyle, 407 So.2d 348 (Fla. 4th DCA

1981); Haines v. Askew, 368 F.Supp. 369, 376 (M.D. Fla. 1973) aff'd 417 U.S. 901, 94 S.Ct. 2596, 41 L.Ed.2d 308 (1974)(no constitutional right that employment-related misconduct be investigated in secret).[17] Public employees can have no legitimate expectation of withholding information relating to their employment from their ultimate employers, the people of the State of Florida.[18] See Plante v. Gonzalez, 575 F.2d at 1135; Duplantier, 606 F.2d at 670.

B. No Florida Constitutional Right Of Disclosural Privacy Exempts Personnel Records From Public Disclosure

If there is no federal constitutional right of disclosural privacy limiting access to personnel records, certainly no such right can be found in the Florida constitution. The people of Florida have adopted an amendment to the Florida constitution which states that the Florida constitutional right of privacy

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[17] Even in a state where rights of privacy are specifically articulated in its public records act, a Texas court has emphasized that material of an evaluative nature in a personnel file must be publicly accessible. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W. 2d 546 (Ct. App. Tex. 1983). The court held that such disclosure was no invasion, let alone a clearly unwarranted invasion of privacy.

[18] Note that in Shevin, the public nature of the records was affirmed even though they contained information from prospective public employees who were promised confidentiality. Apparently, the applicants' expectation was not reasonable. See Mills v. Doyle, 407 So.2d 348, 350 (Fla. 4th DCA 1981). This lack of a legitimate expectation of privacy distinguishes the case from Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981), upon which the officers relied heavily below. Fadjo concerned a private individual, not a public employee.

shall not interfere with disclosure under the Public Records Act. Art. I, § 23, Fla. Const. The balance has been explicitly struck in favor of the public's right of access to the governing process. Roberts v. News-Press Publishing Co., 409 So.2d 1089, 1093 (Fla. 2d DCA 1982), petition denied, 418 So.2d 1280 (Fla. 1982).

III. EVEN IF THIS COURT HOLDS THAT CERTAIN INFORMATION IN PERSONNEL FILES MAY BE PROTECTED BY A RIGHT OF DISCLOSURAL PRIVACY, THE MANDATORY DELAY PERIOD IMPOSED BY THE COURT BELOW IS UNNECESSARY TO PROTECT THAT RIGHT.

Precedent discussed in the foregoing sections of this brief leaves no doubt that employees have no legitimate privacy interest in preventing the disclosure of material properly within their personnel files; that is, material related to their qualifications, experience, and job performance. No decision (even the decision of the Second District Court of Appeal in Roberts and this case below) would seem to give the employee any right to withhold that sort of information from public view. However, the decision below mandates delay in the release of such information based upon the fear that the custodial agency will act improperly and include irrelevant information in files subject to disclosure. Thus, read most favorably to the officers and the City, the decision below can be seen as an attempt to prevent the release of this improperly kept, irrelevant information unrelated to employment. Given a cursory examination, a delay to avoid such disclosure seems not unreasonable. However, closer scrutiny reveals that approval of the mandatory delay period will have a devastating effect on the production of

public records in Florida. Alternatives exist to satisfy the employees' desire to prevent the release of non-job related material without compromising the enforcement of the Public Records Act.

A. Alternatives Are Available To Ensure The Protection Of The Employee's Privacy Interest Without Sacrificing Prompt And Inexpensive Disclosure Of Public Records

The district court erred when it failed to consider reasonable alternatives to mandatory delay that would protect both the employees' privacy interests (to the extent they exist) and the public's access to records. The flaw in its decision is not that it provides a mechanism for employees to ensure that irrelevant material is not publicly disclosed; it is the court's failure to recognize that a review process need not begin at the time public records are requested. Thus, The Tribune must stress that it is not suggesting that public employees have no right to litigate their alleged rights of privacy. No one can take that right from them. But the constitution does not require that access rights be delayed to allow the employee to litigate those rights at the time the records are requested when privacy rights could have been asserted earlier. The ultimate effect of the district court's erroneous decision is to drag the public and the media into a controversy that is more properly litigated between the employee and his or her employer.

It should come as no surprise to the state employee that the information in his or her personnel files effectively is open to public view. Public records disclosure has been mandatory in

Florida since the early part of this century. Moreover, for ten years the Florida Attorney General has opined that personnel records are subject to disclosure. See, e.g., 1973 Op. Att'y Gen. Fla. 073-30 (Feb. 22, 1973). And this Court's decision in Shevin has been the law of Florida since 1980. Shevin, 379 So.2d at 640.[19]

The agency has an ongoing responsibility to keep irrelevant material out of employee personnel files. Likewise, it is the employee's duty, if he or she is concerned with protecting that right of privacy, to ensure that the agency fulfills that responsibility. That monitoring process can and should take place before the point is reached where privacy rights must clash with the rights of public access. Yet, the mandatory delay imposed by the Second District Court of Appeal encourages the employee to wait until his or her records are requested before checking those files to be sure that irrelevant or otherwise non-employment related material has not been included.

Thus, viewed properly, this is not a difficult case. The Court need concern itself only with the timing of the employee's challenge and not the right of challenge. In this light it is evident that the interest of the employee can be protected without imposing mandatory delays.

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[19] The City of Tampa requires that all of its employees and job applicants be advised that their personnel files are available for public inspection. Executive Order No. 82-41. Such notification should be the standard practice of all public employers.

This proposition is perfectly illustrated by Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983). As discussed above, Barry concerned a provision that permits public inspection of New York City employee financial information. The financial disclosure act, New York Local Law 48, protects the employee's privacy, by giving each employee the right at any time to claim that a particular item in his financial report should be withheld from public inspection on the ground that inspection would constitute an unwarranted invasion of his privacy. The employee's right, however, is not at the expense of timely disclosure. The Act forbids the assertion of a privacy claim for the first time after a request for access to the employee's financial disclosural form is made by the public. 712 F.2d at 1557.

The Second Circuit found the disclosural plan constitutional. So long as the employee has some opportunity to protect his or her privacy, the constitution does not dictate when or how that opportunity must be provided. 712 F.2d at 1561.

Petitioners will argue, as they did below, that if disclosure is not delayed, employees will unfairly "bear the burden" of monitoring their personnel files.[20] This argument ignores the fact that it is the employee's right of privacy that is allegedly being asserted. The alternative chosen by the court below transfers the employee's burden to each and every citizen who attempts

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[20] This "burden" did not render the New York scheme unconstitutional. 712 F.2d at 1560-61.

to make a Public Records Act request. Moreover, The Tribune is not asserting that it should be solely the employee's burden. It is part of the duty of the custodial agency to ensure that it only keeps records relevant to the employee's employment. Employees individually and in groups (the most obvious example being public employee unions) can work with custodial agencies to monitor the agency's recordkeeping practices and procedures.

There are essentially two situations where employees may wish to protect their right of privacy. The first concerns the custodial agency's improper decision to maintain a class or category of information completely unrelated to the employee's employment.[21] The second concerns obviously irrelevant information that has accidentally or improperly found its way into a particular employee's personnel file.

The first class of information presents no problem. Removing irrelevant classes of information from personnel files requires neither individual nor continuous monitoring of the agency. Disputes over the relevance of various categories of information can be solved by a give and take process between groups of employees and the custodial employer at any time and certainly need not be postponed until the time a record is requested. Inquiry

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[21] An obvious example would be a record of the employee's charitable contributions over the last year.

by one employee can effectively protect the interest of all. If a dispute develops over the relevance of maintaining a particular category of information, that dispute would be between the employee and the custodial agency.

If the employee is vindicated and the information is termed irrelevant to the employment process and is removed from all personnel files, the employees' privacy will be protected and the public will not have been deprived of information relevant to the performance of any governmental function. If the agency is vindicated and the information is determined to be relevant to public employment, then the information should remain in the personnel file and will be accessible when requests are made.[22]

As to the second class of information (isolated bits of data that were accidentally or improperly included within an employee's personnel files on an isolated basis) each employee in conjunction with the custodial agency can insure that this type of information is not released. Obviously, the employee has the power to check his or her personnel file for such information at any time. But more importantly, the custodial agency should be relied upon initially to ensure that such improper information

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[22] The second advantage to this process is that certain classes or categories of information need be litigated only once rather than continuously and repetitively litigated each time records are requested.

does not find its way into personnel files and if preventative measures fail, to excise such irrelevant information before the file is requested.[23] The Second District Court of Appeal imposed the mandatory delay only because it felt the custodians would not perform this responsibility:

> The custodian will often be too busy performing his or her day-to-day duties and responsibilities and may be able at best to make only a cursory examination of the record to protect the employee's private concerns.

8 Fla.L.W. at 2411.

The district court is wrong. By relieving the custodial agency of the burden of maintaining proper files, the burden of policing those files is shifted to Florida citizens who request public records. Perhaps the most important function of an agency is the communication of its performance to those to whom it must answer. It is true that the Public Records Act places some burdens upon records custodians. They must maintain records, collect records when requested, review records promptly to determine whether the records or any portion are statutorily exempt, and forward records to the requestor all within a reasonable time. It is not too onerous a burden to place upon the agency to ensure that its records are free from extraneous material harmful to its

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[23] The Tribune is not advocating total discretion by the custodial agencies to routinely excise information from personnel files when access requests are made. If such information is regularly a part of a personnel file and is relevant to the employee's employment by the state, the public has every right to have access to that information. The Tribune is referring to the excision of isolated extraneous irrelevant material that accidentally becomes reposed within the file.

employees. In any event it was not the Second District Court of Appeal's responsibility, nor is it the responsibility of this Court, to determine whether too heavy a burden has been placed upon the public agency. That decision was made by the Florida legislature when it enacted the Public Records Act. The Act cannot be held hostage on the basis that custodians may act carelessly or improperly to disseminate irrelevant private information. The decision of this Court must be made on the assumption that custodians will properly carry out their duties. Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L. Ed.2d 64 (1977); Barry, 712 F.2d at 1561.

B. If This Court Recognizes A Right Of Disclosural Privacy And Approves The Mandatory Delay, Guidelines Should Be Established To Insure That Non-Private Records Are Accessible Without Delay

Even if this Court decides, over the strenuous objections of The Tribune, that the employee's right of disclosural privacy can be protected only by the mandatory forty-eight hour delay, this Court, to prevent the complete evisceration of the Act, should impose strict guidelines on custodial agencies. It is beyond dispute that the major portion of an employee's personnel file contains information that should be publicly accessible. For example, those records that concern the employee's salary, disciplinary actions taken against the employee, information reflecting job qualifications and performance, and other material of a direct evaluative nature are clearly not private. There is no reason to delay disclosure of such information simply on the basis that other information in the file may be private. This

Court should at least require custodial agencies to immediately release such material when requested and to delay the release of only those classes of information which may arguably impact upon privacy concerns. Further, members of the public and the media should not be required to repetitively litigate the privacy issues each time records are requested. If this Court determines that the dispute resolution process must take place after records are requested, the Court should at least make clear that delays should concern only material over which there is substantial doubt concerning any right of privacy.

C. Approval Of The Mandatory Delay Period Will Make Enforcement Of The Act Far Less Certain, Far More Time Consuming, and Enormously Costly

The assured impact of the mandatory delay period imposed by the Second District Court of Appeal is to delay the release of newsworthy materials for a period of at least forty-eight hours.[24] This delay can be arbitrarily imposed even when there is absolutely no doubt that the request is legitimate, concerns no exempt material, and intrudes upon no privacy interest. As this Court has recognized on numerous occasions, even delays of twenty-four or forty-eight hours often have a critical adverse impact on the news media's ability to effectively report a

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[24] Although the Second District Court of Appeal's opinion does not require, but only permits, local agencies to impose a forty-eight hour delay, prior experience proves that the delay will rapidly become the standard practice of all records custodians.

breaking story. The instant case is no exception. See note 8, supra.

Far more disturbing, however, is the fact that the delay will seldom be just twenty-four hours or forty-eight hours. Once the built-in delay is invoked, a long and arduous litigation process usually commences. In the instant case, the original seven-day delay period imposed by the City of Tampa stretched into three weeks while The Tribune litigated the access question in two state proceedings at the circuit court level, one proceeding in the district court, and one federal proceeding in the Middle District of Florida. Moreover, had the City filed its notice of appeal from Judge Gallagher's last order, The Tribune might still be waiting for release of the records. Thus, even though no irrelevant private information was involved and the case law was clear, The Tribune's access rights were severely delayed, nearly thwarted, and became outrageously expensive to protect.

The instant case is far from unique. Even where the facts and law are clear, the delay can stretch into a period of years. For example, in State ex rel Times Publishing Company v. Pinellas County Unified Personnel Board, Number 81-9624-17 (Fla. 2d DCA February 4, 1983), aff'd., 8 Med.L.Rptr. 2042 (Fla. 6th Cir. 1982), even though a judge inspected the records at issue in camera and determined that absolutely no private material was contained in the employee files, approximately two years elapsed between the Times Publishing Company's initial request for the records and its receipt of those records from Pinellas County.

See also State ex rel Times Publishing Company v. Pinellas County Sheriff's Department, 7 Med.L.Rptr. 1091 (Fla. 6th Cir. 1981).

These delays alone fly in the face of the Act's requirement that records be open for inspection at all times.[25] But the damage done goes far beyond delay. Although large metropolitan newspapers can afford to litigate their rights of public access, to this Court if necessary, the average individual citizen has neither the resources nor the time to pursue that right to such lengths. To permit privacy objections (no matter how frivolous) to be delayed until the time the Public Records Act request is made is to effectively foreclose access under the Public Records Act to the average Florida citizen. The decision below ensures that the release of personnel files will require at least a trip to the circuit court and probably a trip to the district court as well. It is simply wrong to remove from the average citizen the precious access rights afforded by the Act.[26]

Approval of the mandatory delay provision will also open an entirely new round of "public policy" litigation. State agencies

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[25] Further, the policy will require all those who seek personnel records to make two requests. Increasing the burden upon the public in such a manner will result in the abandonment of some requests.

[26] The City and the officers will undoubtedly argue that the remedy of attorneys' fees is available to those who seek to challenge frivolous nondisclosure. Of course, attorneys' fees are unavailable until long after the litigation is completed. Further, Florida courts have only rarely awarded attorneys' fees, even to meritorious Public Records Act petitioners. Effectively the City asks private citizens to put substantial amounts of their own money at risk to achieve what they are plainly entitled to receive under the clear language of the Act.

will once again be free to assert public policy as an excuse to withhold records. In the future they will simply be clever enough to cite a constitutional provision along with their public policy argument. The door to such exemptions, once thought closed by this Court's decision in Wait, would be reopened once more.[27]

The effect of the Second District Court of Appeal decision is nothing more than to place a new set of weapons in the arsenal of those public officials who have historically demonstrated their opposition to public disclosure. This Court must recognize that although the rights ostensibly being asserted in this case are those of the employee, it is the custodial agency which benefits most and the public that benefits least from the decision below.

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[27] Of course, the decision below does not completely protect the privacy interest of state employees. For example, what about those employees who are on vacation or unreachable for 48 hours? The next step in the litigation process will undoubtedly be a series of cases determining under what circumstances delays longer than 48 hours are appropriate to protect the interests of these absent employees.

CONCLUSION

The Second District Court of Appeal erred in its interpretation of the statute, in its interpretation of the public policies behind the statute, and in its interpretation of the applicable principles of constitutional law. The Florida legislative mandate is clear. Full and ready access to public records is the law in Florida. Court-imposed procedures which unnecessarily and improperly conflict with that law must be struck down. To preserve the integrity of the Florida Public Records Act, this Court should reverse the five member majority decision and hold that it is impermissible to delay the release of non-exempt public records on the basis of any asserted right of Florida or federal constitutional privacy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of The Tribune Company 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; R. Jeffrey Stull, Esquire, and Edwina J. Dryea, Esquire, Stull & Heidt, counsel for Robert DePerte, Robert Jones, and Roy Pierce, 602 South Boulevard, Tampa, Florida 33606; Sanford L. Bohrer, Paul & Thomson, 1300 Southeast Bank Building, Miami, Florida 33131; Richard J. Ovelman, 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; and to Steven Carta, Esquire, Smith, Carta & Ringsmuth, Post Office Box 2446, Fort Myers, Florida 33902-2446 this 21st day of November, 1983.

Attorney