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 CYNTHIA SONTAG, DIRECTOR OF ADMINISTRATION OF THE CITY OF TAMPA

December 12, 1983

Joseph G. Spicola, Jr.
City Attorney, City of Tampa
By: Luis G. Figueroa, Esq.
Assistant City Attorney
City Hall, Fifth Floor
Tampa, Florida 33602
(813) 223-8996

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

OTHER AUTHORITY

STATEMENT OF THE FACTS AND THE CASE

The facts in this case have been presented to three courts in identical form, therefore, in the interests of time and clarity, Respondent Cynthia Sontag accepts the factual statement as presented in the en banc proceeding Tribune Co. v. Cannella, 438 So.2d 516.

ARGUMENT

The decision of this Court on the issues presented by the Second District Court of Appeal will determine whether individuals are compelled to give up all right to privacy upon acceptance of a government position. Contrary to the scenario presented by Petitioners, this decision has little to do with the continued viability of the Public Records Act, Chapter 119 Florida Statutes. No narrowing of the Public Records Act has occurred. Indeed, this case has operated to insure compliance with the goals of the Act within a specified time frame. No serious delay nor obstruction has been created nor condoned. The Court has merely interpreted provisions of the Act to insure minimal protection of individual rights of public employees.

The District Court has not erred. The statute does not prohibit the 48-hour maximum delay period approved by the Second District Court of Appeal. The court correctly interpreted the statute to provide a proper balance between the privacy rights of public employees and the Public Records Act. The decision preserves timely access to public documents. No "judicial legislation" has taken place. The court has properly interpreted a legislative act to preserve it's continued vitality.

Respondent Cynthia Sontag is the Director of Administration for the City of Tampa. Respondent bears the responsibility of being the custodian of all official personnel related records of the City of Tampa. Therefore, the Respondent's Brief will be

limited to those issues which concern custodians of public records.

I. THE DISTRICT COURT DID NOT ERR IN PERMITTING A MINIMAL DELAY IN THE DISCLOSURE OF PERSONNEL FILES.

The District Court in its en banc decision correctly balanced the right of privacy of public employees and the goals of the Public Records Act in permitting a minimal delay period before compliance with a public records request. The district court construed the Act to permit the individual to assert any statutory privilege or exemption or any constitutional right of non-disclosure. 438 So.2d 516 at 522. Despite Petitioner's arguments to the contrary, the court relied on the plain language of the statute to allow such a delay period.

A. A 48-hour delay in releasing personnel records is reasonable and permissible under the Public Records Act

Certain delays in responding to a public records request are necessary and reasonable in order to comply fully with state and federal laws and protections. The District Court properly balanced the right of the public to obtain disclosure of personnel records against the administrative concerns of the custodians of these records and any individual rights affected by a request for disclosure.

The interpretation of the Florida Public Records Act, Fla. Stat. §119.01 et. seq. (1981) and its numerous exemptions has resulted in substantial litigation in both federal and state courts. The Florida legislature amends the Public Records Law almost annually creating exemptions to accommodate specialized

needs of individuals, access, and privacy. cf. "Florida Constitutional Privacy and the Public Records Law", R. D. Woodson and Ricki Lewis Tannen, 33 U. Fla. L.R. 313 (1981).

The role of the custodian of public records has become very specialized. On the one hand, they are charged with the responsibility of maintaining, preserving and producing all public records generated by the agency. Fla. Stat. 119.031. Additionally, custodians also have the responsibility of excising exempted material from requested records. Due to the litigation surrounding the Public Record Act and its exemptions and the actions of the legislature in expanding these exemptions, custodians of public records are faced with continued responsibilities and considerations which create the need for temporary delays in responding to requests for disclosure pursuant to the Public Records Act. These delays are both reasonable and necessary to effectuate the purposes of the Public Records Act, while at the same time, guaranteeing that materials protected from disclosure remain confidential.

Florida Statutes §119.07(3)(a)-(k) creates more then fifteen exemptions to the disclosural mandates of the Public Records Act. Exemptions also appear throughout the various chapters of the Florida Statutes (i.e. §39.031 Juvenile Records, §447.605 Labor Negotiations, §112.533 Complaint against Law Enforcement Officers). Subsection (3)(a) also refers to exemptions which may be created by special law.

The custodians of public records are faced with two responsibilities. They must comply with the mandates of the Public

Records Act and they must protect those records exempted by law from disclosure. Florida Statutes §119.07(2)(a) provides that:

> "Any person who has custody of public records and who asserts that an exemption provided in subsection (3) or in general or special law applies to a particular record shall delete or excise from the record only that portion of the record for which an exemption is asserted and shall produce for inspection and examination the remainder of such record."

In order to comply with the Public Records Act and to insure that exempted material remains undisclosed, the custodian must go through a multi-step process. First, the custodian has to gather the requested records. The Public Records Act implicitly recognizes this step by providing for fees when the compilation requires extensive clerical or supervisory time, Florida Statutes §119.07(1)(b) (1981). The time expended in this step depends on the nature of the records requested.

Second, the custodian must review the requested records to determine if any exemptions preclude dissemination of the material requested. The amount of litigation which has arisen under the Public Records Act demonstrates the complexity of this particular step. This step frequently requires the assistance of legal counsel to ascertain whether any exemptions exist which prevent disclosure and also the extent to which a particular exemption may apply.

Finally, in those situations where an exemption exists, the custodian must edit the requested documents to delete the exempted material and then produce the remainder. Although basically a ministerial function, this step is one that by its

very nature necessitates some delay in responding to public records requests.

The Second District Court of Appeal correctly found that

> "While Section 119.07(2)(a) places the duty of excising exempt portions of requested records on the custodian of those records we do not believe that a public employee whose personnel file has been requested should be forced to rely on the records custodian to protect the employee's interests." 438 So.2d 516 at 522.

This Court has also recognized that the individual is the proper party, in fact the only party, to assert his rights in these type of cases. News-Press Publishing Co. v. Wisher (Fla. 1977) 345 So.2d 646 at 647.

In addition to the administrative concerns of custodians in responding to public records requests, there are also some concerns peculiar to individuals which may necessitate reasonable delays in complying with requests under the Public Records Act. Most of the litigation which has arisen under the Public Records Act revolves around issues concerning individual rights and the disclosural mandates of the Act.

> "Government files hold information composed of both public business and private relevations. The policy behind open records and access to information is to allow citizens to obtain information about the operation and policies of government. This intent is distorted where the public records concept is used to gain information only about an individual....The privacy interest involved shall not yield to an overly broad open records statute and statutory interpretation." "Federal Constitutional Privacy and the Florida Public Records Law: Resolving the Conflicts", R. D. Woodson and Ricki Lewis Tannen, 33 U. Fla. L.R. 313 (Spring 1981).

The Second District Court of Appeal in Roberts v. News Press Publishing Co. Inc., 409 So.2d 1089 (2nd DCA 1982), first considered the issue of whether a 24-hour delay in producing personnel information records violated the Public Records Act. In that case, the Court recognized that no conditions are proper which would deny access. However, reasonable regulations permitting an employee an opportunity to protect privileged contents of his file is proper. The Court recognized that keeping personnel files is not the primary purpose of any agency, but an internal function facilitating accomplishment of some other primary purpose. For this reason, and the fact that employees may have privacy interests at stake, the Court held that the 24-hour delay was not unreasonable, 409 So.2d 1094.

In the Roberts case, the court recognized that a constitutional right of disclosural privacy may exist, 409 So.2d 1094. The Court cited part of the opinion in Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981) which stated that "the legislature cannot authorize by statute an unconstitutional invasion of privacy." Aside from the right of privacy, individuals may assert other constitutional rights such as equal protection, freedom of association and the right to work without any restraints as possible bars to disclosure of material under the Public Records Act.

In Kestenbaum v. Michigan State University, 294 N.W. 2d 228 (Mich. Ct. of Appeals 1980), the court in interpreting the provisions of the Florida Public Records Act acknowledged that

the right of the public to know has to be balanced against the individual's right to privacy. In that case the Court stated:

> "When fundamental privacy interests secured by the due process clauses of the United States and Florida Constitutions are implicated, however, it is not enough that the statute generally serves the compelling interest in disclosure of public records. There must be a compelling state interest in the public revelation of the particular information in which the prospects would otherwise enjoy privacy. To override Constitutional privacy interests, a countervailing state interest must exist and be compelling to override Constitutional privacy interest in the particular information sought, an intrusive statute must be narrowly drawn to express only the legitimate state interest at stake."

The 5th Circuit Court of Appeals acknowledged the balancing test in the Fadjo decision, 633 F.2d 1191.

The Petitioners have focused solely on the existence of a federal right of disclosural privacy in their argument that a delay period is unnecessary. The District Court in its opinion did not focus so narrowly on what rights could be asserted. The Court stated:

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

Review of personal and seemingly private matters which might be contained within a personnel file affects not only the individual's right to privacy, but affects other rights as well

which should be protected. Government employees are among those persons having rights under the United States and Florida Constitutionals including those of equal protection and equal enjoyment of rights. The District Court recognized the fact that the Public Records Act in its current form tends to make second class citizens of state and local government employees in Florida. 438 So.2d 516 at 522. This Court in Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980) in dismissing the Federal Constitutional claims recognized that the Supreme Court may at some time give "substance and life" to these claims. 379 So.2d 633 at 638. If the employee is not given an opportunity to assert these claims in a proper case, these rights can never be recognized or defined.

Petitioners raise several arguments which are without serious merit in reaching their conclusion that delays should not be permitted. First, Petitioners argue that any delay period will result in minimal compliance by public agencies. This argument is void of merit since the delay period does not operate to deny disclosure. The sole effect of a delay period is to provide a maximum 48-hour period for an employee to protect any individual rights which may exist. The Second District Court of Appeal in the Roberts decision recognized that "The right to be present may well result in the employee waiving any right of privilege or confidentiality, and, therefore work to the advantage of prompt access to the records." 409 So.2d 1089 at 1095.

Secondly, Petitioners argue that the delay period would work against the right of the press to promptly report news events as

they occur. Again this argument is devoid of merit. As the District Court stated in the Roberts decision

> "Personnel records are not kept as a principal function of an agency....In light of the purpose of personnel files and because of the potential rights of the employee in their contents, a short delay in access to allow an employee an opportunity to protect potential rights does not seem to us to be an undue restriction on those seeking access." 409 So.2d 1089 at 1095.

In its en banc proceeding the Court went further in recognizing

> "While the public clearly has a right to information such as salary and job attendance and efficiency reports, much of the information contained in an employee personnel file, such as marital status, number of children, home address, telephone number and certain health records, appears to us to be of no legitimate interest to anyone but the employer and the individual employee." 438 So.2d 516 at 522.

Therefore, it is clear without doubt that any news story which would rely on personnel information contained in these files would not be jeopardized by a maximum 48-hour delay especially when balanced against an employee's right to protect this information from disclosure.

The Petitioners also argue that the delay period would be costly and prohibitive to the ordinary citizen seeking a public document. Again the answer is that this is a delay period not a prohibition against disclosure. The Act in §119.11 and §119.12 provides additional protection which guarantees that unreasonable delays do not occur. The first protection is that of expedited hearings. This insures that a Court will promptly hear the

issues involved when requests for disclosure are denied or challenged. This provision also offers an impartial forum for the balancing of interests. In light of the rapidly changing expansion of individual rights by the Courts, such case by case hearings are necessary to insure protection of both public access and individual rights. Further Section 119.12 provides for the award of attorney's fees when a court determines that a public agency unreasonably refused to permit public records to be inspected. This provision insures both access to the courts and a protection against frivolous denials of public records requests.

Petitioners also argue that no delay period is necessary because an agency has these same avenues for redress whenever confronted with the issue of whether a record should be produced. Inspite of the fact that the District Court and this Court have already found these type of objections can only be brought by the individuals and not by the custodian, this argument places the expense and burden squarely on the custodian of public records. Therefore, additional public funds must be expended whenever a possible exemption is raised by an employee in order to insure that items not subject to disclosure are kept secret. To refrain from exerting these exemptions would expose the custodian to liability. The Public Records Act does not provide for awards of attorney's fees to public agencies which are successful in exerting exemptions. §119.12.

Finally Petitioners claim that the only delay which is recognized under the Act is the delay necessitated to retrieve

and produce the document. Amicus State of Florida also would allow a delay for conducting other agency business. It is important to note that these type of delays are not the concern of Respondent Cynthia Sontag. Public records requests are given top priority in the City of Tampa. The Respondent merely seeks to afford its employees the modicum of protection for reasons of fairness and equal treatment which the District Court has endorsed. 438 So.2d 516 at 522.

The factual circumstances of the case which is before this Court affirms the wisdom and protections of the delay period. Here the affected employees had the opportunity to litigate their claims of exemption. They were able to present their constitutional claims to both the federal courts and the state courts. Although the records were eventually released, the employees were afforded the full protection of the judicial system. When balanced against the arguments of the Petitioners, this short delay was inconsequential.

B. The District Court did not engage in "Judicial Legislation" in permitting a delay period

The purpose of the Public Records Act is to provide knowledge to the public that they might act as a check and balance on governmental abuse, indiscretion, and incompetency, see Browning v. Walton, 351 So.2d 380 (Fla. 4th DCA 1977). It is under the umbrella of this noble purpose that personnel files are made public.

The court in Fadjo v. Coon, 633 F.2d 1172, 1176 (5th Cir. 1981) found that the Florida Legislature cannot authorize by

statute an unconstitutional invasion of privacy. As mentioned earlier, the Legislature also has provided numerous exemptions from disclosure of public records. In addition, the Courts have often based their refusal to recognize such rights on the fact that it was the custodian and not the employee who was the party before the Court. Roberts, 409 So.2d 1089 at 1094.

The District Court in Roberts stated

> "If then, there are federal constitutional rights of non-disclosure as well as statutory exemptions from the public records law, what is the process by which those rights and exemptions are to be recognized."

Executive Order 82-41 of the City of Tampa was adopted to provide this mechanism. Nothing in this Executive Order conflicts with the language of the Public Records Act nor its noble purpose. Indeed the Executive Order operates to accommodate the requirement that personnel files be made public.

Section 119.07(1)(a) provides that those having custody of public records shall permit them to be "inspected" at reasonable times, under reasonable conditions." The Court in Roberts held that

> "We agree that no conditions are proper which would tend to deny access, we do find that an enlargement of the Wait statement is warranted. That enlargement would include reasonable regulations that would permit an employee whose file is being sought an opportunity to protect contents of the file that might be the subject of any statutory or constitutional privilege." 409 So.2d at 1094.

The rules of statutory construction allow such a result. The first rule of construction provides that if the language is

clear and unambiguous, there is no need for other rules of statutory construction. Coupled with that premise is the rule of construction that words are to be given their plain meaning. It is evident that the Court found the plain meaning of the statute to permit reasonable regulations by public agencies as provided in §119.07. The District Court found the delay period to be a reasonable condition. 409 So.2d 1089 at 1095.

The Court did not retreat from this position in its en banc decision and instead reiterated its holding in Roberts.

> "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." 438 So.2d 516 at 522.

This is not judicial legislation but rather fundamental statutory construction. The Court was well within its bounds to determine that a delay period was a reasonable condition which is allowed by the Public Records Act. This could also destroy the pre-emption arguments of the Petitioners in that the Act specifically permits the imposition of reasonable conditions by a custodian of public records.

C. There are no reasonable alternatives to the delay period

The Petitioners argue that the delay period is unnecessary for two reasons. First the employee can periodically check his file to insure that privileged material is kept out of the file. Second the agency shall insure that "improper or irrelevant"

items are not placed in personnel files. The Petitioners have clearly "missed the boat" with their arguments.

As stated earlier, personnel records are not kept as a principal function of a public agency. They are merely an internal agency function maintained to facilitate the primary function of that particular agency. Roberts, 409 So.2d 1089 at 1095. Employee information such as marital status, number of children, home address, telephone number and certain health information is necessary for the employee-employer relationship but serves no special public interest. This information must be kept and cannot be excised from the personnel file. Indeed the power to excise any material from personnel files is one strictly prohibited by the Public Records Act. §119.041.

Therefore, the other alternatives as propounded by the Petitioners are not existent. Only the delay period affords the modicum of protection endorsed by the Second District.

D. Whether a Constitutional Right of Disclosural Privacy Exists in Florida

The Respondent has acknowledged that the proper party to argue constitutional right of privacy is not the custodian of the records but the aggrieved individual. However, the Respondent feels compelled in the interest of justice to ask this Court to revisit its holding in Byron, Harless as to these issues.

In this regard, the Respondent adopts the arguments of Judge Lehan on this matter as presented in the en banc opinion pages 527-529. Judge Lehan's concern that a proper balance between rights be achieved strikes deeply into the day to day operations

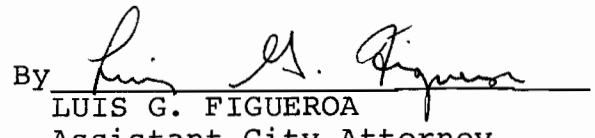
of the custodian of personnel records. Respondent argues that the protection of individual rights of government employees need not be at the expense of open public records. Florida's open government rule is admirable and can co-exist with the protection of privacy interests of individuals who serve in government capacity without diminishing either.

CONCLUSION

In light of the preceding arguments, it is clear that minimal delay in compliance with the Public Records Act is both reasonable and permissible. Custodians of records need a reasonable opportunity to protect exempted material as do individuals whose personal rights may be affected by disclosure of public records. To hold otherwise would effectively deny them the right to exercise any exemptions.

Respectfully submitted,

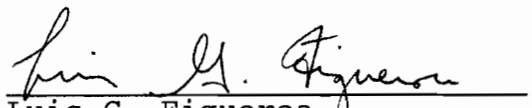
JOSEPH G. SPICOLA, JR.
CITY ATTORNEY, CITY OF TAMPA

By 

LUIS G. FIGUEROA
Assistant City Attorney
City Hall, Fifth Floor
Tampa, Florida 33602
(813) 223-8996

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Steven L. Brannock, Esq., Holland & Knight, P.O. Box 1288, Tampa, Florida 33601; Eric J. Taylor, Esq., Assistant Attorney General, Department of Legal Affairs, The Capitol-Suite 1501, Tallahassee, Florida 32301; R. Jeffrey Stull, Esq. and Edwina J. Duryea, Esq., Stull & Heidt, 602 South Boulevard, Tampa, Florida 33606, this 15th day of December, 1983.



Luis G. Figueroa