IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 64,450

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.

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Respondent.

REPLY BRIEF OF THE TRIBUNE COMPANY

January 10, 1984

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INTRODUCTION

In this brief petitioner-respondent The Tribune Company replies to the arguments forwarded by respondents-petitioners Robert DePerte, Robert Jones, and Roy Pierce and respondent Cynthia Sontag. As in its initial brief, The Tribune Company is referred to as "The Tribune"; Robert Deperte, Robert Jones, and Roy Pierce are referred to as "the Officers"; and Cynthia Sontag is referred to as "the City."[1] Additionally, The Tribune will refer to its initial brief as "Initial Br." The briefs submitted by the Officers and Sontag will be referred to as "Officers' Br." and "City's Br.", respectively.

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[1] Respondent Norman Cannella, Chief Assistant State Attorney at the time this action was filed below, has not participated in this appeal. The State of Florida, Times Publishing Company, and The Miami Herald Publishing Company (the latter two jointly) have submitted amici curiae briefs in support of The Tribune's position.

ARGUMENT

The magnitude of the instant threat to the Public Records Act is evident from the relief requested by the Officers in the conclusion to their initial brief. According to the Officers:

> The individual's federal constitutional right to disclosural privacy can only be protected by the institution of a delay in order to give the public agency controlling the records requested such reasonable time as is necessary to notify the affected individual. After notification, the individual will need only a brief time in which to assert an objection to disclosure based upon his right of disclosural privacy. At that point, the burden would be on the party requesting the information to demonstrate before a court a legitimate public interest outweighing the individual's right of privacy.

Officers' Br. 22. As The Tribune warned in its initial brief, the Officers seek a ruling from this Court that would require every request for a personnel file under the Public Records Act to be accompanied by a trip to state circuit court or federal district court. Initial Br. 40.

The need for this drastic relief is premised on two fundamental misconceptions. First, The Officers argue that a body of case law may develop recognizing that public employees have a federal constitutional right of disclosural privacy protecting information in their personnel file from public disclosure. Officers' Br. 20. According to the Officers, if a delay period is not afforded prior to Public Records Act disclosure, this body of case law will be unable to develop, and the Officers' potential right to privacy will be left unprotected.

Second, the Officers argue that this "developing" right of disclosural privacy can be protected only by the mandatory delay envisioned by the court below. Absent the delay, they conclude, the Act violates the Federal Constitution and must be struck down. However, the Officers go even further than the District Court -- the Officers argue that it is impossible to set a specific time constraint on the mandatory delay. Apparently, the delay must be as long as necessary to provide the employee with notice and time to file suit, Officers' Br. 22-23, regardless of the effect of the delay on Public Records Act enforcement. See Officers Br. 20 (recognizing that delay will spawn substantial litigation).[2]

Neither premise can withstand scrutiny. A body of case law has already developed holding that an employee has no constitutional right of personal privacy in information properly reposed within his or her personnel file. No court in any state or federal jurisdiction has ever held otherwise. Second, to the extent the employee has legitimate privacy concerns, alternative mechanisms are available to ensure the protection of those rights. The Constitution does not require the imposition of a mandatory and automatic delay at the time the records are requested.

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[2] Thus, as feared by The Tribune in its initial brief, the public can look forward to a long series of cases determining the delays that are appropriate under certain circumstances, such as when an employee is ill, on vacation, or otherwise unavailable. Initial Br. 41 n.27.

I. THE OFFICERS HAVE NOT DEMONSTRATED THE EXISTENCE OF A FEDERAL CONSTITUTIONAL RIGHT OF DISCLOSURAL PRIVACY IN PUBLIC EMPLOYEE PERSONNEL RECORDS.

Both the City and the Officers recognize that, if any right of disclosural privacy exists, it must be derived from the United States Constitution. Wisely, neither the City nor the Officers relied upon the Florida Constitution which rejects the existence of any right of privacy in public records. Art. I, § 23, Fla. Const.

As to the federal privacy right asserted by the Officers, this Court, citing the same cases relied upon by the Officers, has rejected the existence of a constitutional right of disclosural privacy in the type of information commonly appearing in personnel files. Shevin v. Byron, Harless, Schaffer, Reid, & Associates, Inc., 379 So.2d 633 (Fla. 1980). This term, the Court reiterated that result, holding in Wood v. Marston, 8 Fla.L.W 471 (Dec. 9, 1983) that discussion of a potential employee's qualifications and background must occur in the sunshine. Obviously, such discussion would necessarily center on exactly the type of personal information at issue here: the potential employee's personal history, background, and qualifications. There was no indication in Wood v. Marston that the privacy concerns of the applicants troubled the Court. Each candidate

knew that the information he furnished was subject to public disclosure.[3]

Even when the statutory scheme requires the disclosure of the personal financial information of public employees, the constitutionality of the disclosure has been overwhemlingly upheld. 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); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979); Hubert v. Hart-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. Ct. App. 1983); Stein v. Howlett, 52 Ill. 570, 289 N.E.2d 409 (1972), appeal dismissed, 412 U.S. 925, 93 S.Ct. 2750, 37 L.Ed.2d 152 (1973); Montgomery County v. Walsh, 24 Md. 502, 336 A.2d 97 (1975), appeal dismissed 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed.2d 306 (1976); Fritz v. Gorton, 83 Wash. 275, 517 P.2d 911 (1974), appeal dismissed, 417 U.S. 925, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974).

The Officers are forced to rely entirely on a single statement by the Fifth Circuit in Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981). Fadjo, a private individual, furnished "intimate and personal" information to the Florida State Attorney's office under a promise of confidentiality. Officers' Br. 12. When the

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[3] See also Gadd v. News-Press Publishing Co., 412 So.2d 894 (Fla. 2d DCA 1982); Douglas v. Michel, 410 So.2d 936 (Fla. 2d DCA 1982); Roberts v. News-Press Publishing Company, 409 So.2d 1089 (Fla. 2d DCA 1982), petition denied, 418 So.2d 1280 (Fla. 1982); Mills v. Doyle, 407 So.2d 348 (Fla. 4th DCA 1981)(all holding that no Florida or federal constitutional right of disclosural privacy protects information in personnel files).

state attorney later broke that promise of confidentiality and furnished the information to private insurance companies investigating Fadjo, Fadjo sued under 42 U.S.C. § 1983, claiming an invasion of his right to privacy. The court, not ruling on the merits of Fadjo's privacy claim, held only that Fadjo had stated a cause of action under Section 1983.

The core of the Officers' reliance on Fadjo appears in note three of the opinion. There, the state attorney had argued that Fadjo's privacy had not been invaded because the information revealed (despite the earlier promise of secrecy) was potentially a public record under the Florida Public Records Act. The court rejected this defense to Fadjo's civil rights action stating: "It is clear that the legislature cannot authorize by statute an unconstitutional invasion of privacy." 633 F.2d at 1176 n.3.

No one could argue with the unremarkable premise that the Florida Legislature must comply with the Constitution. However, the Fifth Circuit did not hold that Fadjo's right of privacy had been violated. Nor did it hold that the Florida Public Records Act was unconstitutional on its face or as applied in Fadjo. Reliance on Fadjo merely begs the central question presented by this case: Whether a public employee has a right of privacy in personnel records. The courts have ruled that no such rights exist. See supra, 4-5; Initial Br. 23-30. Thus, Fadjo's warnings are inapplicable here.

Fadjo on its facts does not support a right of privacy in personnel records. The Officers have made much of the distinction between the public's right to disclosure about

government and the public's right to disclosure about individuals, but the Officers fail to recognize that Fadjo is the perfect illustration of that distinction. Fadjo was a private individual who offered personal and confidential information to a government official based upon assurances that the information would never be revealed. Undoubtedly, Fadjo concerns information about an individual, not about government.

In this case, The Tribune sought information vital to the assessment of the Officers' performance as public servants employed by the people of the State of Florida.[4] Such information constitutes information about government. See Duplantier, 606 F.2d at 669-71; Plante, 575 F.2d at 1134-36.

The Officers' attempt to distinguish Duplantier and Plante by arguing that a salaried employee has a "more weighty" interest in privacy than the elected official. There is no support for this argument. Certainly, the "invasion" is the same, and as long as elected, appointed, and regular salaried employees know that public access is the law, the expectation of privacy is the same.[5] Thus, the courts have recognized no principled distinction

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[4] Moreover, unlike Fadjo, the Officers did not divulge the information in their personnel files under a promise of secrecy. They had no legitimate expectation of privacy. See Executive Order 82-41 of the City of Tampa (requiring all of its employees and job applicants to be advised that their personnel files are available for public inspection).

[5] Indeed, an elective office in one county may be an appointive office or salaried position in another. The Officers must thus posit a sliding scale of constitutional protections based on the duties performed by the governmental employee. The Court should unequivocally reject the Officers' invitation to lead the Public Records Act into such an impenetrable quagmire.

between persons in elected positions, appointed positions, and salaried positions.

> The fact that federal judges are appointed rather than elected, does not significantly decrease the public's interest in their personal finances. Like the state senators in Plante, judges are "not ordinary citizens but are rather people" who have chosen to accept public office. Though not chosen by the public, they themselves have elected to assume public responsibility.

Duplantier, 606 F.2d at 670; Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983)(rejecting the argument that Duplantier and Plante do not apply to policemen and firemen); O'Brien v. DiGrazia, 544 F.2d 543 (1st Cir. 1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977)(policemen subject to financial disclosure). See Gideon v. Alabama State Ethics Commission, 379 So.2d 570 (Ala. 1980)(all employees earning more than $15,000 subject to financial disclosure); Browning v. Walton, 351 So.2d 380 (Fla. 4th DCA 1977)(names and addresses of trash collectors subject to disclosure); Montgomery County v. Walsh, 274 Md. 502, 336 A.2d 97 (1975), appeal dismissed, 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed.2d 306 (1976)(certain civil service employees subject to financial disclosure).

Weighing the other side of the balance, the public's need for information concerning their salaried employees is every bit as acute as their need to maintain a watchful eye over their elected officials. Can anyone argue, for example, that information concerning a policeman's performance in a life and death situation is less important than a judge or a senator's possible financial conflict of interest? Policemen are often the sole

dispensers of justice. The entire purpose behind public records disclosure is to expose abuses of trust and to instill in the public trust and confidence in all governmental officials. Browning, 351 So.2d at 381; Stein v. Howlett, 52 Ill.2d 570, 289 N.E.2d 409 (Ill. 1972), appeal dismissed, 412 U.S. 925, 93 S.Ct. 2750, 37 L.Ed.2d 208 (1974). This interest is "compelling". Id. at 413; Montgomery County, 336 A.2d at 105-06. One court said it best:

> The right of the electorate to know most certainly is no less fundamental than the right of privacy.

Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911, 925, appeal dismissed, 417 U.S. 902, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974).[6]

II. THE MANDATORY AND AUTOMATIC DELAY SOUGHT BY THE CITY AND THE OFFICERS IS NOT CONSTITUTIONALLY REQUIRED.[7]

By couching their arguments in the abstract, the Officers make this case seem more troublesome than it really is. Recognizing that there was no support for a right of privacy in the evaluative materials requested by The Tribune (and thus no need for an automatic delay), the Officers argue that a delay period

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[6] Thus, it is the Officers and not The Tribune that have failed to consider the side of the scale representing the interest advanced by public disclosure. Officers' Br. 13-14.

[7] The Tribune rests on the statutory construction arguments forwarded in its initial brief. The City has forwarded no arguments that would support the construction placed upon the Public Records Act by the court below. The Officers predicated their entire request for relief on federal constitutional principles.

is nonetheless necessary because in some future case sensitive and private information may be the subject of the request. Thus, a delay in the release of all information in every case is necessary to preserve a right that may exist in only rare cases and may relate to only a small percentage of the information reqested.[8] Imposing a delay in every case comes at severe expense to the mandates of public disclosure.

The dramatic adverse effect of such delay on the enforcement of the statute has been demonstrated in petitioners' initial brief and in the submissions of amici curiae The State of Florida, Times Publishing Company, and The Miami Herald Publishing Company. See, e.g, Initial Br. 38-41. The Officers attempt to soften that impact by arguing that, as case law develops (after "substantial court interpretation"), their rights of disclosural privacy will be pared and refined, thus reducing the amount of litigation, and therefore the length of any delay. Officers' Br. at 20. But, regardless of the nature of future restrictions on their right of disclosural privacy (and regardless of the fact that the courts have already substantially pared and refined that right), the Officers contend that all they must do is state an objection at the time of the Public Records Act request and the party seeking the records must again go to court

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[8] By avoiding more specific references to the types of information that may be subject to a right of privacy, the Officers are able to make the dangers of public disclosure seem more acute. They also make it difficult for The Tribune to tailor its responses to the Officers' specific fears.

to prove the public nature of those records.[9] Officers' Br. 22. Thus, although it will become easier for a member of the public to win release of public records before the trial court (as courts tire of endless and repetitive delays to disclosure of such records), an expensive and time-consuming trip to the state court or district court will still be required, so long as the employee, upon notification, asserts that a right of privacy exists.[10]

This drastic and crippling remedy is neither necessary nor constitutionally required. The Second Circuit has already upheld a statutory disclosure scheme that forces objections to disclosure to be made before, rather than at the time of the public request for that information. Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983). Thus, the employee's constitutional rights are satisfied so long as the employee has some opportunity to assert his rights of privacy. The timing of that opportunity, however, does not rise to a constitutional level.

The Officers reject the idea that challenges based on privacy can occur before the request for a particular record is made. They argue that the courts have mandated a balancing process that

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[9] The City disclaims all responsibility for assessing the employee's privacy claims. City's Br. at 5-7. Thus, the City will presumably honor the employee's privacy claim and withhold the records in every case.

[10] Even though Florida privacy law has been perfectly settled since Shevin was issued in 1980, the courts have already been subjected to a string of repetitive privacy cases, each filed in response to a specific Public Records Act request. See supra, note 3.

can only take place in the context of a particular request for a particular record. This argument ignores the fact that in every case they have cited in support of their right to disclosural privacy, access questions were raised before a specific request threatened disclosure of a record. In Plante, for example, the financial disclosure law was challenged in an action for declaratory judgment long before the first request for public access was made. Even though the Act required the disclosure of many different types of financial information in which the Senators had varying privacy interests, the Court had no difficulty balancing the public interests in disclosure against those various privacy interests. The fact that the Act did not provide for repetitive challenge each time a financial disclosure record was requested did not render it unconstitutional. See Duplantier, 606 F.2d at 660-61 (action to enjoin enforcement of financial disclosure); Montgomery County v. Walsh, 274 Md. 502, 336 A.2d 97 (1975), appeal dismissed, 424 U.S. 901, 96 S.Ct. 1091, 47 L.Ed.2d 306 (1976)(declaratory judgment action).

The Tribune has already addressed the efficacy of pre-request challenges in its initial brief. Initial Br. 30-41. One fact, however, is worth emphasizing. Information within an employee's personnel file does not simply appear in the file by itself. That information is reposed in the file because the employee has voluntarily furnished it to his employer as a condition of his or her public employment. Thus, the employee is aware from the first day of his or her employment of the types of information that have become a matter of public record. Informa-

tion that is added later (particularly information relating to disciplinary action) is added only after a formal or informal proceeding in which the employee has significant due process rights. Unless the agency acts in violation of the employee's rights, the employee will always be aware of the information that is part of the public record. If the employee feels the information is sensitive and private, those concerns may be brought before a court at any time.[11]

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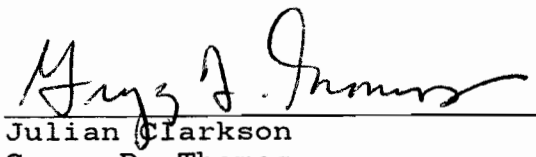
[11] Perhaps the most appropriate time for making such an objection would be at the time that the information is requested by the public employer. It is at that time that the employee's right of privacy (to the extent it exists) is implicated, not later when a member of the public seeks access to that public information. At that point, the objection can be made to the custodian without the need for court intervention.

CONCLUSION

The mandatory and automatic delay imposed by the district court encourages repetitive privacy actions concerning the same type of material and encourages the delay of such actions until the point where timeliness of disclosure is most critical. The Constitution of the United States does not mandate such impediments to the enforcement of Florida's Public Records Act. Rights of privacy, to the extent they exist at all, can be adequately protected without compromising the central purpose of the Public Records Act. The forty-eight hour delay imposed by the five member majority below should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellant's Reply Brief has been furnished by United States Mail this 10th day of January, 1984, 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 amicus curiae, The State of Florida, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32301; R. Jeffrey Stull, Esquire, and Edwina J. Duryea, 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, The Miami Herald Publishing Company, One Herald Plaza, Miami, Florida 33101; and to George K. Rahdert, Esquire, and Patricia F. Anderson, Esquire, Rahdert, Anderson & Richardson, Post Office Box 960, St. Petersburg, Florida 33731.

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