IN THE SUPREME COURT
OF FLORIDA

CASE NO. 64,725

MIAMI DAILY NEWS, INC., and THOMAS H. DUBOCQ,
Petitioners,

vs.

ALICE P., et al., and MORTON LAITNER, as attorney for HEALTH AND REHABILITATIVE SERVICES,
Respondents.

DISCRETIONARY REVIEW OF A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE THE MIAMI HERALD PUBLISHING COMPANY

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SUMMARY OF ARGUMENT

This Court invoked its discretionary jurisdiction to review a decision of the Third District Court of Appeal on the ground that the decision directly and expressly conflicts with decisions of this Court and those of other district courts. Contrary to all other applicable decisions, the Third District created "by implication" an exemption to the inspection provision of the Public Records Act for midwifery records even though those records are not the subject of any statutory exemption. If left undisturbed, the decision would eviscerate much of the statutory right of access to public records enjoyed by the public and press.

The Third District purported to hold[1] that, in the absence of an express statutory exemption to the Public Records Act (the "Act"), public *records* are exempt from its inspection provision if they contain *information* that is also contained in other *records* that are exempted from

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1. The Third District relied in part on § 382.35(1) which states that "all *birth records* of this state shall be considered confidential documents." Since a midwife application is not a "birth record," the Third District found it necessary to rewrite that statute to provide: "all birth *information* of this state shall be confidential." As discussed in detail, *infra*, the court thus erroneously converted a "records exemption" into an "information exemption." The court then assumed that the *information* in the exempt birth records would be the same information found in the midwifery records here at issue. That is likewise wrong.

The court also misconstrued § 455.241. That statute restricts only the dissemination by certain enumerated "health care practitioners" of "reports made of . . . examination or treatment." Midwives are not among the health care practitioners regulated by the statute. Likewise, a midwife application is not a report under § 455.241. *See* Point I (D)(1), *infra*.

inspection under the Act.[2] Consequently, the ruling would bar public inspection of documents compiled from sources wholly independent of the confidential records, even though there is no statutory exemption providing that such records or such information be exempted.

The decision flies in the face of the legislative intent behind the Act and ignores all controlling precedent. This Court and numerous district courts of appeal have repeatedly held that the Act was amended in 1975 to preclude judicial exemptions from the statutory right to inspect public records. When the Legislature has intended that certain *information* be exempted from inspection under Chapter 119, in all the government records in which it may be found and irrespective of the reasons for its collection, it has enacted *information exemptions*. Conversely, when the Legislature has intended to exempt a particular type of record, rather than the information which may be found in that sort of record, it has passed a *"records exemption"*.

Florida's legislators fully grasp the difference between a "records exemption" and an "information exemption," and this distinction is fundamental to our open government laws. Certain information may be gathered and memorialized in government records of an agency for a particular purpose that does not require public inspection of those documents in order for that agency

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2. *Alice P. v. Miami Daily News, Inc.*, 440 So.2d 1300 (Fla. 3d DCA 1983). The panel stated:

> The status of the information, as exempt from disclosure, does not change because it is submitted to a regulatory body in compliance with another statute or rule which does not expressly recognize that protected status. *Since the information sought is otherwise unavailable to the public under the authority of Section 382.35, it is exempt under Section 119.07(3)(a) from the Public Records Act.* *Id.* at 1303. (emphasis supplied).

to be held accountable to the public.[3] However, the Legislature may require the same information, when collected in other public records by another agency for a different public purpose, to be open to public inspection (i) in order for that agency to be held accountable to the public or (ii) to achieve any of the other fundamental goals of open government. Judicial creation of new exemptions to Chapter 119 "by implication" is particularly inappropriate now, because the Legislature has enacted "Sunset" legislation to eliminate *all* statutory exemptions currently on the books and not supported by compelling state interests. Fla. Stat. § 119.14, effective October 1, 1984. Only if such interests are shown in legislative hearings and the exemption is reenacted by the Legislature will it continue to be the law of Florida.

Where the Legislature has created no exemption for a record, or the information in a record, the judiciary is obligated to respect the implicit legislative judgment that access to such information is relevant to the public's ability to evaluate that agency's performance or some other public interest. Unless the Legislature has determined that certain information should be confidential for all purposes, the courts will not so hold.

Here, the Third District exempted from the right of public inspection granted by Chapter 119 midwifery records that *apparently* contain the names and addresses of the mothers whose "birthings" the midwife applicant claimed to have attended and the medical details of those

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3. More precisely, the Legislature has determined that fundamental interests supporting confidentiality dictate non-disclosure of governmental records or information when gathered for compelling state interests that do not implicate the public policies served by open government.

births.[4] The court did so despite the absence of any statutory exemption. The panel first reasoned that, although the identity and addresses of the mothers are available from the public portion of birth certificates, the fact that a midwife applicant was present at the birthing is not. However, nothing in the midwifery or birth certificate statutes (or any other law) makes such information or records "exempt" or "confidential." The judicial creation of an information exemption not enacted by the Legislature conflicts with the controlling decisions of this Court.

Access to the midwifery records at issue here would clearly advance the fundamental interests the Act is intended to serve. Under the midwifery statute existing at the time of the request, the public could verify whether a midwife was qualified and had, in fact, participated in 15 birthings only if the application and supporting documents were made available as public records.[5] The public could assess neither the agency's performance in licensing midwives nor the competency and credibility of the applicant without the application material. Thus, information that may be irrelevant to general public monitoring of births (and therefore not required to be open to inspection in "birth records") is highly relevant to assessing the qualifications of a midwife applicant and

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4. The Miami Herald notes that the records withheld from inspection by The Miami News were not made part of the record on appeal by the respondents and remain in the custody of HRS.

5. Recognizing the importance of midwifery to those members of the population who cannot afford the enormous cost of hospital births as well as the dangers presented by poorly regulated at-home births, the Legislature has completely overhauled the regulatory apparatus relating to midwives. *See* Chapter 467, Florida Statutes (1983). The new law contains more stringent requirements and a more ambitious regulatory scheme than the law in effect at the time the instant application was made. *Compare* Chapter 485, Florida Statutes (1981) (repealed).

the performance of the state agency licensing midwifery. This is presumably why the Legislature has never created any exemption for the midwifery records in either Chapter 119 or in the midwifery statutes.

Closing those portions of the midwife application relating to the medical details of the birthings, the Third District reasoned that a statute prohibiting certain enumerated health care practitioners from disseminating certain reports of medical examinations without a patient's consent creates an exemption to the Act for information in a midwife's application relating to the medical circumstances of a birth. Again, no statute exempts such *information* or the *midwife records*.

The Third District was apparently oblivious to the significant contraction of the public's right to know that would result from its decision. The Court must have been equally unaware of the astonishing administrative burden it would place on agency records custodians who must now search through the statute books to make sure information in their own records is not exempted by some law dealing with other records. There is no precedent for this decision that stands the Public Records Law on its head and invites claimed exemptions never envisioned by the Legislature.

The case before this Court is a simple one. The Act provides that all state records must be open to public inspection unless there is a statutory exemption from the provisions of the law. Midwifery records are not covered by any exemption to the Act. Thus, they are subject to inspection under Chapter 119.

The privacy claim presented here is specious. Both the express language of the Florida Constitution and the

decisions of this Court preclude any exemption to the Act based on the Florida law of privacy. Likewise, both this Court and uniform federal precedent hold that the federal right of privacy does not implicate interests sufficient to create exemptions for facts found in state disclosure or public records laws.

STATEMENT OF THE CASE AND FACTS

Government licensed midwifery is a relatively new social phenomenon. It permits an individual who cannot afford a medical doctor to obtain reliable assistance in giving birth, without the supervision of a physician. These births take place in the mother's home and generally occur without the benefit of emergency medical care.

The Public Records Act was intended to protect those of modest means, as well as those who are affluent. Consequently, members of the affected public have a right to know the types of individuals who are being licensed as midwives, the criteria the state employs in the licensing process, and what abuses, if any, are taking place, both in the regulatory process and in the profession itself.

The Midwife Application

Linda Wilson submitted an application with attachments to the state seeking to become a licensed midwife pursuant to Florida Statutes, Chapter 485. (R. 12-21; Petitioner's App. 29-38). The application was required to be submitted by provisions of the Florida Statutes governing midwifery. The applicable statute provided that the applicant demonstrate that she had:

> . . . attended under the supervision of a duly licensed and registered physician not less than 15 cases of labor and have had the care of at least 15 mothers and newborn infants during lying-in period of at least 10 days each; and shall possess a written statement from said physician that she has attended such cases in said 15 cases, with the date engaged and address of each; and that she is reasonably skilled and competent and establish the fact that she is reasonably skilled and competent to the satisfaction of the department. . . .

Fla. Stat. § 485.031(4)(b)

The statute does not exempt the midwifery records, or any of the information in them, from the Public Records Act. At the time suit was filed, the administrative regulations governing applications for licensing as a midwife were contained at *Fla. Admin. Code* Rule 10D-36.22, and provided, in pertinent part:

> (1) Application for license shall be made on forms provided by the Department of Health and Rehabilitative Services and shall be accompanied by:
>
> (a) Evidence of having attended within a one (1) year period under the supervision of a duly licensed and registered physician not less than fifteen (15) cases of labor including the care of not less than fifteen (15) mothers and newborn infants during the lying-in-period. Such evidence shall include:
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> 1. A statement written by the attending physician in each case documenting the level of skill and competence exercised.

2. A list of the patient's *name*,[6] address and delivery date for each of the documented cases.

(b) Letters of recommendation for licensure by at least two registered practicing physicians, one of whom may be the county medical director...

The applicant was also required to pass a physical examination, a brief written examination and demonstrate the ability to complete birth certificates. *Fla. Admin. Code* Rule 10D-36.22(1)(c)(d) and (2). Thus, at the time of the public records demand, government regulation of midwifery was minimal and depended largely on the review of documents submitted by the applicants who claimed to be trained informally by private physicians.

The Public Records Request and Proceedings Below

The MIAMI NEWS attempted to inspect the application but was refused access to the names and addresses of the mothers and the medical records concerning the births ("the records"). (R. 10, App. 27). The newspaper then brought a complaint under the Public Records Act for a Writ of Mandamus ordering the custodian to release all documents pertaining to the application. (R. 3-8, App. 1-6). The trial court, after reviewing the disputed records,

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6. The First District Court of Appeal has struck down the requirement that the patient's name be furnished as an invalid exercise of delegated legislative authority since the midwifery statute did not expressly require such information be collected by the agency. *State v. McTigue*, 387 So.2d 454 (Fla. 1st DCA 1980). *See also, Department of Health & Rehabilitative Services v. Petty-Eifert*, 443 So.2d 266 (Fla. 1st DCA 1983) (holding that HRS regulation requiring applicant to attend 15 births within one year was an invalid exercise of delegated legislative authority because the statute places no time restriction on the births attended).

in camera, ordered the custodian to permit the newspaper and its reporter to inspect and copy the complete application, consisting of the HRS standard form and all additional documentation supplied by Ms. Wilson. (R. 39-40, App. 101-102).

The Respondents, the mothers whose childbirths were observed by Wilson, were intervenors in the original proceedings. (R. 35, App. 97). After the trial court entered the Writ, they filed an appeal arguing both that the public records were exempt from disclosure under Chapter 119 and that any release of the information in them would be an invasion of their constitutional right of privacy.

The Opinion of the Third District Court of Appeal

The Third District affirmed the trial court's order insofar as it permitted inspection of the HRS application form for a midwife's license, the certificate of having attended 15 live births, and the attestations of the physician attending those births. It reversed that part of the lower court's ruling which ordered disclosure of the names and addresses of the patients and the medical details of the births. *Alice P.*, 440 So.2d at 1304.

The Third District therefore barred disclosure of three categories of facts that were contained in public records:

1. The mothers' names—information not expressly required by statute, but required by agency rule, as part of the application;

2. Medical details of the births—information not expressly required by statute or rule as part of the application and;

3. The mothers' addresses—information expressly required as part of the application.

The Third District held:

(a) The medical data made part of the application constituted confidential reports of health care practitioners under Section 455.241 and confidential birth records under § 382.35, Fla. Stat.

(b) Relevant portions of midwife applications are exempt from inspection under the Act when they contain information also found in certain confidential records.

The holding of the Third District thus judicially created both a new category of records exempt from the Act and a new exemption for information not provided by the Legislature to be exempt from Chapter 119. As such, it is in direct and express conflict with decisions of this court as well as other district courts of appeal which unambiguously hold that only the Legislature may define the categories of records and information exempt from disclosure.

The Respondents also argued in the Third District that the trial court's ruling violated their constitutional right to privacy. As will be demonstrated, there is no support for that position under either Florida or federal law.

ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL ERRED IN RULING THAT MIDWIFERY RECORDS ARE EXEMPT "BY IMPLICATION" FROM THE INSPECTION PROVISION OF THE PUBLIC RECORDS ACT EVEN THOUGH THE LEGISLATURE ENACTED NO EXEMPTION FOR THE RECORDS.

A. Applications for Midwife Licenses Are Public Records Open to Public Inspection Pursuant to Chapter 119.

The Public Records Act, Chapter 119, Florida Statutes, is perhaps the broadest open government law in the United States. The Act provides that " 'public records' means *all* documents . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." § 119.011(1). The Act establishes in clear and unambiguous terms this State's firm commitment to keeping public records open to inspection by the citizenry.

The general state policy regarding public records is set forth in the preamble to the Public Records Act at § 119.01:

> It is the policy of this state that all state, county, and municipal *records* shall at all times be open for a personal inspection by any person. (emphasis added).

Consistent with this policy is the provision governing the procedure for inspection and examination of records which provides:

> 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, under reasonable conditions, and under supervision by the custodian of the records or his designee. (emphasis added).

Fla. Stat. § 119.07(1)(a).

This commitment to openness, which is likewise embodied in the "Sunshine Law", Section 286.011, Florida Statutes, reflects the Legislature's recognition of the importance of an informed citizenry. For the public to make educated decisions and participate in government, it must have access to government records, which by definition, are the *public's* records. The agencies comprising government cannot be permitted to operate behind a veil of secrecy.

The record at issue, an application for licensing as a midwife, involves the regulation of health care, a critical area of public interest and concern. Health care involves each citizen in a personal manner. It is, literally, a matter of life and death. The public needs to be informed about new developments in medical treatment, regulation, costs and a number of other areas.

The qualifications of a midwife are especially important since she is directly involved with the birthing process. Society's responsibility to provide competent midwives is great because an infant cannot look after its own interest in having a successful birth. The emerging fetus depends solely upon its mother and those medical personnel upon whom she chooses to rely. Public access to midwifery records was critical at the time this action was filed because state involvement in the regulation of midwifery was wholly inadequate. Prospective mothers or members of the press seeking to verify a midwife's qualifications needed access to all public records relating

to her competency. The Florida Legislature fully recognized the inadequacy of the prior midwifery legislation and in 1982 enacted an extraordinarily ambitious and exacting regulatory scheme for midwifery. *Compare* Chapter 467, Florida Statutes (1983) *with* Chapter 485, Florida Statutes (1981) (repealed). This remedial legislation did not exist at the time the public records demand was made.

The existence of even one incompetent midwife professional in a community is clearly of legitimate concern to the public. Since the public generally lacks the time and expertise to independently determine whether the state adequately regulates health care professionals, the press ordinarily would "watchdog" the agency and disseminate this information to the public.

Linda Wilson submitted her midwife application and attachments to the state on a standard form provided by the Department of Health and Rehabilitative Services pursuant to then existing Chapter 485. Since there is no issue they are documents "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency,"[7] they are, by defini-

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7. The Miami Herald notes that Respondents failed to argue at any time, and therefore waived, the issue as to whether the documents containing the medical details of the births and the names of the mothers were, in fact, "public records." This argument was waived even though neither document was expressly required by law to be submitted to, or received by, the agency. In fact, no law required the mothers to permit the midwife applicant to submit any information concerning their births to any agency. If the applicant wrongfully submitted such information, the mother's remedy is against the applicant. In any event, the Third District's departure from the fundamental rule of law regarding exemptions seems particularly gratuitous and indefensible here since certain of the documents involved may not have been "public records" in the first place. Of course, had it been shown they were not "public records", it would have been unnecessary to reach the exemption issue at all. Under the structure of current Chapter 467, such records are simply not created.

tion, "public records" for purposes of Florida Statutes § 119.011(1). The application for licensure is within the definition of "public record" as it constitutes "material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type." *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633 (Fla. 1980).

B. Public Records May Be Exempted From Public Inspection Under Chapter 119 Only by Statute.

The Third District concluded that the midwifery records are public records. It found, however, that certain portions of the records are exempt from inspection under Chapter 119.

Public records may be excluded from the inspection requirements of Chapter 119 only where explicit statutory language provides exemptions from Section 119.07(1)(a). The Third District's opinion exempting records from Chapter 119.07, in the absence of a legislative mandate, is thus in direct and express conflict with numerous decisions of this Court and other district courts of appeal which preclude courts from creating exemptions to the Act. *Rose v. D'Alessandro*, 380 So.2d 419 (Fla. 1980); *Wait v. Florida Power & Light*, 372 So.2d 420 (Fla. 1979); *State ex rel. Cummer v. Pace*, 118 Fla. 496, 159 So. 679 (1935); *Gadd v. News-Press Publishing Co.*, 412 So.2d 894 (Fla. 2d DCA 1982), *pet. denied*, 419 So.2d 1197 (Fla. 1982); *Douglas v. Michel*, 410 So.2d 936 (Fla. 5th DCA 1982); 1982 *Op. Att'y. Gen. Fla.* 082-75 (Sept. 28, 1982), (opining that Section 455.241(2) does not exempt medical information contained in public records from inspection under Chapter 119).[8]

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8. For a detailed discussion of this significant Attorney General Opinion, *See* Point I (D)(1), *infra.*

See also Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So.2d 577, 581 (Fla. 1964); *Mills v. Doyle*, 407 So.2d 348, 350 (Fla. 4th DCA 1981); *Miami Herald Publishing Co. v. City of North Miami*, 420 So.2d 653 (Fla. 3d DCA 1983); *Tober v. Sanchez*, 417 So.2d 1053 (Fla. 3d DCA 1982); *News-Press Publishing Co. v. Gadd*, 388 So.2d 276, 278 (Fla. 2d DCA 1980); *State ex rel. Veale v. City of Boca Raton*, 353 So.2d 1194, 1196-97 (Fla. 4th DCA 1977). Thus, only the Legislature may create exemptions to the Public Records Act.

In *Wait*, this Court held:

> [T]he Public Records Act excludes any judicially-created privilege of confidentiality and exempts from public disclosure only those public records that are provided by statutory law to be confidential or which are expressly exempted by general or special law. *Wait, supra* at 425.

In *Wait*, a city resisted public access to certain records, asserting the attorney-client privilege recognized at common law. This Court upheld disclosure and banned reliance on common law privileges as not "provided by law," *i.e.*, not cognizable as exemptions under the express statutory scheme. *Id.* at 424. Pleas for additional exemptions should be directed to the Legislature, not the courts, since "(c)ourts deal with the construction and constitutionality of Legislative determinations, not with their wisdom . . . we are confined to a determination of the Legislature's intent." *Id.*

Wait holds that the Legislature, not the judiciary, determines the existence of exemptions to the Act. Where the Legislature has not provided an exemption, the courts must conclude none was intended.

Likewise, the Second District Court of Appeal noted in *News-Press Publishing Co. v. Gadd,* 388 So.2d 276, 278 (Fla. 2d DCA 1980):

> Absent a statutory exemption, a court is not free to consider public policy questions regarding the relative significance of the public's interest in disclosure and the damage to an individual or institution resulting from such disclosure.

Later, in *Gadd v. News-Press Publishing Co.,* 412 So.2d 894, 987 (Fla. 2d DCA 1982), the same Court stated that a public hospital seeking to protect its committee and personnel files from inspection "need only to persuade the Legislature to add Section 768.40 to the short list of statutes provided by Section 119.07(3)(b) to be exempt from public inspection." Thus, for a midwife application, or information in it, to be exempt from Chapter 119, it must be exempted by a specific statutory provision.

The Florida Legislature has enacted two fundamental types of exemptions from its general mandate that agencies open their files to public inspection. The Legislature distinguishes between (i) exemptions for particular classes of records ("records exemptions") and (ii) exemptions for particular classes of *information* irrespective of the records in which they are found ("information exemptions").

The Act's express records exemptions provisions are the following:

> (3)(a) All public *records* which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, shall be exempt from the provision of subsection (1).

> (b) All public *records* referred to in ss. 198.09, 199.22, 228.093, 257.261, 288.075, 624.319(3) and (4), 655.057 (1)(b), (3), and (4) are exempt from the provisions of subsection (1). (emphasis added).

The Act's information exemptions include Section 119.07(3)(d), which provides:

> Active criminal intelligence *information* and active criminal investigation *information* are exempt . . .

Other sections of the Act and various exempting statutes draw this fundamental distinction between exempt records and exempt information. The Legislature has often decided that information necessarily held confidential in one type of record must be open to public inspection when contained in different records. Information that should be confidential in one context must be public in another in order that a government agency be kept publicly accountable and the public's interests safeguarded. In such cases a *records* exemption is enacted to cover only those records to which access should not be granted. Where the Legislature has decided that certain information should be made confidential irrespective of the type of record in which it may be found, it has enacted an *information* exemption. For example, active criminal intelligence information is exempt whether it is in a sheriff's file, a state attorney's file, or a police department record. Fla. Stat. § 119.07(3)(d). These policy decisions are for legislative, not judicial determination. Thus, as this Court has repeatedly held, any exemption to the Act must be made clearly and by statute.

C. The Statute Governing Midwifery Records Does Not Exempt Them From the Inspection Provision of Chapter 119.

At all times material to this case, midwifery records were governed by Chapter 485.[9] The Chapter provides neither a records exemption nor an information exemption for any midwifery records. Chapter 119 contains no such exemption either. No other chapter exempts midwifery records or the information in them. In fact, the new midwifery statute, Chapter 467, also creates no exemptions from inspection under the Act. Since the Legislature has not seen fit to exempt midwifery records, or any information therein, either in Chapter 119 or elsewhere, this Court's inquiry should be at an end.

D. There Is No Exemption From the Inspection Provision of Chapter 119 for Midwifery Records in Any Other Statute.

1. Midwifery Records Are Not Reports Prepared by "Health Care Practitioners" As Defined by Section 455.241.

The Third District held that Chapter 455 of the Florida Statutes provides an exemption to inspection under Chapter 119 for midwifery records because they constitute confidential medical records. However, Chapter 455 restricts only the right of certain enumerated health care providers to circulate certain specified records.

Florida Statute § 455.241, governing disclosure of medical records, provides, in pertinent part:

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9. Only statutes in effect at the time the demand for inspection is made govern the resolution of a public records case, absent an express legislative intent to the contrary. *Dade County School Board v. Miami Herald Publishing Co.*, 443 So.2d 268 (Fla. 3d DCA 1983).

(1) Any health care practitioner licensed pursuant to chapter 458, chapter 459, chapter 460, chapter 461, chapter 462, chapter 463, chapter 464, chapter 466, or chapter 474 making a physical or mental examination of, or administering treatment to, any person shall, upon request of such person or his legal representative, furnish copies of all reports made of such examination or treatment. The furnishing of such copies shall not be conditioned upon payment of a disputed fee for services rendered.

(2) Such records shall not be furnished to any person other than the patient or his legal representative, except upon written authorization of the patient. . . .

The categories of health care specifically covered by Chapter 455 include only the following: Physicians (Chapter 458), Osteopathy (Chapter 459), Chiropractic (Chapter 460), Podiatry (Chapter 461), Naturopathy (Chapter 462), Optometry (Chapter 463), Nursing (Chapter 464), and Veterinary (Chapter 474). The Statute makes no mention of midwives. Moreover, Chapter 455 concerns only certain reports of medical examinations made by these health care practitioners. It does not address midwifery records. Thus, neither the records nor the records custodians contemplated by Chapter 455 are involved here. Until and unless the Legislature chooses to amend the statute, midwives will not be covered by the confidentiality provision of Chapter 455.[10]

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10. In 1982, the Legislature had yet another opportunity to add midwifery records to those exempted from public inspection when it enacted the Midwifery Practice Act, Chapter 467. *See* Chapter 82-99, Laws of Florida. However, the Legislature saw fit neither to place such an exemption directly in chapter 467 nor to amend Section 455.241 to add midwifery records to

(Continued on following page)

Further, even medical reports compiled by physicians are *not* confidential when incorporated in other public records. 1982 *Op. Att'y. Gen. Fla.* 082-75 (Sept. 28, 1982). *See* discussion at Subpoint E, *infra*. The documents at issue cannot be considered medical records in any event, since the labor records made by the applicant are not "reports . . . of . . . examination or treatment" under the statute. Rather they are observation records made by midwife applicants.

Even if the statute were amended to cover midwives, it would merely prevent disclosure of medical records by the health care practitioner. Respondents seek to prevent inspection of public records maintained by the state. Once the record is in the hands of a government agency it is no longer governed by Chapter 455. 1982 *Op. Att'y. Gen. Fla.* 082-75 (Sept. 28, 1982).

In ruling that § 455.241 barred disclosure, the Third District overlooked the principle of *expressio unius est exclusio alterius*, that is, the expression of one thing by the Legislature is the exclusion of the other. *Thayer v. State*, 335 So.2d 815 (Fla. 1976); *University of Florida, Institute of Agricultural Services v. Karsh*, 393 So.2d 621 (Fla. 1st DCA 1981); *Wanda Marine Corp. v. State Department of Revenue*, 305 So.2d 65 (Fla. 1st DCA 1974). If the Legislature wanted to include the records at issue within the ambit of Chapter 455, it could have done so by simply listing midwives and midwife applicants within the categories of health care practitioners covered by the statute. It did not.

Footnote continued—

those of optometrists, nurses, veterinarians, and other enumerated "health care practitioners." Likewise, in the subsequent 1983 and 1984 sessions, the Legislature has been silent. Without such an enactment, it is improper for a court to make such an exemption "by implication." *State ex rel. Cummer v. Pace*, 118 Fla. 496, 159 So. 679, 681 (Fla. 1935).

2. The Midwifery Records Sought Are Not "Birth Records" Under Chapter 382.

The Third District also found that the "labor records" of the midwife-applicant are exempted by implication from inspection under Chapter 119 by Chapter 382, which regulates "birth records." The notes kept by the midwife, however, are simply not birth records under Chapter 382. Section 382.35 provides:

> (1) All birth records of this state shall be considered confidential documents and shall be open to inspection only as hereinbefore or hereinafter provided for . . .
>
> (3) The State Registrar shall, upon request, furnish to any applicant, a short form certificate of birth or birth card in such form as the State Registrar may designate which shall contain only the name, color, sex, date of birth, place of birth, date of filing of the original certificate, and certificate number which shall be certified to by the State Registrar . . .

The documentation made part of Linda Wilson's application for licensure as a midwife was *not* kept pursuant to any duty imposed by Chapter 382, Chapter 455 or any other statute or regulation. The records were maintained by Ms. Wilson and reflected her duties and training while still an unlicensed midwife applicant; they were not "certificates of birth."

Again, the Third District erroneously looked to the *information* contained in the records covered by Chapter 382, rather than the records themselves, to create an exemption from inspection. In fact, the information Ms. Wilson collected would not be the same information found

in birth certificates. For example, the presence of a midwife at the birthing is not even included in a birth certificate. On the other hand, the name and address of the mother is part of the public portion of a "short form birth certificate," yet the Third District exempted such information from inspection in midwifery records.

The opinion by the Third District is an attempt to substitute its judgment for that of the Legislature with respect to midwifery records. The statutory scheme, as designed, was perfectly consistent with legislative intent to keep all such records open to public scrutiny. From the foregoing, it is evident that such records do not fall within any of the exemptions from disclosure under the Public Records Act. Consequently, they are open to public inspection. See *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

If allowed to stand, the Third District's chivalrous but misguided search for a means to protect the mothers' privacy will be used in later cases to further erode the Legislature's policy that "all state, county, and municipal records shall at all times be open for a personal inspection by any person." Fla. Stat. § 119.01. Moreover, it robs the poor of the protection of open government because it is overwhelmingly the less fortunate who must depend upon midwives and who would be victimized by midwives whose incompetence goes undetected. Only if the qualifications of midwives are examined in the "sunshine" will the public have some assurance of safety for the mothers of newborn infants who depend on their services.

E. The Third District Erred in Holding That Midwifery Records Are Exempt "By Implication" From the Inspection Provision of Chapter 119 Solely Because They May Contain Some Information Also Found in Unrelated Public Records That Are Exempt by Statute From Public Inspection.

The Third District did not find that any of the express statutory exemptions contained in Florida Statute 119.07(3)(b) prevented disclosure of applications for midwife licensing; rather, it erroneously found that Wilson's application is exempt from disclosure because it contains *information* that is also contained in other public records that are exempt from inspection.

In exempting portions of the midwife records from public inspection, the Third District declared:

> The *status of the information,* as exempt from disclosure, does not change because it is submitted to a regulatory body in compliance with another statute or rule which does not expressly recognize that protected status. *Since the information sought is otherwise unavailable to the public under the authority of Section 382.35, it is exempt under Section 119.07(3)(a) from the Public Records Act.*

Alice P., 440 So.2d at 1303. (emphasis added).

The Third District therefore held that certain portions of midwife applications were exempt from the Act, not because these records were made exempt by "general or special law" in accordance with Fla. Stat. § 119.07(3)(a), and not because the information contained in the records was made exempt by Fla. Stat. § 119.07(3)(c)-(m) or

any other information exemption. Rather, the midwife records were made exempt solely because certain records not involved here (birth certificates) are exempt by statute, and those records allegedly contain some of the same information as the midwife applications record.

The Court defined its mission to be determining "whether any of the *information* sought by appellees is covered by a statute which preserves its confidentiality." *Alice P.*, 440 So.2d at 1303 (emphasis supplied). The opinion thus requires records custodians to engage in searches through broad categories of information for "implied exemptions" rather than to make a simple determination as to whether the records or information are exempt by statute. *See Wait v. Florida Power & Light, supra.* This places an impossible burden on the custodians, endows them with boundless discretion, and impermissibly infringes the public's right to know.

Clearly, the same information can be gathered for different purposes. In one context, the information may be contained in a state public record subject to the Act. In another context, it may be confidential. When determining whether an exemption applies, however, the Court must determine whether the records or information are exempt under a specific provision of law. Categories of *information* can be exempt from disclosure only if they are specifically enumerated by statute. The Legislature has not seen fit to make the information contained in the midwife applications confidential under any information exemptions.

The Third District's convoluted approach to Chapter 119 poses a grave threat to continued access to public records as envisioned by the Legislature. If left undisturbed, its opinion will create chaos as it directs govern-

ment agencies to focus on the character of the *information* instead of the *records* containing the information, where the Legislature intended no such procedure.

A 1982 opinion of the Florida Attorney General considered a strikingly similar situation. The issue was whether medical records contained in fire department personnel files were subject to public inspection under Chapter 119. The opinion concluded that the records must be disclosed under Chapter 119, notwithstanding the fact that medical records are confidential under Chapter 455. 1982 *Op. Att'y. Gen. Fla.* 82-75 (Sept. 28, 1982). The Attorney General analyzed the interplay of Chapters 119 and 455 in these terms:

> This statute does not purport to make medical records that are contained in personnel files of public employees in the custody of a public custodian, supplied to him by or for public employees, confidential for purposes of the Public Records Law; nor does it prohibit inspection of the same by the public. This statute merely forbids the designated health care practitioners from furnishing such reports to third parties, except upon written authorization of the patient. . . . If the medical information contained in the personnel files of district employees was received by the district in connection with its official business transactions and furnished to the district by or for the district employees, then § 455.241, F.S., would not operate to exempt such information from the Public Records Law. In fact, § 455.241(2) does not refer to or have anything to do with public records or the Public Records Law or exempt any public record from the operation of such law.

Id.

The Attorney General's opinion is important for at least two distinct principles overlooked by the Third District in its opinion:

1. *Information* that may be found in a record made confidential by one statute is subject to disclosure when contained in a public record open to inspection under Chapter 119.

2. Section 455.241, relied on by the Third District as one basis for an exemption to disclosure in this case, only bans disclosure by health care practitioners to third parties, not by the government to the public, once the information is in government records. (*See* Subpoint D, *supra*).

The Third District's opinion also holds that information compiled independent of the confidential records is nonetheless exempt from disclosure when placed in a public record. This is precisely the case with Linda Wilson who submitted allegedly confidential information as part of her application. However, she did not consult the confidential records to compile the details; she did not attach private birth certificates to the state form; she did not rifle through a health care practitioner's medical records to assemble her application. She merely attended certain births and kept a record of facts and impressions as she observed them. This observation was first-hand and gained independently of any records (whether public or confidential) then in existence.

The application with its attachments, when submitted, was not exempt. That Linda Wilson *observed* some facts that may also have been recorded by someone else in certain other documents made confidential by law for other purposes does not make her record of the event exempt from the inspection provision of the Act.

The Third District has focused its inquiry on the *information* sought. Lacking an "information exemption" created by statute, that is an improper approach. Even more novel is the holding that exempts the application from disclosure because the confidential information could not be located elsewhere in public records:

> The fact that a midwife applicant attended the birth, however, is *not* reflected in that part of the birth certificate open to public inspection. If appellee were furnished with appellant's names and addresses as requested, this fact would be effectively disclosed.

Alice P., 440 So.2d at 1303.

Of course, there is no requirement that a supposedly private fact be contained in a public record before it is made part of another public record subject to disclosure. Yet this is the effect of the Court's finding that the midwife application cannot be revealed because it would release the fact of midwife attendance at a birth, something not otherwise contained in public records. This is circular reasoning.[11]

The Third District's opinion gives the Act little vitality. It fails to recognize that *information* can be confidential for one purpose and public for another. It invites spurious claims for exemptions by assertions that records in state personnel files, public assistance records, licensing boards and the like all contain information, which in some context, is contained in some other public record which is confidential.

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11. This reasoning is contradictory to that of *Wiggins v. McDevitt*, 10 Med.L.Rptr. 1699 (Me. 1984). In that case, the court ruled that those portions of a deputy sheriff's income tax return that would otherwise be confidential, became public records when they contained information concerning official fees received by the deputy for serving process. Therefore, those portions of the return revealing the deputy's official income were required by the court to be made available to the public.

II. COURTS MAY NOT JUDICIALLY CREATE CONSTITUTIONAL PRIVACY EXEMPTIONS TO THE PUBLIC RECORDS ACT.

A. There Can Be No Exemptions to the Public Records Act Based on the Florida Law of Privacy.

This Court has flatly refused to recognize a disclosural right of privacy under either the federal or Florida constitutions that would prevent disclosure of information contained in public records. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633 (Fla. 1980) ("Shevin"); *Laird v. State*, 342 So.2d 962 (Fla. 1977). In *Shevin*, this Court characterized the disclosural privacy interest as "the individual's interest in avoiding public disclosure of personal matters." *Id.* at 637. Respondents here have attempted to assert precisely this privacy interest, and this Court has rejected it.

In *Shevin*, an independent consulting firm of psychologists was employed by the Jacksonville Electric Authority ("JEA") to conduct a nationwide search for a managing director. The consulting firm conducted interviews with employees of electric utility companies nationwide. It assured interviewees that their statements were confidential. Eventually, the consulting firm's files contained names, addresses, employment information, intimate biographical, sexual and familial data and comments by the consultants regarding the candidates' personalities, living habits, and families.

A television station requested access to the firm's papers under the Act prior to the completion of the final report. When the request was refused, the television station and the state attorney general applied for a writ of mandamus to compel production of the files as public

records. The trial court granted the relief, and the consultant appealed. The First District Court of Appeal found that the records were public because they were made "in connection with the transaction of official business" which JEA had employed the consulting firm to perform. *Byron, Harless, Schaffer, Reid and Associates, Inc. v. Florida ex rel. Schellenberg,* 360 So.2d 83, 89 (Fla. 1st DCA 1978). However, the district court also found that the applicants had a constitutionally protected right of "personhood" which included the right of disclosural privacy as to the personal information given by them to the consultant under an assurance of confidentiality. *Id.* at 96.

The First District therefore reversed, finding that public inspection of the firm's papers would deprive the interviewees of "fundamental privacy rights secured by the United States and Florida Constitutions." *Id.* at 99. This Court reversed the First District, holding that there was no federal or state right of disclosural privacy that would prevent public disclosure of the consultant's papers. *Shevin,* 379 So.2d at 638.

This Court squarely refused to recognize a disclosural state right of privacy that would prevent the public from inspecting the consultant's papers. *Id.* at 639. This Court found no support in any language of the Florida Constitution to establish such a right.[12] It rejected the lower court's reliance on the "search and seizure" provision stating that it "deals only with the collection of information and not its dissemination." *Id.* at 639. The Court suggested that any doubt as to the existence of a state con-

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12. *Id.* The *Byron Harless* case was decided prior to the enactment of the privacy amendment to Florida Constitution. Fla. Const., Article I, § 23; *See, Laird v. State, supra* at 965 n.2. *See* fn. 13, *infra.*

stitutional right of privacy was "dispelled" by its earlier decision in *Laird v. State,* 342 So.2d 962 (Fla. 1977), wherein it made clear that Florida has no general state constitutional right of privacy. *Shevin, supra,* 379 So.2d at 639.

In 1980, shortly after this Court's decision, the people of Florida constitutionalized the *Shevin* holding with respect to public records by passing an amendment to the Florida Constitution, Article I, Section 23 (the "privacy amendment").[13] The privacy amendment created a Florida constitutional right of privacy, but it explicitly stated that the right "shall not be construed to limit the public right of access to public records and meetings as provided by law." *Id.* Florida law recognizes no privacy right which may create an exemption to the Public Records Act.

B. The Federal Disclosural Privacy Right Does Not Extend to Facts Found in Public Records.

Both this Court and the United States Supreme Court have held that the federal disclosural privacy right has no applicability to facts found in public records. *Shevin, supra,* at 638-39; *Paul v. Davis,* 424 U.S. 693, 713-14 (1976). In deciding *Shevin,* this Court was concerned primarily with the interpretation of federal constitutional law. This Court noted that the United States Supreme Court has analyzed the federal constitutional right of privacy as encompassing three distinct categories. The first, derived from *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19

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13. That amendment provides: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." Fla. Const., Art. I § 23.

L.Ed.2d 576 (1967), is the right to be free from governmental intrusions into one's private life, such as the placement of "bugging" devices in one's home (the "intrusion right"). The second category, based principally on *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973), protects an individual's "decisional" right of privacy with respect to personal matters such as marriage, childbearing and education (the "customary right"). These powerful rights may be overcome only by compelling state interests,[14] and they have frequently provided the basis for declaring legislative acts unconstitutional.[15] The third category, the right of "disclosural privacy," has been expressly discussed as it relates to public records in only three Supreme Court decisions, *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869 (1977); *Nixon v. Administrator of General Service*, 433 U.S. 425, 97 S.Ct. 2777 (1977); and *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976), and concerns the individual's interest in prohibiting public disclosure of personal information.[16]. It is only this weak privacy claim which is at issue under the facts presented here.[17]

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14. *See, e.g. Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973); *Akron v. Akron Center for Reproductive Health*, ... U.S. ....., 103 S.Ct. 2481 (1983).

15. *See, e.g. Griswold v. Connecticut*, 381 U.S. 471, 85 S.Ct. 1678 (1965); *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010 (1978); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973).

16. There is, of course no mention of "privacy" in the United States Constitution. The right is found to emanate from the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution. *Griswold v. Connecticut*, 381 U.S. 471, 85 S.Ct. 1678 (1965).

17. There is no intrusion issue here because neither the midwifery regulations nor the statute required mothers to provide any state agency with any information regarding their use of midwives, licensed or otherwise. There is no autonomy

(Continued on following page)

This Court noted in *Shevin* that no United States Supreme Court decision has extended the federal interest in disclosural privacy to facts included in public records. In fact, this Court observed that "[D]espite announcing that a privacy interest which protects individuals from public disclosure of private matters does exist, neither *Whalen* nor *Nixon* explicitly held that the federal constitutional right of privacy precludes dissemination of private information by the government." *Id.* at 637.

In *Whalen,* the Supreme Court considered the constitutionality of a New York statute requiring the disclosure of personal information by individuals seeking to purchase certain prescription drugs. The statute required the patients' names, addresses and ages to be collected by the State Department of Health, but prohibited disclosure of the information to the public. Several patients challenged the statute as an invasion of their right of privacy. The Supreme Court acknowledged the existence of an "individual interest in avoiding disclosure of personal matters" but upheld the statutory disclosure requirement as properly based on legitimate state interests. *Whalen,* 429 U.S. at 599.

The Court did not discuss the precise nature of the privacy interest and expressly reserved the question of whether disclosure by the government to third parties might be actionable as an invasion of privacy:

Footnote continued—

issue here because neither the decision of respondent mothers, nor any other mothers, to use midwives could be affected by the inspection of these midwifery records. This is true as to any mother's future decision to use a midwife because under the current law, Chapter 467, such information is no longer collected by government or disclosed to the public in agency records. It is true as to the records involved in this case because the Respondent mothers have already used Ms. Wilson as a midwife.

> The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional—or by a system that did not contain comparable security provisions. We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.

Whalen, 429 U.S. at 605-06.

The *Nixon* case concerned a challenge to a federal statute that provided for the collection and public disclosure of documents and tape recordings of the former president's conversations. Nixon claimed that the law violated his disclosural right of privacy. Again, the Supreme Court noted a "privacy interest" in nondisclosure of private facts, but found it unnecessary to decide the question because the presidential archives law provides adequate safeguards for preserving Nixon's private documents.

In *Paul v. Davis, supra,* the Supreme Court addressed for the first and only time the relationship between the disclosural privacy interest and state public records. The Court recognized that zones of privacy may be created by specific constitutional guarantees, but ruled that public disclosure of an arrest record did not deprive the plaintiff of his right to disclosural privacy. In that case an in-

dividual sought damages and injunctive relief under the Civil Rights Act after the police distributed a circular that named him in a list of "active shoplifters." Although the plaintiff had been arrested for shoplifting, the charges were dismissed, and he filed a lawsuit based on the First, Fourth, Fifth, Ninth and Fourteenth Amendments. The Supreme Court, however, rejected the attempt to find a constitutional underpinning for the "infliction by state officials of a 'stigma' to one's reputation." *Paul*, 424 U.S. at 699. The Court also rejected the specific claim of disclosural privacy as being "far afield" from the line of decisional privacy cases previously decided by it. *Id.* at 713.

> He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

Id.

Thus, while the United States Supreme Court has mentioned the existence of a disclosural privacy interest, it has held that the federal constitutional right of disclosural privacy does not preclude the dissemination of facts found in state public records. This Court adopted that holding in *Shevin*.

C. Even Were This Court to Recognize a Federal Right of Disclosural Privacy Applicable to Public Records, the Right Could Not Be the Basis for Exempting Midwifery Records From the Public Records Act.

1. Assuming the Federal Right to Disclosural Privacy Applies to the Disclosure of Facts in Public Records, It Is, at Best, a Weak Right Outweighed by Any Substantial Governmental Interest.

Against the backdrop of *Whalen, Nixon,* and *Paul,* the Fifth Circuit Court of Appeals decided *Fadjo v. Coon,* 633 F.2d 1172 (5th Cir. 1981), one year after this Court rejected the opportunity to recognize a right of disclosural privacy in *Shevin.* The meaning and significance of *Fadjo* has been largely misunderstood. In *Fadjo,* the plaintiff was the beneficiary of a number of life insurance policies of an individual who apparently died in a boating accident. Both the state and the insurance companies began an investigation. The state investigator subpoenaed various documents and obtained testimony from Fadjo which concerned "the most private details of his life." *Id.* at 1174. The information was provided voluntarily by Fadjo who waived his Fifth Amendment rights only after he was assured by the state that his statement would be kept confidential. The investigator, however, allegedly turned over the information to the insurance companies.

Fadjo filed suit under 42 U.S.C. § 1983, § 1985, and § 1988, claiming that the investigator and the insurance companies conspired to abridge his constitutional rights of privacy and freedom of speech. In a somewhat murky opinion that involved both an intrusion and disclosural privacy claim. the court found that Fadjo's complaint

stated a constitutional tort claim for invasion of the "confidentiality branch" of the privacy right, even if the information were properly gathered. *Fadjo,* at 1175. In ruling that the defendants may have invaded Fadjo's privacy in revealing the information to the insurance companies, the court was apparently persuaded by the allegations that he conditioned his disclosure to the state on a promise of confidentiality, and that the state's subsequent disclosure of *intimate, private facts* to the insurance companies served no legitimate public interest. In recognizing the privacy right, the Fifth Circuit approved a balancing test and found that Fadjo's claim that no legitimate state interest supported the disclosure of private facts to the insurance companies was enough to state a claim for relief:

> Fadjo clearly states a claim under the confidentiality branch of the privacy right. He does not claim that the state lacked authority to obtain personal information from him while pursuing a criminal investigation. However, even if the information was properly obtained, the state may have invaded Fadjo's privacy in revealing it to Julson and the insurance companies. Alternatively, although the state could compel Fadjo's testimony it could delve into his privacy only in pursuit of aims recognized as legitimate and proper. Implicit in both formulations of the complaint is the allegation that no legitimate state purpose existed sufficient to outweigh the invasion of Fadjo's privacy.

Id. The court did not hold that the disclosural privacy right creates exemptions to the Public Records Act. It held only that a state investigator may not improperly dump private facts into public records to insulate himself from liability under 42 U.S.C. § 1983 for unlawfully disclosing those facts to third parties.

The *Fadjo* court itself relied on the balancing test suggested by *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979). *See also DuPlantier v. United States*, 606 F.2d 654, 669 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981). The *Plante* court upheld Florida's financial disclosure laws, Fla. Stat. § 112.3145 *et seq.*, for various elected officials and judges after it reviewed the competing public interests involved and noted that public figures have a reduced expectation of privacy. The *DuPlantier* court similarly upheld state disclosure laws.

The federal cases stand for the proposition that the weak disclosural privacy right must give way to any substantial governmental interest in disclosure.[18] State interests do not have to rise to the "compelling interest" level in order to overcome the putative federal right. Consequently, a balancing test is applied because almost any reasonable state purpose would outweigh the privacy interest. Even *Fadjo* stands only for the proposition that a state investigator may not acquire highly intimate private information from an individual under false pretenses, disgorge the information to private parties for their own benefit where the disclosure serves no legitimate public purpose, and then attempt to avoid liability by planting the material in a public file. In other words, government agents may not lie to obtain private facts they could not otherwise lawfully obtain in order to disclose those facts to

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18. *See, J. P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) in which the court stated, "The Constitution does not encompass a general right to nondisclosure of private information." *See also, Barry v. City of New York*, 712 F.2d 1554 (2nd Cir. 1983); *St. Michael's Convalescent Hospital v. California*, 643 F.2d 1369 (9th Cir. 1981); *McElreth v. Califano*, 615 F.2d 434 (7th Cir. 1980); *United States v. Choate*, 576 F.2d 165 (9th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 350 (1978); O'Brien *v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2173 (1977); *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69 (8th Cir. 1976), *cert. denied*, 429 U.S. 855, 97 S.Ct. 150 (1976).

self-interested private parties. Nothing in *Fadjo* suggests that the right to disclosural privacy would be abridged where information is properly gathered and its public disclosure advances the interests the Public Records Act is intended to serve.

2. This Court Has Long Held That the Public Records Act Serves Most Compelling State Interests.

This Court's decisions have consistently held that the policies supporting the preservation of government records open to public inspection are among the most compelling interests recognized in the State of Florida. *Wood v. Marston*, 442 So.2d 934, 941 (Fla. 1983). The Legislature underscored the gravity of this interest in the introductory passage of Chapter 119 where it provided that, "It is the policy of this state that all state, county and municipal records shall at all times be open for a public inspection by any person." Fla. Stat. § 119.01(1).

One appellate court has termed the policy considerations behind the Public Records Act a "state interest of the highest order":

> Florida's public records law and its companion, the open public meetings law, promote *a state interest of the highest order*. By promoting open government and citizen awareness of its workings, Chapter 119 and Section 286.011 enhance and preserve democratic processes. Florida's interest in opening governmental processes to public inspection has repeatedly been emphasized in decisions of our Supreme Court. *News-Press Publishing Co. v. Wisher*, 345 So.2d 646 (Fla. 1977); *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974); *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971); *Board of Public Instruction of Broward Co. v. Doran*, 224 So.2d 693 (Fla. 1969).

Byron, Harless, Schaffer, Reid and Associates, Inc. v. Florida ex. rel. Schellenberg, 360 So.2d 83, 97 (Fla. 1st DCA 1978), *rev'd on other grounds,* 379 So.2d 633. (emphasis supplied).

The rationale for open government was ably expressed in *Krause v. Reno,* 366 So.2d 1244 (Fla. 3d DCA 1979), a "Sunshine Law" case approved by this Court in *Wood v. Marston.*

1. When records are open, citizens are able to provide input to the governmental process thereby improving the quality of public decision making.

2. Representative government requires that it be responsive to the wishes of the governed, i.e., the public which is the ultimate source of consent;

3. Maintaining records open to the public produces stability and public confidence in government;

4. Public records disseminated by the news media insure that our system of government will function as a genuine participatory democracy, i.e., the governed will have a right to participate in their government;

5. Public access to public records has a "checking effect" on governmental abuses;

6. The public can better evaluate public officials and their projects by being privy to information contained in public records; and

7. Public access to governmental records enables members of the public to understand more completely the decision-making processes of government and thereby consider future governmental developments and the consequences of developments for their own lives. *See Krause, supra,* 366 So.2d at 1250.

Thus, Florida's commitment to "government in the sunshine" preserves the public's right (and legitimate need) to monitor the performance of public agencies. Public scrutiny is a check on abuse, corruption and simple incompetence in governmental programs and regulatory bodies.

3. Because Public Inspection of the Midwifery Records Would Serve the Compelling State Interests Which Animate the Public Records Act, the Federal Right of Disclosural Privacy Grants No Exemption for the Records.

This Court noted in *Florida Board of Bar Examiners Re: Applicant*, 443 So.2d 71, 76 (Fla. 1983) that, since the disclosural right of privacy is a weak interest to be adjudicated under a balancing test, it must give way when confronted with a "compelling state interest." As noted above, this Court has long held that the Public Records Act serves numerous state interests of the most compelling nature. *Wood v. Marston*, *supra* at 941. Assuming that the disclosural privacy right applies to facts found in public records, the only question is whether there is a nexus between the midwifery records requested here and the compelling interests served by the Act. If inspection of the midwifery records would serve those most compelling state interests, the federal privacy right is necessarily outweighed by the right to inspect the records.

There can be no question that a pregnant woman's interest in inspecting the midwifery records of her prospective midwife is compelling. How else can she verify her midwife's qualifications and competency? Access to such records could be a matter of "life or death." This was particularly true prior to the Legislature's passage of the

extensive training and educational requirements found in new Chapter 467. Without the names and addresses of the mothers whose birthings the midwife claimed to assist, no investigation of the prospective midwife would be possible.

The detailed records of the birthings attended by the midwife would be the only documents revealing her qualitative experience level, whether she understood her duties, whether she knew the procedures required in difficult births and whether she had ever attended a difficult birth. Given the limited governmental regulation of midwifery, the only real protection the public had from incompetent midwives was access to the records. Further, the only source of information to which the press had access in order to investigate, monitor, and "watchdog" midwifery and its regulation were records such as those at issue here. In fact, public access to similar midwifery records may have caused the re-evaluation of the regulatory apparatus which has led to the passage of Chapter 467. The federal right to disclosural privacy, if applicable, is clearly outweighed by the compelling interests served by public inspection of the midwifery records.

CONCLUSION

Based on the foregoing reasons, the decision of the Third District Court of Appeal should be reversed insofar as it creates exemptions by implication to the Public Records Act.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *AMICUS CURIAE* BRIEF OF THE MIAMI HERALD PUBLISHING COMPANY was served by mail this 31 day of July, 1984, to:

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