O/A 11-8-84

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 ATTORNEY GENERAL OF FLORIDA

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ATTORNEY GENERAL

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THE RIGHT OF PRIVACY AND THE "TRAVELING EXEMPTION"

Amicus Attorney General, Jim Smith files this brief to address the issue of a constitutional right of privacy vis-a-vis the Florida Public Records Act (Chapter 119, Florida Statutes). Despite the specific finding of the District Court of Appeals that the court need not reach the constitutional issue presented, see Alice P. v. Miami Daily News, Inc., 440 So.2d 1300 (Fla. 3d DCA 1983); all of the parties, including Amicus American Civil Liberties Union, have extensively addressed the constitutional issue not reached by the court below. It is on this issue and ancillary matters appurtenant thereto that the Attorney General wishes to be heard.

Respondents in their Answer Brief apparently are urging this court to adopt the test and the reasoning of the United States Court of Appeals, Fifth Circuit in Plante v. Gonzalez, 579 F.2d 1119 (5th Cir. 1978) and Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981) as the lodestar by which issues pertaining to a constitutional right to privacy is determined. It is the Attorney General's position that the analysis of this court concerning the issue of the constitutional right of privacy is correctly stated in the opinions of Shevin v. Bryon, Harless, Schaffer, Reid and Assoc., Inc., 379 So.2d 633 (Fla. 1980) and Forsberg v. Housing Authority of the City of Miami Beach, ___So.2d___, 9 FLW 335 (Fla. 1984). In those cases this court

correctly found that there is no "per se" federal constitutional right to privacy, but rather a balancing test is to be used on a case by case basis. Forsberg, supra (9 FLW 335). In reaching those opinions, this court reviewed the decisions of the United States Supreme Court in Nixon v. Administrator of General Services, 433 U.S. 425 (1977); Whalen v. Roe, 429 U.S. 589 (1977) and Paul v. Davis, 424 U.S. 693 (1976). In addition, Justice Overton in his concurring opinion in Forsberg (9 FLW 337) specifically rejected the analysis of the Fifth Circuit in this area. The Attorney General requests that this court specifically adopt Justice Overton's analysis in Forsberg and reject the Fifth Circuit's opinions granting to an individual substantial control over the disclosure of material pertaining to that person held by a government agency.

The Attorney General recognizes that there are certain privacy rights encompassed in the penumbra of the Bill of Rights. Those rights would not be trampled upon by the release of information voluntarily submitted in support of an application by references for a licensee. In this case, those references are mothers who gave birth while being attended by a midwife and who consented to this information being included in an application. The public has a right to review the information submitted voluntarily by those references to a governmental body. By their actions these parties have waived any right to privacy so that the balancing test referred to above is unnecessary. They have,

by their own actions, permitted this information to be placed in a public record. Accordingly, they may not later challenge the review of that information.

It is the position of the Attorney General that individuals may not and should not be permitted to place conditions upon the release of information contained in a public record. It is the Legislature which, in balancing the rights of the individual against the public's need to know, should determine what information is confidential or exempt from release after determining what constitutes a public record. The right, if any, of a citizen to assert a constitutional right or privilege exists at the time of the collection of the information and not after the material is contained in a public record. It is far too late in the game for an individual to object to the release of data in a public record when, as here, that data was freely and voluntarily submitted. See Nixon, supra at 459. Further, as indicated above, it is for the Legislature to determine in the creation of exemptions and the declarations of confidentiality whether the material collected may or may not be released. In this regard, the Third District Court of Appeal in the case sub judice specifically found that certain data contained in the birthing records (§382.35 and specifically §382.35(2)) was open to public inspection. The court stated,

> ". . .It is thus clear that some part of the birth certificate, which must be filed for each live birth, is open to

> public inspection. That would include at the least, the name of the institution or, if not an institution, the address where the birth occurred, the name of the mother, and the physician or licensed midwife in attendance during or immediately after the birth." Alice P., supra at 1302-03. (Emphasis supplied.)

Having made that statement, the court then proceeded to find that the names and addresses of Respondents here were not releasable because other portions of the birth records were deemed confidential or were exempt from release as being medical records of the attending physician. Apparently the District Court believes that if information is confidential in one record it is confidential in all records. This "traveling exemption" is unworkable and would wreck havoc with the state's public policy to open the public records for inspection. It would place an intolerable burden upon the custodians of the records to require them to determine in advance if any portion of the record in their custody contains any information which might be exempt or deemed confidential under any statute or if that same information is also contained in another record which is exempt from inspection. Turmoil and indecision would be rampant. Clearly that is an untenable situation and will lead to excessive litigation over the release of matter and would in effect place restrictive covenants upon the use, release or inspection of the data in public records. For example, under the ruling of the Third District Court of Appeals in this case, information

contained in a state employee's personnel file of a medical nature would not be releasable if a portion of that information is also contained in the otherwise confidential birthing record filed pursuant to §382.35. If an employee's name and social security number is contained in an agency file deemed confidential or exempt from release that confidentiality and exemption should not "travel" to all other public records wherever located to incorporate therein that data. Such a result would vitiate the Florida Public Records Act by placing intolerable burdens upon the custodians to the extent that little could be inspected or released in a timely manner.

Based on the above, the Attorney General would urge that this court reverse the finding by the District Court of Appeal that the information pertaining to references attached to the midwifery application is confidential. The voluntary submission of private information to a government agency precludes a later attempt to prevent disclosure of that information to the public. An individual may not place restrictions upon the release of information submitted in accordance with the law and regulation.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MITCHELL D. FRANKS
CHIEF TRIAL COUNSEL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE, ATTORNEY GENERAL OF FLORIDA, has been furnished by United States Mail to Joseph P. Averill, Esquire, Attorney for Plaintiffs/Petitioners, 1237 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; Bruce Rogow, General Counsel, American Civil Liberties Union Foundation of Florida, Inc., Nova University Law School, 3100 SW 9th Avenue, Ft. Lauderdale, Florida 33315; Charlene Miller Carres, Attorney for Amicus Curiae, American Civil Liberties Union Foundation of Florida, Inc., University of Miami School of Law, Post Office Box 248087, Coral Gables, Florida 33124; and Thomas G. Sherman, Esquire, DeMeo & Sherman, P.A., Attorney for Respondents, 3081 Salzedo Street, Coral Gables, Florida 33134, this 25th day of October, 1984.

MITCHELL D. FRANKS