OIA 11-8-84

IN THE SUPREME COURT

OF FLORIDA

CASE NO. 64,725

MIAMI DAILY NEWS, INC. and

THOMAS DUBOCQ,

Petitioners,

vs.

ALICE P., et al.,

Respondents.

_____/

ANSWER BRIEF OF RESPONDENTS

THOMAS G. SHERMAN, ESQ.
DeMEO & SHERMAN, P.A.
Attorney for Respondents
3081 Salzedo St.
Coral Gables, Fl 33134
Phone: (305) 448-5898

TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

The opinion of the Third District Court of Appeal at issue safeguards fifteen mothers and babies from public dissemination of the intimate records of their respective childbirths attended by a lay midwife applicant and supervised by a licensed medical physician. The documents reflecting their records were contained in a lay midwife's license application, filed with the Department of Health and Rehabilitative Services, State of Florida. The Third District's opinion upheld the sanctity of these most intimate records from the Florida Public Records Act based upon two exemptions provided by General Law, F.S. §385.35 and §455.241, which provide that birth certificate records (§382.35) and medical records (§455.241) are confidential information. The Third District did not reach the question raised by Respondents of whether the Florida Public Records Act was unconstitutional as applied.[1] Respondents thus contend herein that:

1. The Third District Court of Appeal properly held that the records in question were exempt from the Public Records Act by virtue of the statutory exemptions set forth in F.S. §385.35 and §455.241, and alternatively, that

2. The records at issue are protected from disclosure to the public by the constitutional rights to privacy of the Respondents. While Petitioners attempt to obfuscate the fact that the information

---

[1] State ex-rel Kennedy v. Knott, 123 Fla. 295, 166 So. 835 (1936), states the axiomatic principle that courts will not decide constitutional issues where a controversy may be resolved on other grounds.

in question, implicates the decisional/autonomy branch of the zone of privacy, it is demonstrated herein that the incident of childbirth falls squarely within the realm of family life which the United States Supreme Court has said the State cannot enter absent a compelling interest.

Finally, Respondents point out that Petitioners' belated claim that Respondents waived their rights to confidentiality and privacy by submitting their records to the State, was properly determined by the Third District since Petitioners failed to preserve this question for review. Moreover, we buttress this portion of the Third District opinion expressing doubt as to the merit of the argument that disclosure to the State waives an individual's right to protection from disclosure to the public.

STATEMENT OF THE FACTS AND CASE

The facts and records as described in the Brief of the Petitioners and the Amicus Brief of the Miami Herald do not present the entire picture of the record below.[2] The following should also be noted.

Department of Health and Rehabilitative Services (hereinafter "HRS") refused to turn over all the documents requested by the Miami News since it seemed that doing so would infringe on Respondent's rights to privacy. [A.16-18]

The Miami News alleges that the Stipulation of Facts entered into between it and HRS essentially admitted the facts required to sustain the complaint. (Brief at p.4) However, the intervenor objected to portions of the Stipulation, and advised the trial court that they were asserting their constitutional rights to privacy, which HRS had no standing to raise. [A. 42,48]

The Miami Herald interjects social "fact" into its Statement of the Case and Facts. (P. 5 of its Brief) In truth, and in fact, Government licensed midwifery has been in existence in this State at least since 1933. F.S.A. §485.011 (1977). Secondly, it does not permit an individual who cannot afford a medical doctor to obtain professional assistance in child birth. This "fact" is

---

[2]At p.3 of its Brief, Petitioners make the odd statement that "although unlicensed, Ms. Wilson made application to HRS for a license under the Midwifery Act." We simply want to correct the negative innuendo. Obviously, Ms. Wilson, if licensed, would not apply for a license, and being unlicensed, certainly had the legal right to apply for one.

neither supported by the record nor reality.[3]

Furthermore, while the Public Records Act cases should not be decided based on the wealth of the populace affected, it is equally true that all economic strata are equally endowed with rights of privacy.

---

[3] Infra, we support our factual contention with reliable authority which shows that the average "home birth" family in the United States today is rarely motivated by the reduced cost of home birth. See Stewart & Stewart, Compulsory Hospitalization, Vol.III, Ch.55,p.759-60, NAPSAC Publications, Marble Hill, Mo. (1979).

THE THIRD DISTRICT CORRECTLY HELD THAT THE RECORDS REQUESTED WERE EXEMPT FROM DISCLOSURE DUE TO THE FACT THAT BIRTH RECORDS AND MEDICAL RECORDS ARE CONFIDENTIAL AS PROVIDED BY F.S. §382.35 AND §455.241.

> Both privacy and open records are necessary if individual citizens are to exist in a cooperative manner under the rule of an elected government. Privacy permits individuals some freedom from government, and from other people. Open records, on the other hand, permit individuals the freedom to rely on other people to govern them.
>
> Federal Constitutional Privacy and the Public Records Act, 32 U. Fla.L.R. 313, 326 (1981).

In enacting Chapter 119, the Florida Legislature recognized some restrictions to open government were essential to maintenance of our free society, and thus, in §119.07(3)(a) it provided:

> 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 provisions of subsection (1).

The Third District expressly followed this legislative provision in the instant case.

Contrary to the assertion of the NEWS and the HERALD, the decision of the Third District does not conflict with this Court's holding in Wait v. Florida Power and Light, 372 So.2d 420 (Fla.1979). The Third District did not judicially create a privilege of confidentiality or an exemption from the Public Record Act that was not already provided by statutory law. Rather, the Third District gave full effect to the legislative purpose behind Florida Statute

§382.35(1)[4] and the express meaning of Florida Statute §455.241.

BIRTH RECORDS

The Third District correctly comprehended that while §382.35(2) provides that copies of the birth certificates may be issued to ennumerated persons, it further provides that disclosure of that portion containing medical details and marital status is prohibited. Alice P. v. Miami Daily News, Inc., 440 So.2d 1300, 1303 (Fla. 3d DCA 1983). The records in question in fact contained medical details of the births, the marital status of the Respondents, and the fact that a midwife applicant attended the birth.

The confidentiality provided by §382.35(1) has ample justification. The information in this case rendered confidential by virtue of this statute undoubtedly constitutes private information. Moreover, this information involves an emotionally charged subject matter, not only for those directly affected by the birth but for various societal groups, including the church, the medical establishment, the government, the media[5], etc. In short, most everyone has an opinion as to under what circumstances one should be able to produce a child, how it should be performed,

---

[4] This statutes provides: "All birth records of this State shall be considered confidential documents and shall be open for inspection only as hereinbefore or hereinafter provided for."

[5] Hence, the NEWS made the public records request at issue.

where it should be performed, who the birth attendant should be, what constitutes the most healthy enviroment for the infant, and so on. These societal debates parallel the interest generated by the abortion question. Thus, to make public one's marital status when giving birth to a child for the individual who does not have a family could most certainly result in public shame and ridicule. As to the medical details, public disclosure could also result in embarassment since these medical details are obviously extremely sensitive and private matters.[6] Further, with respect to the attendance of the birth by a lay midwife applicant, if such information was not confidential, many couples would choose not to register their babies born at home in light of the harrassment they could receive. See, e.g., Stewart David, 21st Century Obstetrics Now!, Vol. I, Chapter 4, p.27. (Health officials harrass couples who register the births of home births babies); Stewart & Stewart, Compulsory Hospitalization: Freedom of Choice in Child Birth, Vol. II, Chapter 35, p. 451, (obstetrical community accuses home birth proponents of child abuse and"mindless"rejection of technology).[7]

---

[6] The response of the Department of Health and Rehabilitative Services to the Petition for Writ of Mandamus below raised this very question, and pointed out that the lay midwife application contained the medical details of the fifteen births including whether a vaginal delivery or a C-Section was performed, the results of the venereal disease tests, whether an episiotomy was performed, whether enema was taken, whether cervical lacerations resulted, whether vaginal lacerations resulted, and notes regarding delivery of the placenta. [A. 16-17]

[7] The difficulties surrounding couples who choose home births with a midwife are discussed and described in greater detail, infra at p. 25.

It is therefore submitted that for reasons including the above, the legislature made portions of birth certificates "confidential" and therefore not subject to public inspection or copying provisions of §119.07(1)(a),(b), F.S. (1983). While the MIAMI NEWS argues that no express exemption was provided by law as to these birth records, this conclusion is simply wrong. §382.35(1) provides that such confidentiality exists. Further, it is simplistic to suggest that no birth records were requested in this case, as the midwife application in question contained exactly that.

The MIAMI NEWS and the HERALD argue that confidentiality of birth records is eviscerated when placed in the hands of a State custodian other than the Registrar. However, this argument ignores the fact that the Registrar is a division contained within the Department of Health and Rehabilitative Services, the same custodian of the midwife application and attachments in question. Thus, even assuming arguendo that the legislature intended that one's rights to confidentiality dissipated when the records containing such private information were transferred from custodian to custodian, in this case, such distinction would not prevail.

However, there is no indication from the statutory scheme of F.S. §119.01, et seq., that such disregard for confidentiality was intended. Rather, as the Third District appropriately pointed out, to hold otherwise would lead to an absurd result and frustrate

the intended purpose of F.S. §382.35(1), which does expressly provide that the information in question remain confidential.[8]

Clearly, Petitioners and Amicus suggest that all exemptions provided by law be interpreted in an absurd and unreasonable manner in order to give an imbalance of weight to the public's right to know and a diminished importance to citizens' rights to confidentiality and privacy, contrary to the Public Records Act's intent. To say that confidentiality as provided by law can be eliminated by an official's intentional, negligent, or whimsical transmission of a record from one division of an agency to another, or from agency to agency, defies common sense. The Third District's opinion thus properly ignored any argument that confidentiality statutes were to be so indifferently treated. As the Third District stated in Yeste v. The Miami Herald Publishing Co., 451 So.2d 491, 494 (Fla. 3d DCA 1984), where it held that portions of a death certificate containing the medical certification of the cause of death was exempt from public inspection under the Public Records Act,

---

[8] Because the Legislature saw fit to provide that a record or report obtained by an agency pursuant to the Florida Crimes Compensation Act, F.S. §960.01, et seq., remain confidential if protected by any other law or regulation if received pursuant to the Act, F.S. §960.15, does not mean that the Legislature had intended that other statutory provisions providing for confidentiality were annulled when submitted to a State agency, when exchanged between divisions of one particular agency, or passed from one agency to another. It appears that §960.15 was included in the Crimes Compensation Act because it was necessary to clarify that although a record of a proceeding before the commission was public record, that information collected pursuant to the proceeding, such as medical records, (F.S. §960.06(e), criminal investigation information, etc.) did not also become public record. F.S. §960.15 (1977).

> [W]e are constrained by law to avoid a literalistic reading of a statute where, as here, such a reading would defeat the entire legislative purpose behind a statute. Garner v. Ward, 251 So. 2d 252, 255-256 (Fla. 1971).

Similarly, to accept the position of the Petitioners would be to defeat the entire legislative purpose behind F.S. §382.35.

The so-called information-records distinction in the Public Records Act urged by Petitioners and Amicus to be so "clearly" expressed by the legislature even if true is of no benefit to the Petitioners in this case. We also contend that such a distinction is not clearly expressed, and that such an interpretation would conflict with the axiomatic principle prohibiting courts from interpreting statutes to reach absurd and unreasonable results.

The only place the word "information" is used in the Act as opposed to the word "record" in defining what is available under the Public Records Act for public inspection and what is exempt is in F.S. §119.07 (3)(e-j), in which criminal intelligence and investigative information are made exempt from the provisions of subsection (1). While Petitioners and Amicus seem to indicate that this distinction is widespread throughout the Act, (Amicus Brief at p.17 ,: "other sections of the Act...draw this fundamental distinction between exempt records and exempt information,"; Petitioner's Brief at p.10), they fail to point to any other sections. Moreover, the distinction between "records" and "information" in the context of §119.07 seem to have little if any significance, as evidenced by F.S. §119.07(2)(b). There, in referring to the "information" referenced in subsections 119.07

(3)(e),(f),(g), the Legislature stated as follows:

> In any action in which an exemption is asserted pursuant to paragraph (e), paragraph (f), or paragraph (g) of subsection (3), the record or records shall be submitted in camera to the Court for a de novo inspection. In the case of an exemption asserted pursuant to paragraph (d) of subsection (3), an in camera inspection shall be discretionary with the court. If the court finds no basis for the assertion of the exemption, it shall order the records to be disclosed.
>
> (emphasis supplied)

Thus, the legislature has used the words "information" and "records" interchangeably in describing the criminal intelligence information exemption.

Similarly, the definitions section of the Act, F.S. §119.011(1), defines "public records" so broadly that no matter what physical form information is contained, it fits within the definition of "records" for purposes of the Public Records Act. This section clarifies that it is the information contained in the records itself which is of significance, not how the records are denominated or labeled.

Based on the foregoing, it is respectfully submitted that Petitioners and Amicus have urged an unreasonable result. All records, public or otherwise, contain information. Therefore, as the Third District noted, it is not the birth certificates per se which is protected by §382.35, but instead, this statute is intended to preserve the confidentiality of certain information

relating to birth. The information in question is contained in records, as defined by §119.011(1), and the information contained in said records is exempt as provided by law.[9]

[9] Contrary to the suggestion of Petitioners, City of Gainesville v. State ex-rel I.A.F.F. Local 2157, 298 So.2d 478 (Fla. 1st DCA 1974), is not in conflict with the holding below. Rather, the holding in City of Gainesville is that the preparation of the information in question there did not fall within the work product exception contained in F.S. §447.023(3). Therefore, the alleged confidentialiry of the records could not be invoked. Herein, information never appeared in a nonexempt context.

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL MAY BE UPHELD ON THE SOLE BASIS THAT THE RECORDS REQUESTED WERE EXEMPT FROM DISCLOSURE UNDER F.S. §455.241, WHICH PROTECTS THE CONFIDENTIALITY OF RECORDS OF THE LICENSED HEALTH PRACTITIONER WHO SUPERVISED THE BIRTHS AT ISSUE

It was clear from the record below that the fifteen births submitted by the midwife, Linda Wilson, to the Department of Health and Rehabilitative Services were supervised by a medical physician or naturopath licensed pursuant to Florida Statute. [A. 16-18,33-34,57,63-64] In fact, a lay midwife applicant was required under F.S. §485.031 to submit to the Department an application containing evidence of having performed fifteen labors and deliveries under the supervision of a duly licensed physician, and to submit with same the recommendation of two licensed physicians. The legislative scheme regulating midwifery at the time this case was litigated in the trial court prohibited a lay midwife applicant from performing births other than under the supervision of a duly licensed physician. As it was the physician and not the midwife who was the legally responsible professional in these births, the patients were entitled to the confidentiality provided by F.S. §455.241.

Thus, these were not "midwifery records" as denominated by the Petitioner and Amicus, but rather, were records that the lay midwife applicant prepared while acting under the legal supervision of a physician. It is irrelevant that lay midwives are not covered by the Patient's Records Statute, F.S. §455.241, since licensed physicians are included. It is similarly insignificant

that the physician himself did not physically make the records since such strictness is not required by the statute. If it was otherwise, nurses' notes made in the doctor's office under his supervision would not be a confidential record. Clearly, such a holding would undermine the sanctity of the physician-patient relationship. See Doe v. Bolton, 410 U.S. 179, 219-220 (1973), (Douglas J., concurring). The point is that the records herein were the result of a medical procedure administered by a physician through a lay midwife applicant and were thus the fruits of the physician-patient relationship as contemplated by F.S. §455.241. Any other interpretation would lead to an unreasonable and absurd result, as it would render patient's records as circumscribed by F.S. §455.241 nonexempt public records every time the doctor himself did not author the records although he may have supervised the procedure.[10]

Nor did the Respondents waive these statutory rights to confidentiality. Contrary to the assertion of the NEWS and the HERALD, there is no authority or logic which even implies that once the medical records are placed in the hands of the State

---

[10] "Supervision" means responsible supervision and control with a licensed physician assuming legal liability for the services rendered by the person supervised. Such is the definition utilized by the Legislature with reference to the supervision by physicians of physician's assistants. F.S. §458.347(2)(f). Just as the notes of a physician's assistant would be confidential if done under the supervision of a physician, the notes of a lay midwife applicant in question are rendered confidential by virtue of the fact that the physician was the legally responsible professional. See also, F.S. §459.022(f).

agency, they magically lose their confidentiality. In this regard, if the Attorney General's opinion contained in 1982 Op. Att'y. Gen. Fla. 082-75 (Sept. 28,1982), provides to the contrary, it is clearly incorrect, and obviously, not binding on this or any court. As argued in the previous section of this Brief, the Public Records Act has attempted to seek a balance between the public's right to know and the private citizens' rights to privacy and confidentiality. To claim that confidential records lose their confidentiality once put in the hands of the State upsets that balance. This is not the intention of the Act.

Moreover, this ground for reversal was not properly preserved in the trial court, and thus, the Third District held that:

> One argument made by Appellee, which we shall dispose of summarily, is that the Appellant having made the detailed birth information a matter of record without a requirement to do so, have waived any exemption from disclosure. Without addressing the substance of the contention, except to express doubt as to its merit, we note that the issue was not presented to the trial court. An issue not raised below cannot be raised for the first time on appeal. Cowart v. City of West Palm Beach, 255 So. 2d 673 (Fla. 1971); Secrist v. National Service Industries, Inc., 395 So.2d 1280 (Fla. 2d DCA 1981).

Thus, the argument once again raised by Petitioners and Amicus that the confidential status enjoyed by the Respondents regarding this information was waived by submission of it to the State was waived by Petitioners below. In addition, the Third District correctly expressed "doubt as to the merit of this argument". The waiver theory advanced by Petitioners and Amicus ignores fundamental

waiver doctrine,[11] and if accepted, would have curtailed the rights of the Respondents to support the licensing of their lay midwife, and consequently, their right to freedom of choice in childbirth.

---

[11] The law regarding waiver is discussed in greater detail, infra, at p.18-21 .

WHILE THE THIRD DISTRICT COURT OF APPEAL DID NOT ADDRESS THE CONSTITUTIONAL ISSUES RAISED BY RESPONDENTS BELOW, THE RESPONDENTS' CONSTITUTIONAL RIGHTS TO PRIVACY PROVIDES AN ALTERNATIVE BASIS FOR PROTECTING THE INFORMATION REQUESTED FROM PUBLIC DISCLOSURE.

Anticipating that Respondents once again would argue as an alternative basis that public disclosure of the information requested would infringe on Respondents' constitutional rights to privacy, the NEWS and HERALD have attempted to address whether case law creating the fundamental right to privacy and disclosural privacy provides protection to such information. However, just as in the court below, the Petitioners do not come to grips with the primary argument advanced by Respondents in the Third District, i.e., that the Public Records Act as applied to this case infringes upon Respondents' rights to constitutional privacy under the branch of such privacy right known as the decisional/autonomy branch, in the event that the information requested was not otherwise exempt as provided by Florida law. In fact, the NEWS now concedes that disclosure of the information in question impacts Respondents' decisional/autonomy rights to privacy, but once again argues such rights were waived by voluntary inclusion of such records in the application of the lay midwife.(Petitioners' Brief at pp. 35-37) Amicus attempts an opposite tact, as well as arguing waiver, and confines its total argument to a footnote. (Brief of Amicus at p. 31, n.17) The HERALD concludes in this footnote, without citation of authority or argument, that "...the

decision of respondent mothers nor any other mothers, to use midwives could [not] be affected by the inspection of these midwifery records." As we will demonstrate below, this is simply not true, and the facts in question clearly meet the test outlined by the Fifth Circuit Court of Appeal in Plante v. Gonzalez, 579 F.2d 1119 (5th Cir.1978), for determining whether or not disclosure under the Public Records Act impacts decisional/ autonomy rights to privacy.[12]

As previously argued, the Third District properly held (and such part of the holding has been ignored by both the NEWS and the HERALD in their briefs) that the issue of whether by voluntarily submitting their records to a State agency Respondents waived any rights provided by the Federal Constitution was waived by the Petitioners below. Alice P. v. Miami News, supra at 1302. As previously stated, as this issue was not presented to the trial court it cannot be raised for the first time on appeal.

---

[12]The HERALD is simply wrong that any mother's future decision to use a midwife under Chapter 467 would no longer be impacted since it is not collected by government or disclosed to an agency. In fact, such records are still required to be submitted to the Department of Health and Rehabilitative Services by rule. Rule 10D-36.43 requires the licensed lay midwife to obtain an informed consent in writing from the patient and to submit same to the Department. Rule 10D-36.47(7) requires the lay midwife to submit the birth certificate to the Registrar or Vital Statistics and the Department of Health and Rehabilitative Services division which supervises lay midwives. Moreover, even if a decision protecting the privacy rights of these Respondents would have no future impact on lay midwives' clients, this obviously is no basis for intruding upon the privacy rights of these Respondents. This argument by the HERALD is not only wrong, it is insensitive to rights of individuals. It is equally unconstitutional to punish a private citizen for exercising a fundamental right to make a decision intimately related to a family as it is to curtail such decision-making in the future.

Furthermore, in the constitutional context, this waiver argument of the NEWS and the HERALD is a doubtful merit as substantiated by the Third District Court of Appeal. Id. at 1302.

Petitioners and Amicus attempt to equate disclosure to the State with unfettered public dissemination of private information.[13] In doing so, they ignore United States Supreme Court decisions such as Whalen v. Rode, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 55, 96 S.Ct.2831, 49 L.Ed.2d 788 (1976); and Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct.2777, 53 L.Ed.2d 867 (1977)[14] These cases make a clear distinction

---

[13]The NEWS now attempts to couch this waiver argument in new terms, i.e., that the disclosure to the public of the records does not impact constitutional rights because it is not compelled by the State. (Petitioners' Brief at pp.24,35-36) The obvious answer is that if the information is not protected by the statutory exemptions contained in F.S. §382.35 and §455.241, then disclosure is compelled by the State by virtue of the Public Records Act, F.S. §119.01, et seq., thereby raising the issue of whether this law as applied clashes unlawfully with the Federal Constitution.

[14]Petitioner's argument that Nixon somehow supports their contention that submission of the records to the State agency caused Respondents to lose their rights to privacy makes no sense. The quote Petitioners take from Nixon at 433 U.S. at 459, which states that documents already disclosed to the public cannot be the subject of an assertion of privacy rights does not apply to the case at bar. In Nixon, the Supreme Court was talking about papers already widely circulated and the subject of official conduct of the presidency. Here, we are talking about unquestionably private, intimate information which has been only submitted to a State agency for a specific purpose. Ironically, the HERALD has properly cited Nixon for the proposition that Nixon's disclosural rights to privacy were outweighed by the Federal Statute providing for the collection and public disclosure of documents and tape recording of the former President's conversations since there were safeguards for preserving Nixon's private documents and because disclosure would only be to a small group of government archivists. Nixon, 433 U.S. at 465.

between disclosure to limited officials of the State versus wide dissemination to the public. For example, compilation of records of abortions, i.e., a decision constitutionally protected from onerous state legislation, was upheld by the Supreme Court since it found that the individual's rights to privacy were not abrogated because the records would be secure from public disclosure. Planned Parenthood, 428 U.S. at 80, Accord, Whalen, supra, (the recording in the State's computer files of the names and addresses of persons who have obtained doctor's prescriptions for certain drugs was found lawful since public disclosure was strictly prohibited).[15]

Both the NEWS and the HERALD also ignore fundamental constitutional waiver doctrine in suggesting that relevation to the State implies dissemination to the public. It is only reasonable to conclude that the Respondents never contemplated complete disclosure of these intimate facts until this case arose. See Hawaii Psychiatrict Society v. Ariyoshi, 451 F.Supp.1028,1045 (D.Ha.1981). Waivers of constitutional rights must be knowing, intelligent acts done with a sufficient awareness of relevant circumstances and likely consequences. Brady v. United States, 397 U.S. 742 (1970). Such waivers must be unambigious, and courts are duty-bound to indulge every presumption against waiver. Fuentes v. Shevin,

---

[15]Justice Brennan concurred in the result in Whalen and stated at 606:

> Broad dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights and would presumably be justified only by a compelling state interest.

407 U.S. 67 (1972). For these reasons, a finding of waiver on this record, even assuming same was plead by Petitioners below, would be wholly inappropriate.

The argument that disclosure to the State was not compelled by Florida law, specifically F.S. 485.031, and that if it was, Respondents have waived their rights to privacy are off the mark for three reasons. First, this is really another waiver claim, and as previously stated, Respondents did not waive their constitutional rights to privacy by agreeing to provide the information for their midwife to submit for licensure. Second, the State required the midwife to produce the list of name and addresses of her patients. Rule 10D-36.22(1), F.A.C. (1977). Third, why should mothers who are interested in home birth object to cooperating with the State in licensing competent persons to perform the service for which they desire professional assistance? They are penalized for cooperating in this regard if Petitioners' argument had vitality. Indeed, it would make no sense if such individuals were punished for exercising what they believe to be their fundamental right to give birth to a child in their home by a holding that support for this right constituted a waiver of their rights to privacy.

Therefore, Respondents submit that if no Public Records Act exemptions exist which protect their rights to confidentiality, then surely, this act invades Respondents' rights to privacy as guaranteed by the Federal Constitution. This Court has recognized in dealing with constitutional challenges to public disclosures

of state records containing private information that there might exist, under a particular set of facts, a viable Federal constitutional challenge to the Public Records Act. Shevin v. Byron, Harless, Schaeffer, Reed & Assoc., Inc., 379 So.2d 633,638 (Fla. 1980); Wait v. Florida Power and Light, supra. at 422, n.1; as has the District Courts of Appeal, such as in Roberts v. News Press Publishing Company, Inc., 409 So. 2d 1089 (Fla. 2d DCA 1982), and the Federal Courts of Appeal. See Fadjo v. Coon, 633 F.2d 1172, 1176,n.3 (5th Cir.1981), and Plante v. Gonzalez, 575 F.2d 1119 (5th Cir.1978).

Petitioners contend that Respondents postulate a broad constitutional right of "disclosural privacy" and argue that Respondents ignore the holding of this Court in Shevin v. Byron,Harless,Schaeffer, Reid and Ass., Inc., supra. The NEWS made the same misperception in their Third District brief. Respondents submitted to the Third District and again submit that this case falls within the ambit of the branch of the right to privacy which protects personal independence in making basic decisions relating to the family unit, and that Shevin, while binding on this Court, was decided only on its facts,[16] which did not involve an assertion of the kind of right Respondents claim in this case. Id. at 637.

[16] See also,Miami Herald Publishing Co. v. Marko, 352 So.2d 518 (Fla. 1977)(court recognized at 520,n.4, that right to privacy is a viable constitutional right to extent that affected interest involves marital intimacy, procreation and the like, although that case did not involve same).

Thus, this case represents a challenge of first impression to the constitutionality of the Public Records Act, F.S. §119.01, et.seq. While in Florida, Shevin, and in the Federal courts, Plante v. Gonzalez, supra,[17] presented a conflict between an individual interest in avoiding disclosure of personal matters and a legislative demand for public inspection of public records, neither case involved a valid claim under the aspect of the right to privacy which protects personal independence in making important decisions relating to the family. This latter zone of privacy has been given fundamental constitutional protection. Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Skinner v. Oklahoma, 316 U.S. 535 (procreation); Eisenstadt v. Baird, 405 U.S. 438 (contraception); Prince v. Massachussetts, 321 U.S. 158 (1944) (family relationships) Pierce v. Society of Sisters, 268 U.S. 510 (1925)(child rearing). In fact, in Moore v. City of East Cleveland, 431 U.S. 494 (1977), four of the justices stated that the family unit was entitled to constitutional protection as a matter of substantive due process. We suggest that this fundamental right to privacy in making decisions relating to the family would be impermissibly invaded if the lower court order permitting public access to records of Respondents' childbirths would have been left intact.

Understandably, Petitioners have made no real attempt to deny that Respondents' constitutional right to autonomy are at issue herein. The courts have consistently extended fundamental

---

[17] See also, Fadjo v. Coon, supra.

protection to state regulation of matters affecting autonomy within the family. As succinctly stated in Paul v. Davis, 424 U.S. 693, 713 (1976), the right extends to "...matters relating to marriage, procreation, contraception, family relationships, and child rearing and education". In Moore v. City of East of Cleveland, supra at 499, the court acknowledged that a host of cases have consistently affirmed a "...private realm of family life which the State cannot enter". The right naturally includes protection against regulation affecting such matters as to whether to bear or beget a child. Carey v. Population Services International, 431 U.S. 678 (1978); Eisenstadt v. Baird, supra. As stated in Merriken v. Cressman, 364 F.Supp. 913, 918 (E.D.Pa. 1973), there is probably no more private a relationship, excepting marriage, which the Constitution safeguards than that between parent and child.

Based on this formidable precedent, the conclusion is inescapable that the birth of a child and a parent's decision to have that birth at home attended by a lay midwife is a matter of utmost privacy, entitled to the fullest constitutional protection. One's personal choice in a matter of such extreme importance should remain, to the extent possible, pristine, and thus should only yield to a compelling State need; and then only via the least intrusive means. Cf., Carey v. Population Services International, supra. This should be even more clear where the individual unmistakably manifests her intention to keep this matter private by having the birth

in the privacy of her own home.[18] Such a decision reflects a concern of the parents with humanizing the birth experience of the newborn as well as the entire family. Birth at home, inter alia, provides the family with the freedom to warmly welcome its new member into the home from the moment of birth. For the benefit of mother and child, it protects against separation which occurs in the hospital, which in turn, interferes with "bonding". There are in fact numerous reasons in addition to the aforementioned, why some people are now of the opinion that home birth is healthier psychologically/ emotionally and safer than hospital birth. See, e.g., Stewart, Dvaid, Compulsory Hospitalization, Freedom of Choice in Childbirth, V.III, Ch. 50,52, V.II, Ch. 35-37, NAPSAC Publications, Marble Hill, Mo. (1979).

Nevertheless, the choice to have a home birth is frowned upon by the medical establishment. Id.; See,also, New York Times, July 16,1982, §2 at p.18, Study Lauds Midwife Center (medical establishment opposes birth center in New York City); Robert C. Mendelsohn, M.D., Male Practice: How Doctors Manipulate Women, Ch.14,p.140, Contemporary Books, Inc., Chicago, Ill. (1981).

---

[18]It would indeed be ironic if the lower court's ruling was to be upheld by this Court in light of the fact that the birth of a child through what is now conventional means, i.e., assisted by a physician at a hospital, would be protected by statute from public scrutiny based on F.S. §455.241 and F.S. §395.12. The Legislature has also recognized the privacy of birth in birth centers. Florida Session Laws, Ch. 84-283,7, S.12(3), S.21(3).

This most important decision is thus fraught with societal pressure to do the "conventional" which of course restricts freedom of choice. We thus suggest that further restriction of a family's autonomy in childbearing in State regulation can only be constitutionally permissible if a compelling need is demonstrated. Public disclosure of such a private matter is a per se intrusion into a private matter. Clearly, the right to privacy self-evidently bespeaks of nondisclosure to the public. As explained by one commentator:

> Knowingly or unknowingly, those who believe themselves watched will modify their behavior to be pleasing in the eyes of the watcher if there is any fear that they are vulnerable to the will of that watcher. It does not even matter that there actually be a watcher; all that is necessary is that people believe there is.
>
> Miller, A.R., The Privacy Revolution: Report from the Barricades, 19 Washburn L.J. 1, 17-18 (1979).

The courts impliedly have recognized the result we urge herein.

In Plante v. Gonzalez, supra, the Fifth Circuit analyzed the litigants' protestation that revelation to the public of their financial holdings would infringe upon their right to privacy in independent decision-making in matters relating to the family, thus, arguing that public disclosure would have to further a compelling state interest in order to pass constitutional muster. In analyzing this argument, the court queried:

> What impact will financial disclosure have upon the way intimate family and personal decisions are made? Will it affect the decision whether to marry? Will it determine when or if children are born?
>
> Id. at 1131.

The court rebuffed the litigants' arguments since, basically, financial disclosure laws do not involve the kinds of important decisions relating to marriage, birth and the family which the Supreme Court has previously afforded constitutional protection. Id. at 1131.

Similarly, this Court made short shrift of a privacy challenge by applicants for State jobs who protested that public disclosure of records of personal interviews would violate their rights of privacy. Shevin v. Byron, Harless, Schaeffer, etc., supra. Significantly, however, this Court distinguished the type of privacy interest at issue there from the more defined and protected privacy interest in independence in personal/familial decision-making. Id. at 636-37. Thus, on those facts, the Public Records Act was found constitutional. Id. at 638; Roberts v. News-Press Publishing Co., Inc., 409 So.2d 1089, 1093 (Fla. 2d DCA 1982) (recognizing that Public Records Act must comport with Federal Constitutional right to privacy and that Shevin was decided on its facts).

It is important to note that a choice that is entitled to fundamental protection must not be absolutely prohibited by a State statute before that constitutional right is infringed. This suggestion is eviscerated by Carey v. Population Services International, supra at 687-688. See also, Hawaii Psychiatric Society v. Ariyoshi, 481 F.Supp. 1028,1039 (D.Hawaii 1981). In Carey, the court first noted:

> Read in light of its progeny, the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state.

The court went on to explain:

> The significance of these cases [e.g., Roe v. Wade, supra] is that they established that the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as applied to state statutes that prohibit that decision entirely.

As demonstrated, supra, public disclosure is a per se intrusion into this private decision-making process. See also, Plante v. Gonzalez, 575 F.2d at 1134.

A test for invokation of this right as set out by the Fifth Circuit in Plante is easily met by Respondents. Plante involved an issue analogous to the instant case, i.e., the as applied constitutionality of a Florida Statute which required public disclosure of alleged private information. Since the information in question in Plante would not bear significantly on the way intimate family decisions were made, the litigants claim was rejected. In contrast to financial disclosure at issue in Plante, herein disclosure does directly affect such fundamental decisions that involve "...control over such intimacies of our bodies and minds as to offend what are ultimately shared standards of autonomy". Id. at 1132.

Plante also sets forth an indirect test to determine whether this branch of the privacy right should be invoked. This indirect test contemplates whether disclosure would have a strong impact on family decisions within the ambit of the privacy right. Id. at 1130. As the decision herein falls within the autonomy right on its own, we need not consider this indirect test. However, even assuming

the right at issue herein does not fall within the autonomy right on its own, there can be little doubt that disclosure herein meets the strong impact test suggested in Plante. Mere disclosure limits freedom of choice.[19] Miller, The Privacy Revolution: Report from the Barricades, 19 Washburn,L.J. 1, 17-18 (1979). Authorities in the field have also noted the strong disapproval by doctors of home birth which place undue and unfair pressure on a family to limit their freedom of choice in childbirth. Mendelsohn, supra. The impact of public disclosure of this decision of freedom of choice would thus be devastating and outrageous.

Even assuming arguendo that no autonomy right is at issue herein, but rather, the mothers' only possess a right which protects against disclosure of personal matters, they must still prevail. While in Shevin, supra, this Court decided that there did not exist under the facts of that case a "...constitutionally protected interest sufficient to prevent the public from seeing the consultant's papers", Id. at 638, such a disclosural right to privacy has been recognized. For example, in Roberts v. News-Press Publishing Co., supra at 1094, the Second District Court of Appeal stated that "...there is a potential federal constitutional right of disclosural privacy for employees that may exist in addition

---

[19] The HERALD is incorrect in describing the demographic make-up of the midwife/home birth consumer. In fact, the studies have shown that 80% of these consumers have a family income ranging from $10,000 to $40,000, and 64% have a college education. Stewart & Stewart, Compulsory Hospitalization, V.III, Ch. 52, p.715, NAPSA Publications, Marble Hill, Mo. (1979). These people have the economic freedom for the most part to make a variety of choices.

to the limited statutory exemptions in regard to the contents of personal files". This right was given life by the United States Supreme Court in Whalen v. Roe, supra. where patients and physicians challenged a New York statute requiring that names and addresses of recipients of prescriptions of certain drugs be subject to State recordkeeping. In determining what statutory safeguards and sanctions in the act in question rendered the act constitutional, the court did recognize a constitutional right to privacy in personal information such as medical data. The court did not discuss the standard to be applied to public disclosure, however, since it determined that the chance of such disclosure occurring was minimal. Justice Brennan suggested in concurrence that public dissemination of the information would implicate constitutionally protected privacy rights. Id. at 606.

In Nixon, supra, the court employed a balancing test in deciding whether screening of the former president's public and private documents by archivists would infringe on his right to privacy, and after balancing the president's interest against the interest of the government, found in favor of the government. This decision was based on the little amount of personal information contained in the voluminous record, and because disclosure would only be to a small group of government archivists. Id. at 465.

In Plante v. Gonzalez, supra, the court also employed a balancing test in deciding on the claim of disclosural privacy as required by the Florida Sunshine Act. The balance tipped in

favor of public disclosure since there were findings of substantial state concerns advanced by disclosure of the public officials' finances, besides the public's right to know. Id. at 1134. The senator's interest in financial privacy, while considered by the court to be substantial, was mitigated by their involvement in public life and outweighed therefore, by the public interest advanced by the Florida Sunshine Amendment. Id. at 1136.

In Hawaii Psychiatric Society, supra., a state statute authorized inspection of offices and records of medicaid providers to obtain evidence of fraud, thus subjecting to the possibility of public disclosure the sensitive information of psychiatric treatment of individuals. The court determined that the statute intruded unnecessarily into the patient's right to make medical decisions. Accordingly, the court enjoined enforcement of the statute. The court found that both strands to the right to privacy, i.e., the right to confidentiality in personal affairs and the right to be free from unjustified governmental interference in protected zones of autonomy were violated. In determining whether the right to privacy circumscribed by the right to confidentiality was invaded, the court in reliance on Whalen, Nixon, and Plante, employed a balancing test pitting the state interests served by the regulation against the intrusion into an individual's privacy. The court noted at 1943:

> [A]s the sensitivity of the personal information disclosed, and hence the intrusion on the right to confidentiality, increases, the burden on the state to justify a disclosure will increase under the balancing test.

The balancing test requires the court to consider the importance of the State's interests and necessity of the challenged regulations to their furtherance, as well as the nature of the disclosures and the privacy expectations of the aggrieved individuals. Id. at 1044. The court concluded that a high probability existed that the Plaintiffs would succeed on their claim challenging the statute in question as violative of the individual's right to avoid unjustified disclosure of personal information.

Applying the balancing test herein, we submit that an interest in individual disclosural privacy exists which far outweighs the State interest in public disclosure so as to allow it to check on the workings of government. While release of the information to the State serves the State interest in analyzing a midwife's fitness to practice and thus, obtain a license, unfettered disclosure to the public is an entirely different matter. See Whalen v. Roe, supra; Planned Parenthood of Central Missouri v. Danforth, supra.; Nixon, supra; Roberts v. News-Press Publishing Co., Inc., supra.

On the other hand, the mothers' interests herein in non-disclosure are substantial. The information in question is unequivocally private, as it involves the most intimate facts surrounding the births of their children and the decision to birth their children at home with a midwife. As discussed, supra, a violation of a right to privacy is harmful without proof of consequential damages, and privacy of personal matters is an interest in and of itself, protected constitutionally. Plante, supra at 1135. Non-

disclosure advances freedom of choice in a most important decision in life for a family and protects against societal pressure to do the conventional. Public disclosure of such information would inhibit mothers from supplying information to the State for regulating midwifery, and thus, would detrimentally affect the public health. Alternatively, mothers would be forced to restrict their freedom of choice, in order to protect their privacy. There is no indication that the Respondents had, nor should have had, the expectation that disclosure to the State would result in disclosure to the public.

We thus suggest that the balance clearly tips in favor of nondisclosure in this case. There is little if any interest promoted by the Public Records Act as applied to these facts, and weighty individual interests are jeopardized by public dissemmination. While we recognize that the Public Records Act furthers the legislative objective of the public's right to check, without impediment, on the workings of government, Federal Constitutional Privacy and the Florida Public Records Act, 33 U. Fla. L.R. 313, 326 (1981), it was not even suggested in the lower court that there existed a compelling state interest herein which outweighs the Respondents' constitutional rights to privacy.[20] Of course, the burden is on the proponent of such a

[20]The HERALD's argument that public disclosure of the details of lay midwife applicant births was especially important because midwife licensure requirements were outdated is of little, if any, force. There is no indication that HRS has not stringently regulated licensed lay midwifery, and, denied or attempted to revoke or suspend licenses when appropriate. These remedies are still available under the new midwife law should a case of incompetence arise.

Moreover, regulation of licensure is of limited effect in controlling malpractice, as clearly evidenced by the outrageous and shocking rise in malpractice by licensed medical physicians. On the other hand, Petitioners cannot cite to a single incidence

State interest to demonstrate the existence of a compelling need. Fadjo v. Coon, supra at 1192. Moreover, one commentator has suggested the common sense notion that the public's right to know recedes when the Public Records Act is aimed at records of personal information rather than records of official action. Federal Constitutional Privacy and the Public Records Act, 32 U.Fla.L.R. 313, 335 (1981). As the public's interest in disclosure is thus relatively weak, and the individuals' privacy interest is unambiguously strong and of vital importance to our system of ordered liberty, disclosre of the Respondents' birthing records would be inappropriate.

20(Cont'd)
of lay midwife malpractice reported in the case law. In fact, studies show that home birth with a midwife is safer than hospital birth. See authority cited supra at p.25 . Apparently, licensure is ineffective in controlling incompetence and malpractice. Therefore, the argument that public scrutiny (which for sake of this point we equate with revelation to a newspaper reporter whether of responsible character or not) protects the public, is not very persuasive, and cannot seriously be argued to constitute a compelling state interest, or even an interest sufficient to overcome a mere disclosural right to privacy.

CONCLUSION

The NEWS and the HERALD would like this Court to interpret the Public Records Act so broadly that the balance struck by the legislature between the public's right to know and the individual's rights to privacy and confidentiality is undermined. If such an imbalance was sanctioned, the strength of our democratic system would be diminished, and the private aspect of people's lives would be left in the hands of newspaper reporters and publishers, who would not need to meet any State imposed requirements at all in order to meddle with and draw unwanted attention to such private matters. While the HERALD has advanced the rationale that disclosure of the records at issue is necessary to protect the poor from incompetent lay midwives, in fact the HERALD has revealed a secondary intention of attempting to deny privacy and confidentiality rights to poor people. However, the truth is that it is the rights of a broad spectrum of the population that are at issue, not just the rights of one economic segment.

The legislature recognized that the Public Records Act did not signify revelation and intrusion of every aspect of life no matter how private, but rather, that certain matters, where provided by law, were to remain confidential. This intention was expressly reflected in F.S. §382.35 and §455.241, which the Third District properly applied to the records in the instant case.

If this Court disagrees with the Third District, then based on the foregoing, the case at bar presents an appropriate opportunity, heretofore reserved for a future date, for this Court to rule that the Federal Constitution places limits on the Public Records Act.

Since disclosure of the records in the instant case unlawfully infringes the Respondents' rights under the decisional autonomy branch of the constitutional right to privacy, the Act is unconstitutional as applied to these facts if no exemption under Florida law is deemed to exist.

For these reasons, the Third District Court of Appeal's decision should be affirmed.

Respectfully submitted,

DeMEO & SHERMAN, P.A.
Attorneys for Respondents
3081 Salzedo Street
Second Floor
Coral Gables, Florida 33134
(305) 448-5898

By: _____
THOMAS G. SHERMAN

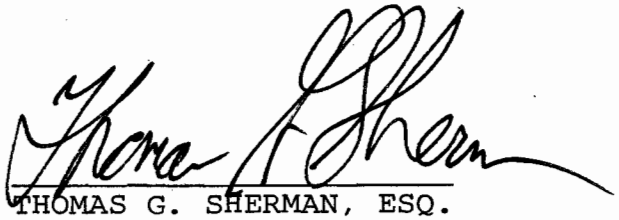
.CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Answer Brief of Respondents was mailed this 10th day of September to :

Jospeh Averill, Esq.
Attorney for Petitioners
25 W. Flagler St.
Miami, Fl 33130

Paul Levine, Esq.
Attorney for Amicus
Curaie, The Miami Herald
3200 Miami Center
100 Chopin Plaza
Miami, Fl 33131

Morton Laitner, Esq.
Attorney for Department
of Health and Rehabilitative Services
1350 N.W. 14 St.
Miami, Fl 33125



THOMAS G. SHERMAN, ESQ.