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IN THE SUPREME COURT
OF FLORIDA

FILED

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Case No. 64,725

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Chief Deputy Clerk

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

vs.

ALICE P., et al.,
Respondents.

**JURISDICTIONAL BRIEF OF PLAINTIFFS/
PETITIONERS, MIAMI DAILY NEWS, INC.
and THOMAS H. DUBOCQ**

JOSEPH P. AVERILL, ESQUIRE

1237 City National Bank Building

25 West Flagler Street

Miami, Florida 33130

(305) 377-3577

*Attorney for Plaintiffs/Petitioners,
Miami Daily News and Thomas
H. Dubocq*

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PRELIMINARY STATEMENT

This Court has repeatedly held that only the Legislature may create exemptions to the Public Records Act (*Florida Statutes*, Ch. 119 (1983)) and that the courts are not to create exceptions to the Act by implication. In so doing, this Court has honored Florida's commitment to openness in government. That commitment is expressed clearly in *Florida Statute* 119.01 (1983), which provides:

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.

Where the lower courts have on occasion failed to fully honor Florida's commitment to open government, this Court has promptly remedied those failures. *See, e.g. Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979); *State ex rel. Cummer v. Pace*, 118 Fla. 496, 159 So. 679 (1935). Unfortunately, another such occasion is at hand.

The decision of the District Court of Appeal, Third District, in *Alice P. v. Miami Daily News, Inc.*, 440 So.2d 1300 (Fla. 3d DCA 1983)¹ is wholly irreconcilable with the decisions of this Court holding that only explicit (as opposed to judicially-implied) statutory exceptions limit access to Florida's public records. The Third District held that *information* in otherwise public documents may be withheld from the public simply because that same information is also contained in *other records* which are confidential.²

In so holding, the Third District failed to honor Florida's commitment to open government, so clearly expressed in this Court's prior opinions. The Third District's decision ignores prior opinions of this Court which preclude judicially-created exceptions to the Public Records Act, whether by implication or otherwise. And the Third District's decision portends chaotic administration of the Public Records Act. Public officials are necessarily uncertain as to which pieces of information (in otherwise non-exempt documents) might be not subject to disclosure because such information might also be contained in a different but confidential file.³ A premium will be placed on caution. Guile

1. A conformed copy of the Third District opinion is to be found in the Appendix which accompanies this Jurisdictional Brief.

2. If logically enforced, the Third District's view leads necessarily to this result: Federal tax returns are expressly confidential by statute. Wage information is included in the Federal tax returns of public employees. Therefore, wage information in municipal records is exempt from disclosure because contained in a distinct, but confidential document.

3. The Third District's view is that once a piece of information is incorporated into a confidential document that piece of information remains confidential wherever it appears in public records. How is the custodian of a public record going to divine if a particular piece of information has been disclosed to a spouse, a lawyer, an accountant or a medical practitioner? [*Florida Statutes* 90.504, 90.502, 90.5055 and 455.241]. How is that custodian

(Continued on following page)

will be its own reward. Much more litigation under the Public Records Act will result. Until undone, the Third District's *Alice P.* decision will stifle the flow of information as to the public and burden the courts. Exercise of this Court's discretionary jurisdiction is clearly available and warranted.

STATEMENT OF THE CASE

This matter began when a Miami News reporter made demand upon the Department of Health and Rehabilitative Services for the documents submitted by an applicant for a midwife's license. When the Department did not fully comply, mandamus proceedings were instituted. The unnamed intervenors had utilized the services of the license applicant. Information pertaining to the births of their children was incorporated into the application for a midwife's license. Over their objection, the Trial Court ordered disclosure.

In part, the Third District reversed. The Third District held (App 6):

Whether otherwise private information, which is made a matter of public record as a requirement of law, will be exempt from general public examination is determined by the express legislative intent with regard to that information. 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. (Emphasis added.)

Footnote continued—

to know if any of the information has been disclosed to a Grand Jury or is presently active criminal intelligence information? [*Florida Statutes* 905.24-.28, 119.07(3)(d)]. The short answer is that he is not. Non-disclosure and litigation are the inevitable results.

Having expressed that general principle,⁴ the Third District then held *Florida Statute* 382.35 (1983) (dealing with disclosure by the Registrar of Vital Statistics of the contents of certificates of live birth) and *Florida Statute* 455.241 (dealing with the disclosure of patient records by medical practitioners) precluded disclosure of portions of the application for a midwife's license. The court below held (App 7):

As to that information, made confidential by Sections 382.35 and 455.241, Section 119.07(3)(a) applies to provide an exemption from the disclosure requirement.

The square holding of the Third District in *Alice P.* is that if information is deemed confidential in the hands of one custodian (whether public or private), that confidentiality travels with the information, wherever and whenever it appears in a public record.⁵ The Court held (App 6):

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. (Emphasis added.)

4. The Third District admitted it was accepting an invitation "to, in effect, legislate interstitially . . ." (App 5.) It is the acceptance by the Third District of that invitation which gives this Court "conflict" jurisdiction.

5. The Third District's judicially-created traveling confidentiality approach is particularly gratuitous since the Legislature has demonstrated its ability to exempt information from the Public Records Act. See, e.g., *Florida Statutes* 119.07(3)(d)-(k) (1983). The Legislature has also incorporated certain specific statutory exemptions into the Public Records Act, *Florida Statute* 119.07(b) (1983). The Legislature has also demonstrated its ability to maintain confidentiality as documents move from custodian to custodian. See, e.g., *Florida Statute* 960.15 (1983). No such express legislative provision is involved here, as the Third District admitted. What is involved is the creation of an exemption to the Public Records Act purely by judicial implication.

ARGUMENT

The Third District's *Alice P.* Decision Conflicts With Prior Decisions of This Court

The rule of law articulated and applied by the Third District in *Alice P.* is wholly irreconcilable with and in express and direct conflict with prior decisions of this Court. *Wait v. Florida Power & Light Co.*, *supra*; *State ex rel. Cummer v. Pace*, *supra*.⁶ This Court's discretionary jurisdiction is properly invoked. *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980); *Williams v. Duggan*, 153 So.2d 726 (Fla. 1963); *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla. 1960).

In deciding *State ex rel. Cummer v. Pace*, *supra*, this Court held, 159 So. at 681:

This statute applies specifically to "all municipal records," and where the legislature has preserved no exceptions to the provisions of this statute, the courts are without legal sanction to raise such exemptions *by implication*. . . . (Emphasis added.)

The Third District ignored this long-established rule. It looked to a statute which imposes upon private medical practitioners a legal duty to preserve their patient's con-

6. The Third District's decision is also in express and direct conflict with *State ex rel. Veale v. City of Boca Raton*, 353 So.2d 1194 (Fla. 4th DCA 1978). The Third District's traveling confidentiality theory is also wholly unreconcilable with *Bay County School Board v. Public Employees Relations Commission*, 382 So.2d 747 (Fla. 1st DCA 1980). In a decision last month, the Third District, without any reference to its earlier *Alice P.* decision, ordered disclosure of "medical, psychiatric and psychological records" of a deceased school teacher. *Dade County School Board v. Miami Herald Publishing Co.*, So.2d (Fla. 3d DCA 1983) (Case No. 82-2079, opinion filed December 20, 1983).

fidentiality and read this statute into the Public Records Act, despite the absence of an express legislative mandate to do so. The Third District chose to, in its phrase, "legislate interstitially." In so doing, it ignored this Court's mandate that Florida's courts are not to create exceptions to the Public Records Act by implication.⁷ In fact, the Third District here did precisely what this Court refused to do in *State ex rel. Cummer v. Pace*, *supra*. In that case, this Court was faced with a Federal statute which arguably made confidential the requested information. This Court refused to allow that statute to create, through judicial implication, an exception to the Public Records Act.⁸ The Third District's effort to preclude disclosure of portions of the application for midwife's license also conflicts with this Court's holding in *Wait v. Florida Power & Light Co.*, *supra*, 372 So.2d at 425:

The 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. (Emphasis added.)

No statute expressly affords an exemption from the Public Records Act to any portion of the application for a midwife's license. To reach its result, the Third District was required to reach far afield to two different statutes and read them by judicial implication into the Public Rec-

7. The Third District admitted as much. It wrote, at App 6: "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." (Emphasis added.)

8. "Implication" is defined as "intendment or inference, as distinguished from the actual expression of a thing in words." *Black's Law Dictionary* (4th Ed. 1951).

ords Act so that it could judicially create a privilege of confidentiality. Birth certificates are not at all involved here. Rather, information which may appear on the birth certificates is involved. Since portions of the birth certificates are confidential in the hands of the Registrar of Vital Statistics (*Florida Statute* 382.35), the Third District read into the Public Records Act a judicially-created exception to disclosure of portions of the application for a midwife's license. The Court below held that, since some information was privileged in the hands of the Registrar, this information was by implication privileged wherever it might appear.

The same treatment—judicial implication in the absence of an express statutory exception—was accorded to the statute which requires that medical practitioners respect the confidentiality of their patients. The Third District held (App 6-7):

Most of the information contained in those records could have been supplied only by one licensed to practice medicine, and therefore this information constitutes a report of treatment or examination as contemplated by Section 455.241. The records are thus exempt from disclosure under the Public Records Act.

This judicial sleight-of-hand is accomplished despite the fact that neither the Public Records Act nor *Florida Statute* 455.241 (1983) purports, as the Third District admitted, to *expressly* exempt documents or the information in the possession of HRS as a part of the application for a midwife's license.⁹ The creation of exceptions to the Public Records Act by judicial implication is clearly prohibited by this Court's prior decisions.

9. The Midwifery Act, *Florida Statutes*, Ch. 485 (1983), contains no statutory exemption from the Public Records Act.

CONCLUSION

The Third District's opinion in *Alice P.* expressly and directly conflicts with prior decisions of this Court. It imposes by judicial implication a traveling confidentiality on information without benefit of any express statutory law creating this traveling confidentiality. Prior decisions of this Court preclude the Third District's attempt to "legislate interstitially." The Third District may not, under this Court's prior decisions, judicially create exceptions to the Public Records Act by implication in the absence of an express statutory exception. The need for this Court's intervention is manifest and its jurisdiction is clearly available. This Court should accept jurisdiction so that the Third District's *Alice P.* decision does not beget a progeny of its own.

Respectfully submitted,

Joseph P. Averill

JOSEPH P. AVERILL, ESQUIRE

1237 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 377-3577

*Attorney for Plaintiffs/Petitioners,
Miami Daily News and Thomas
H. Dubocq*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Plaintiffs/Petitioners was mailed this 30th day of January, 1984 to:

Richard J. Ovelman, Esquire
One Herald Plaza
The Miami Herald Publishing Company
Miami, Florida 33101

Paul J. Levine, Esquire
Morgan, Lewis & Bockius
3200 Miami Center
100 Chopin Plaza
Miami, Florida 33131

Thomas G. Sherman, Esquire
DeMeo and Sherman, P. A.
3081 Salzedo
Coral Gables, Florida 33134

Morton Laitner, Esquire
1350 N. W. 14th Street
Miami, Florida 33125

Joseph P. Averill
JOSEPH P. AVERILL