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IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,725

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

vs.

ALICE P., et al.,
Respondents.

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

INITIAL BRIEF ON THE MERITS OF PLAINTIFFS/PETITIONERS MIAMI DAILY NEWS, INC. and THOMAS H. DUBOCQ

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PRELIMINARY STATEMENT

Once a simple case, this has become a curious matter. It is curious only because what did not happen here has somehow become more important than what did happen.

What happened is that *The Miami News*[1] requested that HRS let a reporter inspect an application for a midwife's license. This was done pursuant to the Public

1. Petitioners, Miami Daily News, Inc. and Thomas Dubocq, a reporter, are collectively referred to in this Brief as "The Miami News". The Department of Health and Rehabilitative Services, a Respondent, is referred to as "HRS" and the remaining respondents are referred to as "the Intervenors".

Records Act. No statute specifically precludes public inspection of such a license application.

The Miami News did not request access to birth certificates in the possession of The Registrar of Vital Statistics. *The Miami News* did not ask a medical practitioner to furnish any patient records to it.

Yet, two years later, *The Miami News* still has not examined the entire application for a midwife's license. This is because:

1) The Third District construed a statute prohibiting disclosure by The Registrar of Vital Statistics (who is not at all involved in this action) of birth certificates in his possession to preclude examination of the application for a midwife's license.

2) The Third District construed a statute regulating disclosure by medical practitioners (none of whom are involved in this action) of patient records to preclude examination of the license application.

The existence of these two statutes—one prohibiting disclosure by The Registrar of portions of birth certificates and the other regulating disclosure by medical practitioners of patient records—induced the court below by judicial implication to exempt from the Public Records Act portions of the application for a midwife's license. The judicial implication below was necessary because the legislature did not expressly exempt the application for a midwife's license from the Public Records Act. The *ratio decidendi* of the court below is as fascinating as the chronology which follows.[2]

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2. The decision below has been reported. Alice P. v. Miami Daily News, Inc., 440 So.2d 1300 (Fla. 3d DCA 1983). The slip opinion of the Third District is found in the Appendix to Petitioner's Jurisdictional Brief. Parallel citations are provided.

The Factual Context

For reasons not pertinent here, the activities of one Linda Wilson, an unlicensed midwife, attracted the journalistic interest of *The Miami News*. (R 8; App. 25.)[3] Although unlicensed, Ms. Wilson had made application to HRS for a license under the former Midwifery Act. (R 12-21; App. 28-38.) At first informally and then in writing, *The Miami News* requested access to Ms. Wilson's license application. (R 9-10; App. 26-27.) The written demand to inspect and copy the application for a midwife's license requested (R 11; App. 28) the following:

> Application for license as lay midwife (form #HRS-H, form 3014, Dec. 1981), together with attachments and contemporaneous submissions, and subsequent submissions filed by or on behalf of Linda Wilson.

HRS honored a portion—but only a portion—of the public records request. (R 10; App. 27.) Some documents encompassed by the request were withheld entirely; others were produced with deletions. (R 9, 10; App. 26, 27) (R 15; App. 32.) The result of HRS' refusal to comply with Florida's Public Records Act, *Florida Statutes,* Ch. 119 (1982), was litigation.

The Case in the Trial Court

The Miami News filed its Public Records Act Complaint, seeking full disclosure of the application for a midwife's license. (R 3-8; App. 1-6.) An alternative writ was

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3. In this Brief, the symbol "R" followed by a number indicates the appropriate page in the Record on Appeal. The symbol "App" followed by a number indicates the appropriate page of the Appendix to Petitioner's Brief on the Merits. This Appendix is identical to the Appendix to Answer Brief, filed in the Third District. By its order of September 30, 1982, the Third District substituted this Appendix for the Record on Appeal. Parallel citations are, where possible, provided.

issued and a hearing established. (R 1-2a; App. 7-14.) HRS answered, raising no affirmative defenses. (R 22; App. 15.) *The Miami News* and HRS entered into a stipulation of facts. (R 9-21; App. 26-38.) Essentially, the stipulation admitted the facts required to sustain *The Miami News'* complaint. (R 9-10; App. 26, 27.) The stipulation incorporated the Public Records Act request of *The Miami News* and HRS' partial response to that request. (R 11; App. 28) (R 12-20; App. 29-37.)

This matter, however, was not to remain so simple. At final hearing, an application to intervene was filed. (R 27-32; App. 20-25.) The intervention request was not made on behalf of Ms. Wilson, the applicant for the midwife's license. Rather, it was made on behalf of a dozen or more unnamed women who had apparently utilized Ms. Wilson's services. (R 27; App. 20.) According to the Intervention petition, Ms. Wilson had conducted at home the births of children of the Intervenors. (R 27, 28; App. 20, 21.)

The women claimed that Ms. Wilson had set forth details of these home births, including the names and addresses of the Intervenors, in her license application. (R 27; App. 20.) The Intervenors opposed disclosure of the requested documents (R 28-30; App. 21-23), asserting these bases:

a) The records were confidential pursuant to *Florida Statutes*, 455.241 (1981); and

b) Disclosure would result in an unconstitutional invasion of their privacy.

At final hearing, the trial court accepted the Stipulation of Facts and granted the motion to intervene. (R 35; App. 97.) The trial court also conducted an in-camera inspection of the requested documents, including those

withheld by HRS. After this in-camera inspection of all the requested documents, the trial court returned those documents to HRS. (App. 76-78.) The requested documents did not become part of the record. They were not available to the Third District when it implied exemptions to the Public Records Act so as to seal them from public view. They are not before this court.

Apart from the Stipulation of Facts and the in-camera inspection of the requested documents, the trial court was offered no further evidence. The trial court ordered full disclosure. (R 39, 40; App. 101, 102.)

The Third District Opinion

In substantial part, the Third District reversed. 440 So.2d at 1304, slip opinion at 7. It did so without reaching the constitutional privacy issue raised by the Intervenors. Rather, the Third District limited itself to construction of Florida's Public Records Act. It ordered HRS to withhold substantial portions of the file pertaining to Ms. Wilson's application for a midwife's license. The Third District deemed it appropriate to incorporate by implication[4] into the Public Records Act the following statutes:

1. *Florida Statute* 382.35 (1981), which makes confidential portions of birth certificates in the hands of The Registrar of Vital Statistics; and
2. *Florida Statute* 455.241 (1981), which regulates the conduct of certain health care practitioners concerning patient records while those records are in the possession of health care practitioners.

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4. "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). The term "implication" is to be contrasted with "expressly" which means "set forth in words." Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Black's Law Dictionary (4th Ed. 1951).

The Third District incorporated by implication each of these statutes into the Public Records Act and held that these statutes, as incorporated by that court into the Public Records Act, precluded disclosure by HRS of portions of the license application. 440 So.2d at 1304, slip opinion at 7.

The Third District discussed first its "birth certificate" exemption to the Public Records Act. 440 So.2d at 1303; slip opinion at 5. After noting that no birth certificate itself was sought, the Third District noted that some of the requested information would be contained in the birth certificate itself. The Third District held, 440 So.2d at 1303, slip opinion at 6:

> It is clear, however, the purpose of Section 382.35 is not to protect the sanctity of the birth certificate *per se* but is instead to preserve the confidentiality of certain information relating to birth. . . . 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.

Thus, the square holding of the Third District, in the first of its two alternative holdings, is that if *information* is contained in a document, portions of which are confidential by statute, that same information is to be deemed confidential wherever it appears elsewhere in the public records, even in the absence of a statute preserving confidentiality elsewhere.

As an alternative holding, the Third District implied an exception to the Public Records Act in *Florida Statute* 455.241 (1981). This is part of the general provisions pertaining to the regulation of professions and occupations by the Department of Professional Regulation. The statute regulates the furnishing by health care practitioners of copies of reports of examinations or treatment. *Florida Statute* 455.241(2) (1981) provides:

> Such reports shall not be furnished to any person other than the patient or his legal representative, except upon written authorization of the patient. Nothing, however, shall prevent the furnishing of such reports without written authorization to any person, firm, or corporation which, with the patient's consent, shall have procured or furnished such examination or treatment or when compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical report shall be furnished both the defendant and the plaintiff.

After setting forth the statute, the Third District held, 440 So.2d at 1304, slip opinion at 6:

> It is clear that the detailed "birthing records" which are the subject of the dispute are not those of a licensed midwife, but those of a licensed physician who was supervising an applicant for a license to practice midwifery. Most of the information contained in these 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.

Thus, the square alternative holding of the Third District is that the statute regulating the conduct of health care practitioners concerning patient records in their possession creates by implication an exception to the Public Records Act.[5] By implying such an exception into the Public Records Act, the Third District held that records which arguably constitute patient records are exempt from disclosure under the Public Records Act even when incorporated into otherwise public documents, without regard to how or why they came to be a part of otherwise public records.

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5. The Attorney General of the State of Florida has reached a contrary conclusion. 1982 Op. Att'y. Gen. Fla. 082-75. In a decision filed late last year, without any reference to its earlier Alice P. decision, the Third District ordered disclosure of "medical, psychiatric and psychological records" of a deceased schoolteacher. Dade County School Board v. Miami Herald Publishing Co., 443 So.2d 268 (Fla. 3d DCA 1983).

SUMMARY OF ARGUMENT

It is undisputed that Intervenors consented to the inclusion of their "birthing records" in Ms. Wilson's license application. Nonetheless, the Third District upheld their objection to disclosure of the license application. The Third District found that two statutes, one regulating the conduct of medical practitioners and the other regulating disclosure by the State Registrar of Vital Statistics of portions of birth certificates, created by implication exceptions to the Public Records Act. These implied exceptions, the Third District held, precluded disclosure of Ms. Wilson's application for a midwife's license. The creation of exceptions in the Public Records Act by judicial implication is clearly precluded by prior decisions of this Court.

Moreover, the "right of confidentiality" asserted by Intervenors has not been recognized by any decision of The United States Supreme Court or this Court. To the extent "disclosural privacy" is an aspect of constitutional privacy, that right precludes governmental compulsion to disclose intimate information where disclosure will inhibit conduct or decision-making in zones of personal autonomy, where the government may not intrude absent a compelling state interest. No properly cognizable claim of "disclosural privacy" is presented by this matter.

Accordingly, the decision of the Third District should be vacated and the judgment of the trial court reinstated so that Ms. Wilson's license application may be inspected pursuant to Florida's Public Records Act.

THE THIRD DISTRICT MAY NOT CREATE EXCEPTIONS TO THE PUBLIC RECORDS ACT BY IMPLICATION

Florida's Public Records Act embodies this State's commitment to openness in government. That commitment is reflected in *Florida Statute* 110.01 (1981), 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.

Florida's Public Records Act

Florida Statute 119.07(1) establishes the general rule that a custodian of public records shall permit access to those records under reasonable conditions and at reasonable times. Section Three of this statute sets forth the exceptions to the general rule of disclosure. The legislature has created two classes of exceptions, which are these:

1. *Information* which is exempt from disclosure. *See, e.g., Florida Statute* 119.07(3)(d)-(k)(1981).

2. *Records* which are exempt from disclosure. *See, e.g., Florida Statute* 119.07(3)(b)(1981).

In addition to demonstrating its ability to distinguish between records and information and to exempt one or the other from disclosure, the Florida legislature also has demonstrated its ability to control the timing of disclosure. For example, active criminal intelligence information is exempted from disclosure by *Florida Statute* 119.07(3)(d)(1982). But at the time documents are given by a law enforcement agency or prosecutor to a criminal defendant, the exemption from disclosure terminates. *Florida Statute* 119.01(3)(c)(5) (1981). The legislature

also has demonstrated its ability to maintain the confidentiality of documents as they move from one public custodian to another public custodian. *See, e.g., Florida Statute* 960.15(1981).

Certain public records are exempt from disclosure by *Florida Statute* 119.07(3)(a)(1981), which provides:

> 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 specific law, shall be exempt from the provisions of Subsection (1). (Emphasis added.)

The current version of *Florida Statute* 119.07(3)(a) incorporates the phrase, "provided by law", a substitution made by the Legislature in 1975 in response to a decision by the District Court of Appeal, Second District, in *Wisher v. News-Press Publishing Co.*, 310 So.2d 345 (Fla. 2d DCA 1975), *rev'd*, 345 So.2d 646 (Fla. 1977). The Second District had held that a former phrase, "deemed by law to be confidential", permitted the courts to engraft judicially-created exceptions onto the Public Records Act. The Legislature's purpose in making the 1975 Amendment was obviously to "overrule the Second District *Wisher* conclusion and to preclude judicially-created exceptions to the Act in question." *State ex rel. Veale v. City of Boca Raton*, 353 So.2d 1194, 1196 (Fla. 4th DCA 1977); *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

Nowhere in the Public Records Act nor in the former Midwifery Act, *Florida Statutes*, Ch. 485 (1981),[6] is there any identified statutory exception from disclo-

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6. Former Chapter 485 was repealed by the Legislature. The practice of midwifery is now regulated by Florida Statutes, Ch. 467 (1983). Neither the former statute nor the present statute regulating midwifery contain any exception to the Public Records Act.

sure of any portion of an application for a midwife's license. It was precisely such a file that was requested of HRS. *Florida Statute* 382.35(1981) does exempt from disclosure by the State Registrar certain portions of certificates of live birth. But in this case, no request for disclosure was made of the State Registrar and no disclosure was sought from any person of a certificate of live birth. What was sought here was the file pertaining to an application for a midwife's license. Nor was disclosure of patient records sought from a licensed medical practitioner. What was sought here was an application for a midwife's license, together with supporting submissions, all in the possession of HRS pursuant to a statutory scheme regulating midwifery.

The Case Law

This Court's decisions have repeatedly recognized that only the Legislature may create exceptions to the Public Records Act. Judicially-created exceptions to the Act, including those founded upon public policy considerations or common law privileges, are precluded. *Rose v. D'Alessandro,* 380 So.2d 419 (Fla. 1980); *Wait v. Florida Power & Light, supra.* Only explicit statutory language can create an exception to the Public Records Act. As this court noted in *Wood v. Marston,* 442 So.2d 934, 938 (Fla. 1983):

> (I)n the Public Records Law, the coverage is expressed generally; exemptions are identified explicitly.

This court held 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.)

This court has properly held that the term "expressly" means "represented in words." *Jenkins v. State, supra.* This precludes judicial creation by implication of exceptions to the Public Records Act. In deciding *State ex rel. Cummer v. Pace,* 118 Fla. 496, 159 So. 679 (1935), this Court held, 159 So. at 681:

> This statute applies specifically to all . . . records, and where the Legislature has preserved no exception to the provisions of the statute, the courts are without the legal sanction to raise such exceptions by implication . . .

Thus, decisions of this court mandate that the lower courts not carve out judicially-created exceptions to the Public Records Act. Decisions of this court require that the lower courts honor Florida's commitment to open government and the State's strong policy that its citizens have access to public records, unless an express statutory provision precludes disclosure.

This the Third District did not do. Rather, in direct conflict with *State ex rel. Cummer v. Pace, supra,* and other decisions of this court, the Third District created by implication exceptions to the Public Records Act. The Third District held that a statute regulating the furnishing of patient records by medical practitioners operated to preclude disclosure of portions of the application for a midwife's license because that application arguably included patient records created by a medical practitioner. The Third District also held that, because the file pertaining to the midwife's license application included *in-*

formation contained in a certificate of live birth, such *information* also was by implication protected from disclosure because a certificate of live birth is, in the hands of the State Registrar of Vital Statistics, exempt from disclosure.

The Birth Certificate Theory

When *The Miami News* requested of HRS a copy of Ms. Wilson's application for a midwife's license, it did not request of HRS copies of any birth certificates. Nor did it request copies of any birth certificates from the legal custodian thereof, the State Registrar of Vital Statistics. Nonetheless the Third District found that *Florida Statute* 382.35 (1981) (pertaining to the disclosure by the State Registrar of copies of original birth certificates) precluded disclosure of portions of Ms. Wilson's application for a midwife's license. The Third District held, 440 So.2d at 1303, slip opinion at 5, 6:

> Appellees emphasize that it is not the birth certificate itself that is sought, but rather the information which is contained in the application for midwifery. It is clear, however, that the purpose of Section 382.35 is not to protect the sanctity of the birth certificate *per se,* but is instead to preserve the confidentiality of certain information relating to birth. Whether otherwise private information, which is made a matter of public record as a requirement of law, would be exempt or not exempt from general public examination is determined by the expressed 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. 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. (Emphasis added.)

The Third District's conclusion is, at best, an implication; at worst, it is a non sequitur. Neither the statutory language nor prior case law[7] support such a conclusion or anything like it. And the holding of the Third District is precluded by prior decisions of this court. *Wait v. Florida Power & Light Co., supra; State ex rel. Cummer v. Pace, supra.*

The Third District, by implication, imposed a sort of "travelling confidentiality" on information contained in birth certificates. After admitting that the application for a midwife's license was submitted under a statute "which does not expressly recognize (a) protected status" from disclosure, the Third District by implication imputed to portions of the application for a midwife's license confidentiality because the application contained information which, in the hands of the Registrar of Vital Statistics, could not be disclosed by the Registrar. The Third District's admission that the statutory scheme under which

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7. If the Third District be correct, then the First District clearly reached an incorrect result in the City of Gainesville v. State ex rel. I.A.F.F., Local 2157, 298 So.2d 478 (Fla. 1st DCA 1974). In that case, municipal financial data had been used in preparation for negotiations with the Fire Fighters Union. Work product of the public employer in preparation for negotiations is exempt from the Public Records Act. The same data was included in the City's proposals relating to the budget for the fire department. The First District held that proposals relating to the budget were not exempt from disclosure under the Public Records Act, even though that information was incorporated into work product preliminary to labor negotiations. Under the Third District's view, incorporation of the financial data into documents privileged as a part of labor negotiations would preclude disclosure of the City's financial data. However, the First District was correct. Adoption of the Third District's Alice P. rationale would produce an unending succession of anomolous results.

the application for a midwife's license was submitted does not expressly preserve the confidentiality of any information mandates its reversal. The Third District's holding flies in the face of this court's prior decision in *Wait v. Florida Power & Light, supra.* This court held, 372 So.2d at 425:

> (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. (Emphasis added.)

See also, Wood v. Marston, supra. The Third District expressly admitted that the exception it perceived to the Public Records Act was not an express exception. This alone requires reversal.

The Florida Legislature also has the power to exempt from the Public Records Act certain information as it moves from public custodian to public custodian. It has exercised that power. For instance, *Florida Statute* 960.15 (1981) specifies that reports obtained under the Florida Crimes Compensation Act and which are confidential in the hands of their original custodian are also confidential when considered by the authorities charged with administering in the Florida Crimes Compensation Act.

Faced with this legislative ability to protect the confidentiality of information as it passes from one custodian to another, the Third District simply created another "travelling confidentiality" exception. This was done even though there is absolutely no hint in this record that any of the information deemed confidential by the Third District was provided to the authorities administering the Midwifery Act by the Registrar of Vital Statistics.

The Third District simply established by implication a judicially-created exception to the Public Records Act. This it may not do. *Wait v. Florida Power & Light Co., supra; State ex rel. Cummer v. Pace, supra.*

The Patient Record Theory

The Miami News requested access to a file pertaining to an application for a midwife's license. The file was in the possession of HRS. The Third District held portions of the file not subject to disclosure under *Florida Statutes,* Ch. 119 (1981), because, in the Third District's view, portions of the file constituted "patient records." 440 So.2d at 1304, slip opinion at 6. By implication, the Third District held that *Florida Statute* 455.241 (1981), which regulates the furnishing by medical practitioners of patient records in their possession, creates an exception to the Public Records Act when these "patient records" come into the possession of a state agency as part of a license application.[8] This statute is clearly part of a statutory scheme to regulate conduct of medical practitioners.[9]

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8. The 1982 amendment by the Legislature of the "Patient Record" statute would seem to preclude the interpretation given by the Third District to that statute. The Legislature amended the statute to provide that the Department of Professional Regulation, as part of an investigation into improper prescription by medical practitioners of controlled substances, may by administrative subpoena come into possession of patient records. The Legislature perceived the need to specifically exempt by statute such patient records in the hands of the Department of Professional Regulation from disclosure under the Public Records Act Florida Statute 455.241 (1983). Were the Third District's view of the Public Records Act correct, the Legislature would not have needed to make this express exception in Section 455.241 (1983).

9. Florida Statute 455.241 (1981) provides as follows:

(1) Any health care practitioner licensed pursuant to chapter 458, chapter 459, chapter 460, chapter 461, 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

(Continued on following page)

It establishes a patient's clear entitlement to his patient records and prohibits the refusal to provide a patient copies of his own records because there exists a fee dispute between the patient and the medical practitioner. The statute limits the furnishing of records to third parties, unless the patient or his legal representative has authorized this. It specifically excepts from this rule physical examinations made compulsory in civil litigation or examinations procured by third parties, a situation which most often arises in insurance applications or in an employer/employee relationship. It is this statute which the Third District held creates, by implication, an exception to Florida's Public Records Act and precludes free access to the entire application for a midwife's license. The Third District held, 440 So.2d at 1304, slip opinion at 6:

> It is clear that the detailed "birthing records" which are the subject of the dispute are not those of a licensed midwife, but those of a licensed physician who was supervising an applicant for a license to practice midwifery. 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 455.241. The records are *thus* exempt from disclosure under the Public Records Act. (Emphasis added.)

Footnote continued—

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 reports shall not be furnished to any person other than the patient or his legal representative, except upon written authorization to any person, firm, or corporation which, with the patient's consent, shall have procured or furnished such compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical report shall be furnished both the defendant and the plaintiff.

Without presently taking issue with the Third District's conjectural conclusion that the records "could have been supplied only by one licensed to practice medicine"[10] the Third District's conclusion that the records are exempt as patient records pursuant to 455.241 (1981) constitutes, at best, the implication of an exception to the Public Records Act, an implication which is prohibited by this court's prior decisions. *State ex rel. Cummer v. Pace, supra.* At worst, the Third District's conclusion here is also a non-sequitur because nothing in *Florida Statute* 455.241 (1981) requires or even permits the conclusion reached by the Third District.

The "patient records" statute does not, in terms, deal with disclosure of an application for a midwife's license. It merely regulates the furnishing of patient records by licensed medical practitioners. Simply stated, the statute regulates the distribution by medical practitioners of patient records in their possession. It in no way addresses the issue of what may become of or may be done with patient records once they leave the medical practitioner's possession. There was no showing that these records were provided to HRS by any medical practitioner or improperly distributed by any medical practitioner. In fact, Intervenors' counsel advised the trial court that the "birthing records" were incorporated into Ms. Wilson's license application with Intervenors' consent. (App. 69.)

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10. The uncontradicted record in the trial court was that the "birthing records" incorporated into Ms. Wilson's license application were made by Ms. Wilson. (App. 76-78.) These records were returned by the trial court to HRS and were not before the Third District. (App. 77-78.) Exactly how the Third District reached its conjectural conclusion that the records in question "could have been supplied only by one licensed to practice medicine" is not clear. The trial court made an explicit finding to the contrary. (App. 84.)

Here, the "birthing records" were incorporated into a public document, Ms. Wilson's application for a midwife's license. *Florida Statute* 455.241 (1981), the "patient records" statute, does not purport to expressly create an exception to the Public Records Act.[11] Nor does the Public Records Act expressly bring "patient records" within its ambit. Rather, the Third District, by implication, engrafted the limitations on the distribution by a medical practitioner of records in his possession onto the custodian of public records which arguably include "patient records." This transmutation of the regulatory limitations on the distribution of patient records by a medical practitioner into a limitation of Public Records Act was accomplished without any regard to how or why the documents which are arguably "patient records" came to be a part of the public records.

This court's prior decisions preclude the Third District's result. The Third District may not carve out judicially-created exceptions to the Public Records Act. *Wait v. Florida Power & Light Co., supra.* The Third District may not create exceptions to the Public Records Act by implication. *State ex rel. Cummer v. Pace, supra.* There is nothing in the "Patient Records" statute, *Florida Statute* 455.241 (1981), or the Public Records Act, *Florida Statutes,* Ch. 119 (1981), which precludes disclosure by

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11. The Third District's construction of the Public Records Act makes a statutory redundancy of Florida Statute 119.07(3)(n)(1983), which provides that patient records obtained by the Hospital Cost Containment Board are exempt from disclosure under the Public Records Act. The Legislature clearly recognized by this statute a need to protect the confidentiality of patient records when they are obtained by the Hospital Cost Containment Board and implicitly recognized that, absent this provision in the Public Records Act, the general disclosure provisions of the Public Records Act would make patient records obtained by the Hospital Cost Containment Board available under the Public Records Act. Contemplation of the import of this sub-section of the Public Records Act reveals how particularly gratuitous are the Third District's "travelling confidentiality" theory and its "patient record" theory.

the HRS of Ms. Wilson's application for a midwife license. The regulatory scheme dealing with distribution by medical practitioners of patient records has nothing to do with *The Miami News'* request for Ms. Wilson's license application. The Third District may not say, by implication, that it does.

The Obvious Result

If this court holds the Third District's view of the Public Records Act to be correct, administration of the Public Records Act by public officials will become neither more nor less than guesswork or gamesmanship and, considering the proclivity of public records custodians to not release records, will be taken to extremes, logical and illogical. *Florida Statute* 905.27 (1983) makes confidential any evidence received by a Grand Jury. Numerous Florida statutes protect the confidentiality of financial information in the hands of various government agencies. *See, e.g., Florida Statute* 198.09 (1983); *Florida Statute* 220.242 (1983); *Florida Statute* 626.941(2) (1983). Under the Third District's opinion, the custodian of a public document would have to guess if any of the information in that document had been received as evidence by a Grand Jury or was provided to a government agency under a statute which provided for confidentiality. If any of this occurred, under the Third District's view, the information possessed by the custodian of the otherwise public document would be exempt from disclosure under the Public Records Act. There would be no end of implied exemptions under the Public Records Act and no end of litigation resulting from timidity on the part of public officials reluctant to guess whether the information in otherwise public documents is elsewhere provided in documents which are accorded confidentiality.

THE CONSTITUTIONAL RIGHT OF PRIVACY DOES NOT PRECLUDE DISCLOSURE OF PUBLIC RECORDS

Intervenors postulated in the trial court and in the Third District a broad constitutional right of "disclosural privacy" or "confidentiality." Based on the evidence before it, the trial court refused to enforce this asserted constitutional right. The Third District, disposing on purely statutory grounds of the matter before it, did not reach this constitutional issue. But Intervenors will doubtlessly raise this issue again in this court.

The Consent of Intervenors

The uncontradicted record before the trial court was that Intervenors knew when they gave birth to their children that Ms. Wilson was going to submit their names and records in furtherance of her license application and had no objection to Ms. Wilson doing so. (App. 69.) This being the case, the constitutional argument is factually, as well as legally, baseless. "(A)ppellant cannot assert any privacy claim as to documents . . . that he has already disclosed to the public." *Nixon v. Administrator of General Services*, 433 U.S. 425, 459, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (hereinafter "*Nixon*".) Intervenors gave their consent to the inclusion of the "birthing records" in Ms. Wilson's application for a midwife's license. This application is properly subject to disclosure under the Public Records Act. Having done this, they are precluded by the square holding of The United States Supreme Court from successfully asserting any privacy claim.

The Purported Right of "Confidentiality"

Moreover, Intervenors' claimed constitutional right to privacy is supported neither by the decisions of the United States Supreme Court nor the decisions of this Court. A constitutional right to disclosural privacy, under very limited circumstances, has been recognized by the United States Supreme Court. *Miami Herald Publishing Co. v. Marko,* 352 So.2d 518 (Fla. 1977). But that constitutional right of disclosural privacy has neither the breadth nor the scope envisioned by Intervenors.[12] This Court held in *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.,* 379 So.2d 633, 636 (Fla. 1980) (hereinafter *"Byron, Harless"*):

> The district court's holding, that a federal right of privacy prevents public disclosure of the consultant's papers, is based on its determination that the Bill of Rights recognizes the fundamental integrity of persons which gives rise to a 'privacy of personhood' that cannot be violated by government except to vindicate a compelling state interest. In essence, the district court formulated a general federal right of privacy the core of which is described as the 'inviolability of personhood.' We find that the district court's conclusion is unsupported by either the decisions of this Court or those of the Supreme Court of the United States.

This Court's 1980 decision in *Byron, Harless* correctly stated the law as it then existed; since then, no decision of the United States Supreme Court has impacted its

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12. The constitutional "right of privacy" has been termed "a shelter of more limited parameters than the commodious label suggests." O'Brien v. DiGrazia, 544 F.2d 543, 545 (1st Cir. 1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977).

accuracy. The law was then as stated by this Court and it remains so. In deciding *Byron, Harless,* this Court held, 379 So.2d at 636:

> While there is no right of privacy explicitly enunciated in the Bill of Rights, the Supreme Court has construed the federal constitution to protect certain privacy interests. These protected interests can be said to comprise the federal constitutional right of privacy. This right of privacy cannot be characterized as a general right because its application has been strictly limited. It has been characterized as consisting of three protected interests: an individual's interest in being secure from unwarranted governmental surveillance and intrusion into his private affairs; a person's interest in decisional autonomy on personally intimate matters; and an individual's interest in protecting against the disclosure of personal matters.

As this Court noted, the present decisions of the United States Supreme Court create a right of disclosural privacy only to the extent that forced disclosure to government of personally intimate data is prohibited only when such disclosure impacts "decisional autonomy"—that is, private conduct in intimate affairs which the government can regulate only on a showing of a compelling state interest.[13] To the extent it has been properly recognized, disclosural privacy in the constitutional sense has these elements:

1. Governmental coercion
2. which compels an individual to disclose

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13. "Virtually every governmental action interferes with personal privacy to some degree." Katz v. United States, 389 U.S. 347, 350, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

3. personally intimate information

4. under such circumstances that the disclosure inhibits decision-making in constitutionally protected areas of personal autonomy.

While some courts have disagreed,[14] the better-reasoned cases, including the decisions of this Court, have concluded that "the Constitution does not encompass a general right to nondisclosure of private information." *J.P. v. DeSanti,* 653 F.2d 1080, 1090 (6th Cir. 1981). *See also, St. Michael's Convalescent Hospital v. California,* 643 F.2d 1369 (9th Cir. 1981); *McElrath 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, 58 L.Ed.2d 344 (1978); *O'Brien v. DiGrazia, supra; McNally v. Pulitzer Publishing Co.,* 532 F.2d 69 (8th Cir.), *cert. denied,* 429 U.S. 855, 97 S.Ct. 150, 50 L.Ed.2d 131 (1976).

The postulated right of "disclosural privacy" remains, at best, amorphous. The Supreme Court has alluded to this purported right only twice. *Nixon v. Administrator of General Services, supra; Whalen v. Roe,* 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (hereinafter *"Whalen".*) In *Nixon,* the United States Supreme Court upheld a

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14. Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981); Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979), cert. denied, 449 U.S. 1076, 101 S.Ct. 854, 66 L.Ed.2d 798 (1981); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979). See also, Tavaoulares v. Washington Post Co., 724 F.2d 1010 (DC Cir. 1984) (recognizing a right of privacy in confidential materials disclosed during discovery, apparently as an alternative holding to the confidentiality imparted by Rule 26, Federal Rules of Civil Procedure), Barry v. City of New York, 712 F.2d 1554 (2d Cir.), cert. denied, ... U.S. ....., 104 S.Ct. 548, 78 L.Ed.2d 723 (1983) (assuming a constitutional right of confidentiality, which was overriden again on a balancing test), United States v. Westinghouse Electric Corp., 638 F.2d 570 (3rd Cir. 1980) (recognizing a right of confidentiality in medical records but overriding that right after applying a balancing test).

statute compelling after-the-fact disclosure of documents and tapes incorporating extremely private communications between the former President and, among others, his wife, his daughters, his physician, lawyers and clergymen, as well as his close friends. The Court then upheld the compelled disclosure to the government of intimate data, given the confidentiality involved in the elaborate archival scheme set up by the statute. An examination of *Nixon* reveals that the Supreme Court was responding in the context of the former President's argument that the statute constituted an improper seizure of his papers. While not clearly stated, the privacy analysis is clearly devoted to determining if the former President enjoyed a legitimate expectation of privacy in the documents arguably subjected to a warrantless search or seizure. The court's analysis of the privacy issue in *Nixon* is grounded on a Fourth Amendment footing; the analysis is not based on a general constitution right to privacy. 433 U.S. at 455-465; *J.P. v. DeSanti, supra,* 653 F.2d at 1089, n.4. Nor is the Supreme Court's *Whalen* decision more helpful in firmly establishing Intervenors' postulated right of nondisclosure. In *Whalen,* the Court had before it a New York statute which required disclosure to the state of the names of persons who obtained certain drugs. The statute incorporated precautions against public disclosure of this information. The Supreme Court explicitly refused to address the issues which Intervenors suggest *Whalen* resolves. In the Supreme Court's view, the facts of *Whalen* did not raise the issue of a possible constitutional right of confidentiality. The Court held, 429 U.S. at 605, 606:

> We . . . need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data. . . .

Such is the scant authority in *Whalen* and *Nixon* on which Intervenors relied to postulate a broad, general right of confidentiality. As this court correctly noted in *Byron, Harless*, 379 So.2d at 637:

> The Supreme Court has provided little specific guidance on this aspect of the right to privacy, and neither *Whalen* nor *Nixon* resolves the question presented.

Indeed neither case resolves the question presented. But the holding of the United States Supreme Court in *Katz v. United States, supra,* does seem more helpful. In *Katz,* the Supreme Court held, 389 U.S. at 350, 351:

> (T)he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual states. (Emphasis in original.)

This holding is entirely consistent with the Supreme Court's later decision in *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (hereinafter *"Paul v. Davis".*) That decision remains good law and was correctly utilized by this court in deciding *Byron, Harless.* In *Paul v. Davis,* the Supreme Court held, 424 U.S. at 712, 713:

> While there is no 'right of privacy' found in any specific guarantee of the Constitution, the Court has recognized that 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon government power. (Citation omitted.)
>
> Respondent's case, however, does not come within these areas. He does not seek to suppress evidence

> seized in the course of an unreasonable search. (Citations omitted.) And our 'right of privacy' cases, while defying categorical description, deal generally with substantive aspects of the Fourteenth Amendment.
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> . . . .
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> Respondent's claim is far afield from the line of decisions. 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 the record of an official act . . . None of our substantive privacy decisions hold this or anything like this and we decline to enlarge them in this manner.

Neither *Whalen* nor *Nixon* overruled *Paul v. Davis.* To the extent *Nixon* dealt at all with privacy interests, it did so in the context of a Fourth Amendment balancing of the governmental intrusion against the limited impact of archival disclosure on privacy interests and the unavailability of any other mechanism for screening out purely personal papers from the presidential papers. In *Whalen,* the Supreme Court held compelled disclosure to the state of incriminating medical information where the disclosed information was for limited and defined purposes and a system of safeguards provided against further disclosure. In *Whalen,* the Supreme Court specifically refused to decide any question which might be presented by the unwarranted disclosure of intimate data. In fact, *Paul v. Davis* dealt with an issue very different than the issue dealt with in *Whalen* and *Nixon.* In *Whalen* and *Nixon,* the issue was the extent to which government may constitutionally compel disclosure of

intimate data to it. In both instances, there were safeguards against further disclosure, whether within the government or to persons outside of government. *Paul v. Davis* specifically dealt with an asserted constitutional right which would have precluded disclosure by government of embarrassing data. In *Paul v. Davis,* the Supreme Court squarely rejected the assertion that there is something in the Constitution which prevents government from disseminating embarrassing data.[15]

After reviewing these authorities, this court refused[16] in *Byron, Harless* to follow the Fifth Circuit decision in *Plante v. Gonzalez, supra,* which held that *Whalen* and *Nixon* created a broad, constitutional "right of confidentiality." This court correctly held that reliance upon *Whalen* and *Nixon* as support for an "expansive right of personhood" is inappropriate. Relying upon *Paul v. Davis,* this court noted in *Byron, Harless,* 379 So.2d at 638:

> The Supreme Court may some day breathe life into the privacy interest asserted by respondents, but, until that occurs, we conclude that there does not exist, under the facts of this case, a constitutionally protected interest sufficient to prevent the public from seeing the consultant's papers.

While the Fifth Circuit has reaffirmed its view of the perceived constitutional "right of confidentiality", other

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15. In Paul v. Davis, there was no compelled disclosure of data to government. The embarrassing data disseminated by the government was a record of an official act of government, an arrest.

16. This refusal was explicit. This court held, "there is nothing in Plante that persuades us that the facts of the present case establish a disclosural privacy interest . . ." 379 So.2d at 638. The Fifth Circuit's subsequent opinions, Fadjo v. Coon, supra, and DuPlantier v. United States, supra, indulge in no independent analysis, but rather have as their starting point the stare decisis effect of the recognition of 'a right of confidentiality' in Plante v. Gonzalez, supra.

circuits have squarely rejected the Fifth Circuit's decisions. After reviewing the pertinent authorities, the Sixth Circuit Court of Appeals held in *J.P. v. DeSanti, supra* at 1088, 1089:

> Some courts have uncritically picked up that part of *Whalen* pertaining to nondisclosure and have created a rule that the courts must balance a governmental intrusion on this 'right' of privacy against the government's interest in the intrusion. . . .
>
> We do not view the discussion of confidentiality in *Whalen v. Roe* as overruling *Paul v. Davis* in creating a constitutional right to have all government action weighed against the resulting breach of confidentiality. . . .
>
> Like *Whalen, Nixon* does not overrule *Paul v. Davis* and create a general constitutional right of nondisclosure against which governmental action must be weighed. . . . The court did not purport to establish a constitutional right to nondisclosure. . . .
>
> Absent a clear indication from the Supreme Court, we will not construe isolated statements in *Whalen* and *Nixon* more broadly than their context allows to recognize a general constitutional right to have disclosure of private information measured against the need for disclosure. Analytically, we are unable to see how such a constitutional right of privacy can be restricted to anything less than the general "right to be left alone". . . .[17]

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17. This concern for a clear analytical framework is well-founded. While the Florida Evidence Code recognizes a privilege for marital communications, the broadly based right of confidentiality has led to an unsuccessful argument that this 'right of confidentiality' establishes a 'boyfriend-girlfriend' privilege. In re: Getty, 427 So.2d 380 (Fla. 4th DCA 1983).

The Ninth Circuit has joined the Sixth Circuit in rejecting the notion that the constitution encompasses a general right to confidentiality of private information. In *St. Michael's Convalescent Hospital v. California, supra,* the court limited disclosural privacy to instances where public disclosure of private information will restrict freedom of action in fundamentally private spheres. The Seventh and Eighth Circuits are of a similar view. *McElrath v. Califano, supra;*[18] *Morris v. Danna,* 547 F.2d 436 (8th Cir. 1977); *McNally v. Pulitzer Publishing Co., supra.* So is the First Circuit. *O'Brien v. DiGrazia, supra.*

The Right of "Disclosural Privacy"

All this is not to say a constitutional right to privacy does not exist. It does. But it is nothing like the "right" which Intervenors claim. The constitutional right to privacy exists in the penumbra of the Bill of Rights. The notion of privacy is at the core of the Fourth Amendment's limitations on the power of government to search and seize. Like other aspects of the Bill of Rights, the constitutional right of privacy is a limitation on the power of government. More specifically, the constitutional right of privacy prohibits, absent a compelling governmental interest, governmental inhibitions on personal decision-mak-

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18. The Seventh Circuit's analysis in McElrath v. Califano, supra, at 441, is instructive, especially in light of Florida Board of Bar Examiners re: Applicant, 443 So.2d 71 (Fla. 1983). In similar contexts, the Seventh Circuit and this court reached, it is submitted, correct results. But the analytical framework is different. Utilizing the Seventh Circuit's reasoning, the Bar Examiners case would be decided thusly: The right to practice law is not one of those personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' This case is not concerned with a regulation impacting the 'privacy' of the bar applicant on the magnitude of criminal sanctions for an absolute prohibition of the applicant's conduct. The claim of the applicant to receive a license to practice law on his own informational terms does not rise to the level of a constitutional guarantee.

ing in areas of constitutionally protected personal autonomy. *See, e.g., Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (abortion); *Carey v. Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed. 2d 675 (1977); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (contraception). Also regarded as supporting, at least indirectly, a constitutional right to privacy are cases decided on other grounds. *See, e.g., Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (plurality decision invalidating, on an equal protection basis, a statutory ban on distribution of contraceptives to unmarried persons); *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (invalidating as "invidious racial discrimination" an anti-miscegenation statute); *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 99 L.Ed. 645 (1944) (upholding, against a First Amendment freedom of religion claim by Jehovah's Witnesses, a child labor law prohibiting street sales of newspapers by minors); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (invalidating, on an equal protection basis, a statute requiring sterilization of "habitual criminals"); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (plurality decision invalidating a statutory requirement of attendance at public schools, as opposed to parochial schools, with the deciding vote on the basis of impairment of the property rights of the impacted schools). Woven together, such cases as these have become authority for the now-accepted proposition that government may not, absent a compelling governmental interest, regulate conduct in such areas of personal autonomy as contraception, abortion, child rearing, education, and other intimate aspects of familial life. *John F. Kennedy Memorial Hospital, Inc. v. Bludworth,* ..... So.2d ....., 9 FLW 196 (Fla. 1984); *Satz v. Perlmutter,* 379 So.2d 359 (Fla. 1980).

To the extent it is properly recognized, disclosural privacy as an aspect of constitutional privacy is a limitation on the power of government.[19] Absent a compelling state interest, the government may not compel disclosure of information where such disclosure of information would inhibit decision-making in areas of constitutionally-protected personal autonomy.[20] To hold anything else would produce a singularly anomolous result. Disclosural privacy, as a constitutional right, can have a scope no broader than that of the now accepted notion of constitutional privacy as a limitation on the power of government to substantively regulate conduct. As an aspect of the constitutional right of privacy, disclosural privacy is, both definitionally and logically, limited. It limits the power of government to inhibit (by compelling disclosure of data) conduct and decision-making in the recognized zones of personal autonomy encompassed by the constitutional right of privacy. Thus, disclosural privacy as an aspect of constitutional privacy operates only to preclude compelled disclosure of data in those recognized zones of personal autonomy. Information not inhibiting decision-making and conduct in these zones of privacy is not at all protected by disclosural privacy. Where the government may substantively regulate conduct as an aspect of its police powers, it may lawfully compel disclosure of information if the disclosure is rationally related to a lawful governmental purpose.

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19. The uncoerced disclosure of intimate data, whether to government or to other private parties, implicates no constitutional right of privacy. Absent governmental coercion, disclosure, whether in the first instance or subsequently, of embarrassing information may give rise to tort remedies under state law, but such disclosures do not impinge upon any constitutional right.

20. The constitutional guarantee of privacy embodies only those personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' Roe v. Wade, supra, 410 U.S. at 152.

It seems clear that if a governmental purpose be a lawful one, and the compelled disclosure be rationally related to the lawful governmental purpose, then the compelled disclosure is a lawful one, absent impairment of a citizen's constitutionally protected decision-making in areas of personal autonomy. If the compelled disclosure impairs decision-making in these constitutionally protected areas of personal autonomy, then the compelled disclosure is lawful only if a compelling governmental interest can be shown. Even where the compelled disclosure involves data pertaining to areas of personal autonomy, the governmental compulsion to disclose is measured against a "reasonableness" standard if the circumstances of the disclosure are such that any impact on protected decision-making is minimized or eliminated.[21] Absent intrusion upon decision-making in the protected areas of personal autonomy, disclosure of personal data may be lawfully compelled by government if there is a rational relationship between a lawful governmental purpose and the data disclosed.

This is why this Court's recent decision in *Florida Board of Bar Examiners re: Applicant, supra,* is so fundamentally correct. Complete disclosure of the bar applicant's total psychiatric history is clearly warranted. It is clearly lawful. Even in the absence of a compelling state interest justifying disclosure of occasional psychiatric counseling nine years prior, the governmental interest in regulating the practice of law is clearly a lawful one.

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21. Factors utilized by the Supreme Court in judging this 'reasonableness' include the unavoidability of disclosing some limited personal data in areas involving personal autonomy because the personal data is interwoven with information properly required by the government, restrictions on the further disclosure by government of such constitutionally protected personal information, and limitations on the use of such information by government. Whalen v. Roe, supra; Nixon, supra; Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

And the information sought (arguably remote and isolated instances of psychiatric consultation) is rationally related to the lawful governmental purpose. Disclosure in that case was properly required even though the data to be disclosed was clearly highly personal and previously confidential. Absent impact on a fundamental personal right (which the ability to practice law is not), compelled disclosure of intimate and confidential psychiatric information is proper, given its rational relationship to the governmental purpose of regulating admission to the practice of law. In terms of the analysis suggested, this court's decision in *Florida Board of Bar Examiners re: Applicant, supra,* is clearly correct. *See also, McElrath v. Califano, supra.* But this is not to say the government may promiscuously compel disclosure of personal data. Any disclosure compelled by government must have a rational relationship to a lawful governmental purpose.

The Case at Hand

This overview of the law of constitutional privacy is applicable to the case at hand. When applied to these facts, it is clear no recognized constitutional right of privacy is impacted here.

First, there was absolutely no governmental compulsion to incorporate "birthing records" into Ms. Wilson's license application. Their inclusion was *not* the result of any governmental direction, express or implied. Their inclusion, thus, was voluntary.[22]

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22. Neither Florida Statutes, Ch. 485 (1981) nor the HRS regulations then in effect required any such submission from Ms. Wilson. This regulatory scheme has been supplanted. See Note 6, supra. The HRS regulations, purportedly issued under the statute, have been held to be an invalid exercise of delegated legislative authority. State v. McTigue, 387 So.2d 454 (Fla. 1st DCA 1980).

Second, the inclusion of "birthing records" in Ms. Wilson's license application was agreed to by Intervenors. Intervenors' consent was voluntary. "(A)ppellant cannot assert any privacy claim to documents . . . that he has already disclosed to the public." *Nixon, supra,* 433 U.S. at 459. It was uncontradicted in the trial court that Intervenors consented to the inclusion of the "birthing records" in Ms. Wilson's license application.[23]

Third, the sensitivity of the records themselves is questionable. Though the Third District speculated that they were sensitive, the trial court had the benefit of an *in camera* inspection of the documents. It ordered full disclosure. The requested records are not before this Court. Hence, the Intervenors are, as a matter of law, unable to show reversible error by the trial court as to any factual predicate for their non-disclosure.

Since the inclusion of the "birthing records" in Ms. Wilson's application was the voluntary act of Ms. Wilson, voluntarily agreed to by Intervenors, neither Ms. Wilson nor the Intervenors can now complain of an unconstitutional invasion of privacy interests.

What privacy interests, then, can possibly be implicated here? The case law reveals that any right of "disclosural privacy" is a limitation solely on the power of government to compel disclosure of personal data. Understood as such, it is a logical aspect of the law of "decisional" or "autonomic" privacy. The elements of this "disclosural privacy" are:

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23. That Ms. Wilson, Intervenors, or Ms. Wilson and Intervenors collectively may have understood that the public would not have access to her application is irrelevant. Even a bilateral agreement between Ms. Wilson or Intervenors and HRS would not affect the application of the Public Records Act. Browning v. Walton, 351 So.2d 380 (Fla. 4th DCA 1977).

1. Governmental coercion
2. which compels an individual to disclose
3. personally intimate information
4. under such circumstances that such disclosure inhibits decision-making in constitutionally protected areas of personal autonomy.

The Federal Constitution is implicated only when the government *requires* an individual to do that which the individual does not want to do and that *compulsion* implicates basic elements of "personhood" which society deems uniquely private, unless the compulsion serves governmental needs so great that these needs outweigh the invasion of "personhood." This rule applies to "decisional" or "autonomic" privacy. It applies equally to "disclosural" privacy where disclosure would inhibit conduct which is protected by "decisional" privacy.

A case which illustrates the appropriate application of constitutional disclosural privacy is *Shuman v. City of Philadelphia,* 470 F.Supp. 449 (E.D. Penn. 1979). In that case, the Internal Affairs Division of the City of Philadelphia Police Department instituted an investigation into the personal life of a police officer, accused of cohabiting with a young lady. The investigation was initiated by a complaint from the young lady's mother. The officer lost his job because he refused to fully answer questions concerning his personal life, including intimate aspects thereof. The officer sued in Federal Court, seeking reinstatement. The City of Philadelphia was ordered to reinstate the officer. The investigation of these aspects of his life was found to have no rational connection to his fitness as a police officer. The dismissal was held to be an invasion of the officer's constitutional right to privacy. It is precisely because *Shuman* is not this case that *Shuman* helps

instruct us why the *constitutional* law of privacy is not implicated in this case.

Is, then, a person without remedy if a governmental official unlawfully discloses (or a reporter unlawfully gets his hands on and discloses) private facts in the possession of government? The answer to that question is that a remedy exists, but that remedy is not in the *constitutional* arena. Rather, it is in the tort field. "The constitutional right of privacy is not to be equated with the common law right (of privacy) recognized by state tort law."[24] *McNally v. Pulitizer Publishing Co., supra,* 532 F.2d at 76.

This tort remedy is, itself, limited (and the principal limitation if the tort right is asserted against a newspaper is, itself, of constitutional dimension) but the remedy is there when these limitations are exceeded. In ruling upon a tort privacy case against a media defendant, the United States Supreme Court examined a plaintiff's claim under state tort law. In rejecting that claim under state tort law, the United States Supreme Court held, *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 494, 495, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975):

> Thus, even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record. The conclusion is compelling when viewed in terms of the First and Fourteenth Amendments and in light of the public interest in a vigorous press. . . .

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24. It was the failure to perceive this distinction which caused the First District to commit the error it did in Byron, Harless, Schaffer, Reid and Associates, Inc. v. State ex rel. Schellenberg, 360 So.2d 83 (Fla. 1st DCA 1978); rev'd sub nom., Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., supra.

> By placing the information in the public domain . . ., the state must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true content of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.

Frankly, Intervenors' "further disclosure" theory, as applied to the facts of *this* case, fails to even approach muster, when considered under tort law. *Howard v. Des Moines Register,* 283 N.W.2d 289 (Iowa 1979). For here:

1. Ms. Wilson voluntarily produced the "birthing records";
2. Intervenors voluntarily consented to that production; and
3. The Florida Public Records Law, which serves Florida governmental interests of the highest value, mandated public disclosure of midwifery applications.

But absent these considerations and absent, as to newspaper publication, the First Amendment considerations of *Cox Broadcasting Corp. v. Cohn, supra,* the tort remedy could be available to a person against "further disclosure." But the tort remedy is the only remedy. The Federal Constitution does not reach as far as Intervenors would have it.

CONCLUSION

In sum, there is no express statutory exception which exempts from disclosure an application for a midwife's license. Neither the "patient records" statute nor the statute precluding disclosure of portions of birth certificates in the hands of the State Registrar creates such an express exception. No patient record was sought here. Nor was any birth certificate sought. The Third District carved, by implication, judicially-created exceptions into Florida's Public Records Act. This the Third District may not do. Prior decisions of this Court preclude the judicial creation of exceptions, whether by implication or otherwise, in the Public Records Act.

Nor does Intervenors' claimed "right of confidentiality" change the result. The Intervenors' consent notwithstanding, the constitutional right of "disclosural privacy" does not affect the operation here of Florida's Public Records Act. There is no governmental coercion and no inhibition on conduct or decision-making in constitutionally protected areas of personal autonomy. The "right of confidentiality" claimed by intervenors simply does not exist as a constitutional right.

The Third District's opinion must be vacated and the trial court's order compelling disclosure reinstated. Additionally, this matter should be remanded to the trial court for the proper assessment of attorney's fees and costs pursuant to the Public Records Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief on the Merits of Plaintiffs/ Petitioners, together with a copy of the Appendix to Petitioners' Initial Brief on the Merits, was mailed this 31st day of July, 1984, to Thomas G. Sherman, Esquire, DeMeo and Sherman, P.A., 3081 Salzedo, Coral Gables, Florida 33134 and to Morton Laitner, Esquire, 1350 N.W. 14th Street, Miami, Florida 33125.

/s/ JOSEPH P. AVERILL