O/a 12-5-84

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 64,944

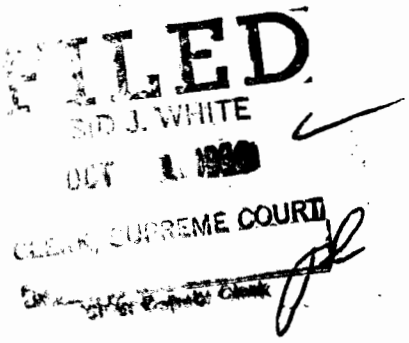
CITY OF NORTH MIAMI, et al.,)

Petitioners,)

v.)

THE MIAMI HERALD PUBLISHING COMPANY,)

Respondent.)



Question Of Great Public Importance Certified By The Third District Court of Appeal of Florida

REPLY BRIEF OF RESPONDENT THE MIAMI HERALD PUBLISHING COMPANY TO AMICUS CURIAE ORANGE COUNTY

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INTRODUCTION

Amicus curiae Orange County reargues to a great extent those arguments already raised in this Court by Petitioners. Specifically, amicus curiae contends that (1) communications between public entity clients and their counsel are confidential and as such are privileged and exempted by Section 90.502 from compelled disclosure under Chapter 119; (2) the Third District misconstrued the scope of Section 90.502 and misunderstood the legislative purpose of that section and the effect of its decision not to construe that section as an exemption; and (3) this Court should follow City of Tampa v. Titan Southeast Construction Corp., 535 F.Supp. 163 (M.D.Fla. 1982), which construed Section 90.502 as a statutory exemption to the Public Records Act. Respondent The Miami Herald Publishing Company will address only points to which it has not previously responded, and adopts and incorporates by reference its prior briefs filed in this Court as its response to the other points made by amicus.

ARGUMENT

THE EVIDENCE CODE DOES NOT RENDER ATTORNEY/CLIENT COMMUNICATIONS BETWEEN A PUBLIC ENTITY AND ITS COUNSEL CONFIDENTIAL OR EXEMPT THEM FROM THE DISCLOSURE REQUIREMENTS OF CHAPTER 119.

A. The Evidence Code Does Not Authorize Public Officials To Engage In Confidential Communications With Their Attorneys.

Amicus curiae assumes that the Evidence Code authorizes public officials and their attorneys to engage in confidential written communications, that it renders secret communications which would otherwise be public. (Brief of amicus curiae at 7). This assumption reflects the fundamental confusion underlying North Miami's claim from the beginning. The Code does no such thing. It in no way authorizes public officials to engage in private communications -- written or oral. It merely creates an evidentiary privilege for those attorney/client communications which are confidential. The availability of records in a judicial proceeding and their admissibility can be altered only by such an evidentiary privilege. Thus the Evidence Code inherently cannot create an exemption to the Public Records Act. When the Legislature enacted the Public Records Act, the people of Florida waived any public actor's expectation of confidentiality with respect to written communications about the public's official business. State ex rel. Veale v. City of Boca Raton, 353 So.2d 1194, 1197 n.1 (Fla. 4th DCA 1977), cert. denied, 360 So.2d 1247 (Fla. 1978). As a result, any member of the

public has a right to inspect those communications and they therefore never can be "confidential". To obtain the result North Miami and amicus curiae Orange County desire, both an exemption to the Act and an evidentiary privilege would be necessary.[1/]

B. The Third District Correctly Construed The Statutory Reference Affording Public Entity Clients The Privilege.

In setting forth its position, amicus curiae urges this Court to adopt the reasoning of the trial court in City of Tampa v. Titan Southeast Construction Corp., 535 F.Supp. 163 (M.D.Fla. 1982). That court fallaciously concluded that the attorney/client privilege would be rendered meaningless if "privileged" communications could be discovered through a public records request. But the Titan court failed to recognize that the Public Records Act applies only to written or otherwise recorded material "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."[2/] Unrecorded oral communications or communications made other than in connection with official agency business may be confiden-

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1/ An exemption to the Act would not, of course, create an evidentiary privilege. It would simply preclude public inspection as a matter of right.

2/ Public records include documents, papers, letters, maps, books, tapes, photographs, films, sound recordings and other material. Fla. Stat. § 119.011(1) (1983).

tial -- not intended to be disclosed -- and as such subject to the privilege.[3/] For example, a conference between a public official and his counsel, even with respect to official business, might be privileged. Similarly, a consultation between public officials and counsel to discuss extra-official business, such as the personal liability of an official for his alleged wrongdoing, would be confidential and subject to the privilege.

Moreover, the privilege has meaning even if, as the Third District found, it merely ensures that recorded communications concerning official business will not be admitted into evidence in judicial proceedings. For these reasons the Legislature's decision to permit public entity clients the right to claim the privilege is not rendered a "nullity".

C. The Third District Correctly Construed The Scope Of The Privilege.

The Third District did not misconstrue the Code's scope in finding that it has no application to public records requests. As The Miami Herald explains in its Answer Brief, Section 90.103 plainly states that the Evidence Code applies solely to judicial proceedings (Answer Brief at 21-22).

The Florida Rules of Civil Procedure have absolutely no affect on the disclosure requirements of the Public

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3/ This, of course, presumes such communication would not otherwise be public pursuant to requirements of the Sunshine Law. Fla. Stat. § 286.011 (1983).

Records Act. Rule 1.280(b), cited by amicus curiae as limiting discovery to "not privileged" matters (Brief of amicus curiae at 13), simply sets forth the scope of discovery in civil actions. Rules of judicial discovery governing the balance of equities between litigants do not involve the same interests or policy concerns as the public's right to know what its government is doing, as implemented by the Public Records Act. Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979); State Department of Highway Safety v. Kropff, 445 So.2d 1068 (Fla. 3d DCA 1984). In Kropff, the Third District adopted this Court's reasoning in Wait, refusing to "equate the acquisition of public documents under Chapter 119 with the rights of discovery afforded a litigant by judicially-created rules of procedure." Id. at 1069 n.1 (citing Wait, 372 So.2d at 425). The Third District further observed that the Public Records Act provides its own procedures for making a public records request and that agencies have created their own procedures for responding to such requests. See, e.g., Fla.Admin.Code, Rule 15-1.07. Id. at 1070 n.1. The Florida Rules of Civil Procedure do not create an exemption to Chapter 119 nor could they since all exemptions must be statutory.[4/]

4/ As recently as last month, this Court in Forsberg v. Housing Authority of Miami Beach, ___ So.2d ___, 9 Fla.L.Wkly. 335 (Fla. Aug. 30, 1984) (Case No. 54,623) reiterated Florida's policy that public records are open for public inspection, rejecting a claim that the constitutional right of privacy creates an exemption for release of personal tenant information contained in public housing records. Justice Overton, in a special concurrence, cited 21 exceptions to the Public Records Act (in addition to those provided for in Section 119.07(3) in the 1983 Florida Statutes). Section 90.502 was not listed as one of them. Id. at 338 n.3.

D. The Third District Correctly Construed The Evidence Code And The Exemption Provisions of Chapter 119.

The Third District correctly read both the Evidence Code and Chapter 119 as serving distinct purposes. While the rules of evidence have been developed for determining categories of proof for use in the adjudication of disputes between litigants, the Public Records Act is an integral element of Florida's fundamental commitment to open government. Contrary to amicus curiae's contention that the "structure of local governments creates a particularly compelling need for such bodies to be able to preserve confidentiality" and that "[public officials] must feel free to explore alternatives and to communicate candidly with counsel without fearing that their discussions will subsequently be revealed" (Brief of amicus curiae at 3), the Third District found no such reason to abrogate the clear public policy of this state or to fabricate an erroneous connection between two fundamentally different statutes.[5/]

5/ If Section 90.502 had previously created an exemption to the Public Records Act, the Legislature would not have subsequently considered attorney/client exemptions to Chapter 119 or in 1984 have amended the exemptions section of Chapter 119 to include a work-product privilege. Newly added subsection 119.07(3)(o) provides a work-product exemption for records prepared by counsel for public entities in anticipation of litigation or adversary administrative proceedings until such proceedings have concluded. Of course, whether the Records are protected from disclosure as work-product is not an issue for this Court's consideration. The trial court on remand found that none of the Records were work-product. The City did not appeal that ruling. See Miami Herald Publishing Company v. City of North Miami, 420 So.2d 653 (Fla. 3d DCA 1982), appeal following remand, ___ So.2d ___, 9 Fla. L. Wkly. 418 (Fla. 3d DCA Feb. 14, 1984) (Case No. 83-688).

See Forsberg v. Housing Authority of Miami Beach, supra; Wait v. Florida Power & Light Co., supra; Kropff v. State Department of Highway Safety, supra, at 1069.

CONCLUSION

For the foregoing reasons and those cited in Respondent's Answer Brief, the certified question should be answered in the negative, or the Petition summarily dismissed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Respondent The Miami Herald Publishing Company to Amicus Curiae Orange County was served by mail this 24th day of September, 1984 upon the following:

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