IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,090

(Consolidated with Case No. 76,803)

DICK LOCKE,

Petitioner,

vs.

PAUL M. HAWKES,

Respondent.

On Review from the District Court
of Appeal, Fifth District
State of Florida

ANSWER BRIEF OF RESPONDENT PAUL M. HAWKES to the Initial Brief of Petitioner Locke and to the Brief of Amicus Curiae Florida House of Representatives

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STATEMENT OF THE CASE AND OF THE FACTS

The Respondent HAWKES specifically disagrees with the Statement of the Case and of the Facts contained in the Petitioner LOCKE's Initial Brief in the following respects and also invites the Court's attention to the following additional facts:

HAWKES filed his Petition in this cause on September 8, 1988 (R-1-3). Through filing his Petition, HAWKES sought an order requiring LOCKE, a member of the Florida House of Representatives, to comply with Chapter 119, Florida Statutes, the Florida Public Records Law. HAWKES alleged that on July 7, 1988, HAWKES requested that LOCKE, an elected official of the 26th District, produce all records maintained by his office relating to the expenditure of over $100,000.00 of state tax money. This state tax money was received by LOCKE pursuant to §11.13(4), Florida Statutes, as intradistrict expense money for the purpose of maintaining his office. The request included any checking account records, receipts, journals or other records maintained by the custodian. On August 5, 1988, another request to view the public records was made. Further, a request was made for a written explanation of any refusal to produce the records. Numerous requests to view the public records in the Respondent's custody were met with either evasive or negative responses. HAWKES, therefore, had to file his Petition in the trial court to seek compliance with the Public Records Law in the manner specifically provided by the Legislature in Chapter 119 itself.

Whether LOCKE ever produced for inspection all the requested records was never determined by the trial court. The trial court at page 6 of the transcript of the hearing below stated, "Two areas I'm interested in hearing, Counselor, is subject matter jurisdiction and whether or not Chapter 119 applies to the Legislature." Counsel for LOCKE then proceeded uninterrupted with his argument for nine pages when he noted to the court that he would close for the moment with a brief mention on the question of mootness. The court immediately responded: "I'm not interested in mootness. I'm interested in these two things alone right now. If I want to hear on mootness, I'll do so." (T-15-16). Counsel for HAWKES then noted to the court that he would not "address the issue of mootness because the Court so stated that it's not interested in it." (T-16). HAWKES had subpoenaed LOCKE

for the hearing so that he could be called to the stand and testify as to the exact nature of what he provided and the scope of what he provided. Such testimony was the subject of the Amendment to Motion for Protective Order (R-458). The trial court, however, refused to allow either party to present any evidence at the hearing. Neither did the court allow any discovery on this issue. The court simply ruled that it did not have subject matter jurisdiction and, if it did, then Chapter 119 did not apply to the legislative branch of Florida government. The trial court did not allow HAWKES to have his day in court on the issue of mootness and did not enter an order on this issue.

The symbols for references used in the Petitioner LOCKE's Initial Brief will also be used in this Answer Brief, and are restated for convenience, along with additional references: Petitioner Dick LOCKE will be referred to by name or as the Petitioner. Amicus Curiae Florida House of Representatives will be referred to by "THE HOUSE." The Respondent Paul M. HAWKES will be referred to by name or as the Respondent. Citations to the original record at the trial level will be made by the letter "R" and the appropriate page number. References to the appendix will be made by the appropriate Appendix letter designation.

QUESTIONS PRESENTED

LOCKE did not provide a presentation of the questions; thus HAWKES submits the following as the appropriate questions presented:

I. WHETHER THE DISTRICT COURT CORRECTLY HELD THAT THERE CAN BE NO SEPARATION OF POWERS PROBLEM AS TO THE LEGISLATURE ENACTING A STATUTE THAT APPLIES TO THE LEGISLATURE.

II. WHETHER THE DISTRICT COURT CORRECTLY FOUND THAT CHAPTER 119, FLORIDA STATUTES, APPLIES TO THE FLORIDA LEGISLATURE.

SUMMARY OF ARGUMENT

Although the Legislature has the power to determine its own rules of procedure pursuant to the Florida Constitution, a rule of procedure is not even questioned in this action. The Legislature passed a substantive law, Chapter 119, the Public Records Law; this law created a substantive right, granting to the people of the state of Florida the right to inspect public records so that the people could know how *its* business was being conducted. At most, all the House of Representatives accomplished according to LOCKE was to pass a rule which merely restated this substantive law. The House did not pass a rule of procedure determining how this substantive law would be effectuated. Neither did it pass a rule which was contrary to the Public Records Law. Even if the House had passed such rules, no one is asking the court to determine the meaning of these rules and no one is complaining that the House violated its own rules of procedure. The Legislature has the power to create a substantive right and it is the duty of the courts to enforce that substantive right. For a court to refuse to enforce the substantive law amounts to an unconstitutional abdication of judicial duty. LOCKE asserts that the Public Records Law is applicable neither to the judiciary nor to the legislature because of the separation of powers doctrine. LOCKE asserts that the Legislature can pass a law which is applicable only to the Executive Branch. This rationale is illogical at best. Such reasoning dictates that the Legislative branch cannot dictate to the Judicial Branch nor to the Executive Branch. If the Legislature also cannot dictate to itself, then to whom does Chapter 119 apply? To no one? Then, what is the meaning of the "Public Records Law"? The Legislature does have the power to pass its own internal rules of procedure, but the Legislature does not have the power to exempt itself from substantive law by passing a "rule of procedure" which is contrary to a policy commitment of the state of Florida--such an exemption would be subject to judicial action. Thus neither the plain language of the statute, long-standing public policy, nor Florida case law supports LOCKE's contentions. There simply is no rule of procedure in question and for the court to make a finding of fact that the subject matter of this action involves the internal procedures of the House is error (it is error especially to make such a finding of fact in a Motion to

Dismiss). There is simply no basis for such a ruling.

Chapter 119, Florida Statutes, the Public Records Law, does apply to the legislative branch of Florida government. The Florida Legislature itself, in §119.01, directed in very strong terms that "all state, county, and municipal records shall at all times be open for a personal inspection by any person." In 1975, the Legislature amended the Public Records Law, which had been codified since 1909, to require that any exemptions from the Public Records Law be only those exemptions which were "provided by law." The Legislature had the power to exempt itself from the effect of this law but instead it chose not to, for to do so would thwart the long-standing public policy that the public has a right to know how its business is being conducted. The Attorney General of Florida has been asked on various occasions to answer the question of whether Chapter 119 applies to legislators. Each time the answer has been in the affirmative. The plain wording of the law states that this law is applicable to *any* state officer, and according to the Attorney General, the law is applicable to any and all state officers, including legislators. Otherwise, the legislature would not have used such all-encompassing language. The Attorney General noted that it is illogical to require local boards to comply with open government laws while at the same time excluding from the law the body which has the greatest impact on the lives and affairs of the people of the state. The Attorney General also opined that in the absence of a House rule of procedure to the contrary, the Public Records Law is applicable to records made or received by legislators in the course of transacting their official business. The case law which has evolved since the 1975 amendment clearly holds that the courts cannot carve out exemptions where the Legislature has not created exemptions. In effect, the trial court in this case has done just that--the legislature did not exempt itself but this trial court judicially exempted the entire legislative branch of government. Such action is clearly an error as a matter of law. The District Court of Appeal committed no error when it reversed the trial court below.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THERE CAN BE NO SEPARATION OF POWERS PROBLEM AS TO THE LEGISLATURE ENACTING A STATUTE THAT APPLIES TO THE LEGISLATURE.

LOCKE and THE FLORIDA HOUSE OF REPRESENTATIVES (hereinafter "THE HOUSE") correctly quote Article III, Section 4(a) of the Florida Constitution: "Each house shall determine its rules of procedure." They also correctly quote Article II, Section 3 of the Florida Constitution: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

Neither LOCKE nor THE HOUSE, however, points to any constitutional provision which expressly allows the Legislature to control by statutory law the procedure for withholding from public scrutiny or for releasing for public scrutiny papers created by the Executive Branch or papers created by the Judicial Branch. Yet the Legislature, through Chapter 119 and its predecessors dating back to 1909, has provided a substantive right to the people of the state of Florida to inspect personally all state, county, and municipal records. Chapter 119 even provides the procedure by which this right can be exercised. The Judiciary did not provide this substantive right; nor did the Executive provide this substantive right. The Legislature has the power to confer substantive rights through statutory laws and to provide the procedure by which these statutory rights can be exercised. Neither LOCKE nor THE HOUSE question this power. For the Legislature to confer upon the people of the state of Florida the right to inspect papers created by the members of the legislature is clearly within its power. How, then, can exercising that power violate the Separation of Powers clause found at Article II, section 3 of the Florida Constitution as quoted in the above paragraph? If anything, for the legislature to confer upon the people of the state of Florida the right to inspect Executive and Judicial branch papers violates the Separation of Powers clause. But how can the Legislature pass a statute applicable to the Legislature and then complain that the Separation of Powers clause has been violated?

Certainly the Judiciary did not violate the Separation of Powers clause when the Legislature in 1909 passed the predecessor of Chapter 119 and when later legislatures amended this Public Records Law throughout this century. So the real question remains: Did the Judiciary violate the Separation of Powers clause when it interpreted or construed Chapter 119 in its opinion of March 8, 1990? In *Moffitt v. Willis*, 459 So.2d 1018 (Fla. 1984), the case upon which LOCKE and THE HOUSE rely on most heavily, the Florida Supreme Court gives the answer unequivocally:

> It is the final product of the legislature that is subject to review by the courts, not the internal procedures. As we stated in *General Motors Acceptance Corp. v. State*, 152 Fla. 297, 303, 11 So.2d 482, 485 (1943), the legislature has the power to enact measures, while the judiciary is restricted to the construction or interpretation thereof.

All the District Court did on March 8, 1990, was construe or interpret Chapter 119 to conclude that Chapter 119 applies to the Legislative Branch. The District Court did not review any internal procedure of the legislature. In fact, for the District Court NOT to construe or interpret Chapter 119 would have been an unconstitutional abdication of its duty.

Additionally, the Legislature through specific provisions on Chapter 119 itself requires judicial intervention for purposes of enforcement of Chapter 119:

> The legislative objective underlying the creation of chapter 119 was to insure to the people of Florida the right freely to gain access to governmental records. The purpose for such inquiry is immaterial. The breadth of such right is virtually unfettered, save for the statutory exemptions designed to achieve a balance between an informed public and the ability of government to maintain secrecy in the public interest. The exclusive technique adopted by the legislature for the accomplishment of the Act's purposes is judicial intervention. When the demand for disclosure competes with a public interest, asserted to be protected by a statutory exemption, the judiciary's role is to insure that the governmental claim does not defeat the right to disclosure. [Citations omitted.]

Lorei v. Smith, 464 So.2d 1330, 1332 (Fla. 2d DCA 1985), *rev. den.*, 475 So.2d 695 (Fla. 1985). Neither LOCKE nor THE HOUSE has asserted an exemption based upon a need to maintain secrecy in the public interest. The judiciary's role, therefore, is to insure that neither LOCKE's claim nor THE HOUSE's claim to exemption defeats the right to disclosure. Chapter 119.11 not only provides for judicial intervention but also provides that this case shall have priority over other pending cases.

But LOCKE and THE HOUSE would argue that HAWKES did not ask the court to enforce Chapter 119 but rather that HAWKES asked the court to enforce House Rule 1.11. Such an argument was propounded *Moffitt v. Willis*, *supra*. The Supreme Court there pointed out that in order to determine jurisdiction, it must first identify the precise activity complained of in the suit below. The publishing companies alleged that certain groups of individuals, which they identified as house and senate committees, held secret closed meetings during the 1981 legislative session. They did not complain of or challenge any specific act or law promulgated by the legislature. Rather, the complaint was that the house and senate violated their own rules of procedure. The Supreme Court held:

> While the judiciary certainly has the power to determine what effect a statute has and to whom it applies as well as its constitutionality, that is not the issue before us today. We are not confronted with whether a statute applies, rather we are asked to allow the courts to determine when and low legislative rules apply to members of the legislature.

Moffitt v. Willis, at 1021-22.

This court must conduct the same scrutiny of the petition filed in the trial court. (Appendix A) The petition solely requests the Court to enter an Order requiring compliance with Chapter 119 Florida Statutes. There is no reference to any rule of procedure whatsoever. THERE ARE NO RULES OF PROCEDURE INVOLVED. There is no complaint that THE HOUSE has violated its own rule of procedure. Neither LOCKE nor THE HOUSE can point to any rule of procedure involved in the petition before the trial court.

LOCKE and THE HOUSE, however, argue that Rule 1.11 of the Florida House of Representatives should have been the subject matter of the petition below. Scrutiny of the petition interestingly reveals that HAWKES made his first request for inspection on July 7, 1988; he made another request on August 5, 1988; other requests were also made. Finally HAWKES filed his petition on September 8, 1988. The Florida Constitution requires that "[o]n the fourteenth day following each general election the legislature shall convene for the exclusive purpose of organization and selection of officers." Article III, Section 3(a). At the organization session held on November 22, 1988, Rule 1.11 was created. (Appendix B) There is no way that Rule 1.11 could have been the subject matter of the

instant case--it did not exist. At the organization session held on November 20, 1990, the House adopted an amended Rule 1.11. (Appendix C) Neither could this rule have been the subject matter of the pending litigation--it did not exist.

This case simply does not present the issue that was involved in *Moffitt v. Willis, supra.* This court, therefore, has never ruled on the issue presented here. The decision of the District Court of Appeal is correct.

Next, let us hypothetically assume for purposes of discussion only that House Rule 1.11 did exist at the time of the Chapter 119 request and subsequent lawsuit filed to enforce LOCKE's refusal to produce pursuant to Chapter 119. The question becomes: Did the House exempt the legislature from the effect of Chapter 119 by passing House Rule 1.11?

What is at issue here is a substantive right--the right to disclosure of public records made or received pursuant to law. Courts have repeatedly heard cases involving this substantive right and repeatedly have held that the right is substantive, not procedural. *Hillsborough County Aviation Authority v. Azzarelli Construction Company, Inc.*, 436 So.2d 153 (Fla. 2d DCA 1983). The legislature does have the power to confer substantive rights and access to public records is a substantive right. *Coleman v. Austin*, 521 So.2d 247 (Fla. 1st DCA 1988). The only time when a house rule of procedure controls over a statute is when the statute relates to procedure and only to the extent that the rule conflicts with the statute relating to procedure. Op. Atty. Gen. 075-282, November 18, 1975. A substantive right conferred by the Legislature cannot be taken away from the people by a House rule of procedure. The Legislature cannot adopt a policy to exempt itself from the application of a general law. *Douglas v. Michel*, 410 So.2d 936, 938 (Fla. 5th DCA 1982).

The 1988 Rule 1.11 provides:

> There shall be available for public inspection and records developed and received in the course of legislative business as follows: . . . (j) all records which are required by these rules or express law to be made or retained. (Appendix B)

The 1990 Rule 1.11 provides:

> There shall be available for public inspection, whether maintained in Tallahassee or in a district office, the papers and records developed and received in the course of legislative business as

follows: . . . (j) all records which are required by these rules to be made or retained. (Appendix C)

Section 119.01(1), *Florida Statutes*, 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.

Section 119.011(1), *Florida Statutes*, provides:

> "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

Obviously, Chapter 119 and Rule 1.11 cover substantive rights, albeit Chapter 119 is more broad. Neither of the House rules provide for the procedure to be followed for inspection. Neither does the new constitutional amendment related to open meetings passed by the citizens of the state of Florida on November 6, 1990, address the public records issue and enforcement thereof. (Appendix D) LOCKE, at page 11 of his Initial Brief, quotes a small portion of the new amendment: "Each house shall be the sole judge for the interpretation, implementation, enforcement of this section." [Emphasis added.] This section refers solely to open meetings. The new amendment does not even mention access to public records. House Rule 1.11 is not a rule of procedure and the House does not have exclusive jurisdiction to interpret and enforce Chapter 119 by passing a similar house rule. The only time when a house rule of procedure controls over a statute is when the statute relates to procedure and only to the extent that the rule conflicts with the statute relating to procedure. Op. Atty. Gen. 075-282, November 18, 1975. The House Rule mentions no procedure whatsoever, much less any procedure which is in conflict with Chapter 119.

Additionally, the legislature itself provided in Chapter 119 at §119.07(3) an all-inclusive list of exemptions from the effect of Chapter 119. THE LEGISLATURE DID NOT LIST ITSELF! If the intent of the legislature were to exempt itself, it surely could have. Section §119.07(3)(a) 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 special law, are exempt from the provisions of subsection (1).

Rule 1.11 certainly is not a provision of law and was not a "presently" provision of law at the time of the passage of §119.07(3)(a). The legislature itself has provided that exemptions can occur only through statutory additions to this list of exemptions. Courts have no justification for creating judicial exemptions to the Public Records Law. One consequence of enumerated exemptions is that the legislature can, and had, added to their number. *Wait v. Florida Power & Light Co.*, 372 So.2d 420, 423 (Fla. 1979); *Douglas v. Michel*, 410 So.2d 936, 940 (Fla. 5th DCA 1982). If the legislature wants to exempt itself from Chapter 119, it must take the affirmative action required to amend the statute to list itself as an exemption under §119.07(3). It has not done so.

Finally, one must wonder why the House passed Rule 1.11 as it relates to the records covered by Chapter 119. Certainly the citizens of the state of Florida would not appreciate this back-door approach by the House to the destruction of their rights to accelerated enforcement of Chapter 119 through the judicial system. As discussed above, §119.11(1) provides for an immediate hearing whenever an action is filed to enforce the provisions of Chapter 119, giving the case priority over other pending cases. Additionally, when the court orders inspection, inspection must be available within 48 hours of the order. Attorney's fees and costs are recoverable if the records were unlawfully withheld. How long would enforcement of Rule 1.11 take and how much would a citizen have to pay to enforce it? We do not even know--Rule 1.11 does not address the procedure for enforcement. However, the time would certainly be long enough, as it was in this case, to protect an incumbent from having to deal with issues during a re-election campaign which could possibly arise from public inspection of the incumbent's expense account records.

This case does not involve an violation of the Separation of Powers clause in the Florida Constitution. The legislature passed a law which is applicable to the legislature and which is the final product of the legislature subject to the constitutional and statutory exercise of judicial interpretation and enforcement. The House cannot ignore the requirements of the statutory scheme (obtaining the concurrence of the Senate and Governor in order to alter or amend Chapter 119) by passing a

substantive rule covering the same subject matter as the statute and then screaming "separation of powers." The District Court of Appeal committed no error.

II. THE DISTRICT COURT CORRECTLY FOUND THAT CHAPTER 119, FLORIDA STATUTES, APPLIES TO THE FLORIDA LEGISLATURE.

The District Court had available for its correct decision a wealth of applicable legislative history, judicial decisions, and Attorney General opinions, as well as the text of Chapter 119 itself. LOCKE and THE HOUSE can hardly be heard to complain that the District Court failed to consider this material.

The Florida Legislature itself, in §119.01, Florida Statutes, the Florida Public Records Law, directed in very strong terms that "all state, county, and municipal records shall at all times be open for a personal inspection by any person." (Emphasis supplied.) The legislature enacted Chapter 119 as an all-encompassing statute to ensure that this right to personal inspection would not be circumvented by those who fear an informed citizenry. This right of the public to know how its business is being conducted has long been recognized by the legislature. Florida's public records law was originally enacted in 1909 as an unconditional statement of public policy that "all [s]tate, county, and municipal records shall at all time be open for a personal inspection [by] any citizen of Florida." Ch. 5942, §1, 1909 Fla. Laws 132. Nevertheless, the Florida Supreme Court recognized judicial authority to grant exemptions from the law based upon public policy demands. *Lee v. Beach Publishing Co.*, 173 So. 440, 441 (Fla. 1937). For a period of seventy years following its enactment, a series of decisions, attorney general's opinions, and statutory exemptions resulted in the steady erosion of the public policy embodied in the Act. In 1975, the legislature amended chapter 119, Florida Statutes, substituting the general exemption for records "deemed by law" to be exempt with an allowance for only those exemptions which were "provided by law." Chap. 75-225, §4, 1975 Fla. Laws 637, 638 (current version at Fla. Stat. 119.07(3)(a) 1987). The legislature itself did not provide an exemption for itself, for to do so obviously would thwart the long-standing public policy.

Section 119.01, Florida Statutes, states that all state records shall be open for inspection. There is no Florida case in which the public's right to inspect is more clearly defined than through the word "all" used in the statute. "All" means all. In ascertaining whether there is a reason for depriving a citizen of his right to inspect these records, the purposes of Chapter 119 must be examined to determine

the breadth and scope of the right to inspect state, county and municipal records. *Copeland v. Cartwright*, 38 Fla. Supp. 6, 9, *aff'd*, 282 So.2d 45 (Fla. 4th DCA 1973). It is a general rule of law that "statutes . . . enlarging the right [to public inspection beyond the common law] should be liberally construed in favor in inspection." 72 C.J.S., *Records* §35(b), page 137; *Copeland*, at 38 Fla. Supp. 9. The *Copeland* court examined numerous decisions from many jurisdictions, one of which was *MacEwan v. Holm*, 226 Ore. 27, 359 P.2d 413, 85 ALR 2d 1086 (1961). The Supreme Court of Oregon concluded that allowing public scrutiny of governmental documents did not require the same assurances as where the authenticity of the document was in question:

> Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and completely performing their function as public servants . . . "Public business is the public's business. The people have the right to know. Freedom of information [about public records and proceedings] is their just heritage . . . Citizens . . . must have the *legal* right to . . . investigate the conduct of [their] affairs."
>
> And the public interest in making such writings accessible extends beyond the concern for the honest and efficient operation of public agencies. The data collected in the course of carrying on the business of government may be sought by persons who propose to use it for their own personal gain. * * * The data gathered by government are available to its citizens for such private purpose. [Citations omitted.] 85 ALR 2d at p. 1093.

Copeland, at 38 Fla. Supp. 11. The *Copeland* court concluded:

> The greater public interest and the right of the public to know how *its* business is being conducted requires that in defining the scope of the right of inspection under chapter 119, Florida Statutes, the term public records be given a liberal construction. I [the court] am of the opinion that a broad construction of the statute requiring that inspection by any citizen be permitted and a definition of public records which embraces all writings which are in the custody of public servants will best serve the public interest and carry out the intent of our legislature in enacting chapter 119, Florida Statutes. Without access to the records prepared by government, the rights of citizens guaranteed by the First Amendment may be effectively abrogated by the government, for the right to speech without knowledge is meaningless.

With such an analysis, the *Copeland* court and the 4th District Court of Appeal thus allowed the plaintiff newspaper reporter to inspect site plan reviews of the Pompano Beach Club prepared by the city's planning technician.

The same analysis is applicable to the case at hand. LOCKE has received taxpayers' money for intradistrict expenses pursuant to §11.13(4), Florida Statutes. The Joint Legislative Management Committee has the power to determine the amount and the procedure for disbursement. The same statute provides that the expenses provided under this subsection shall not include any travel and per diem reimbursed under the rules of either house. Therefore, the monies in question are different from any monies provided by any rules of procedure of either house. The public has provided this money for the conduct of public business and the public has a right to know how its money is being spent by its employees, i.e., the legislators.

The Attorney General has on various occasions been asked to answer the question of whether Chapter 119, F.S., the Public Records Law, is applicable to legislators. In Op. Atty. Gen. 075-282, November 18, 1975, the Attorney General stated that "in the absence of a House or Senate rule of procedure to the contrary, the Public Records Law, Ch. 119, F.S., is applicable to records made or received by legislators in the course of transacting their official business" (emphasis supplied). Obviously, intradistrict expense money was intended to aid legislators in transacting their official business and was not intended for any other purpose. LOCKE, in his argument to the court, did not present HAWKES or the court with any House rule of procedure which contradicts the applicability of the Public Records Law to legislators. Even if this rule were applicable retroactively, it does not make the Public Records Law inapplicable to legislators, for this rule is not contrary to the Public Records Law. Neither is this rule a rule of procedure--rather it is a restatement of substantive law codified by Chapter 119. *Hillsborough County Aviation Authority v. Azarelli Construction Company, Inc.*, 436 So.2d 153 (Fla. 2d DCA 1983).

This same Attorney General's Opinion further states that the Public Records Law "is applicable to, *inter alia, any* state officer." The opinion also states that "since the act is all-encompassing in its terms, it is applicable to any and all state officers, including legislators. The use by the Legislature of a comprehensive term ordinarily indicates an intent to include everything within the term." *Florida Industrial Commission et al. v. Growers Equipment Co.*, 12 So.2d 889 (Fla. 1943); *Florida State Racing*

Commission v. Leon V. McLaughlin, 102 So.2d 574 (Fla. 1958); *State v. Pace*, 159 So. 679 (Fla. 1935); *Copeland v. Cartwright*, 38 Fla. Supp. 6, *aff'd*, 282 So.2d 45 (Fla. 4th DCA 1973).

The Attorney General again opined that the Public Records Law is fully applicable to the Legislature in Op. Gen. Atty. 077-10, February 7, 1977. The questions presented were:

> 1. Can the House of Representatives, exercising its rulemaking power pursuant to s. 4(a), Art. III, State Const., authorize the Select Committee on Organized Crime to hold executive sessions for the purpose of considering information provided by law enforcement of a sensitive or confidential nature, the provisions of s. 286.011, F.A., notwithstanding?
> 2. Can the House of Representatives, exercising its rulemaking power pursuant to s. 4(a), Art. III, State Const., authorize the Select Committee on Organized Crime to withhold certain documents or records provided by law enforcement, which may be of a sensitive or confidential nature, from inspection, examination, or disclosure, the provisions of Ch. 119, F.S., notwithstanding?

The Attorney General noted in answer:

> While your questions presume that Florida's Government-in-the-Sunshine Law, s. 286.011, F.S., and Public Records Law, Ch. 119, F.S., are fully applicable to the Legislature, a question has apparently arisen among some members of the Legislature regarding the applicability of these laws to the Legislature. Because of this, it is appropriate to again reiterate what has been the consistent position of this office since I assumed the office of Attorney General.

The Attorney General then noted his rationale for concluding that the Legislature is subject to both the Sunshine Law and the Public Records Law:

> In concluding that the Legislature is subject to the Sunshine Law, this office was guided primarily by the apparent intent of the 1967 Legislature which enacted the law, the illogic of requiring local boards to comply with s. 286.011. F.S., while at the same time excluding from the law the body which has the greatest impact on the lives and affairs of the people of the state, as well as previous opinions of the Supreme Court of Florida which have consistently stated that all doubts regarding the applicability the law would be resolved in favor of the public. *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971).
>
> Regarding the applicability of Ch. 119, F.S., to the Legislature, the act itself clearly extends to all "state officers" which includes, but is not limited to, members of the Legislature. Section 119.011(2), F.S.; AGO 075-282.

In answer to Question 2, the Attorney General stated:

> Assuming the documents referred to in question 2 of your inquiry fall within the "police secrets rule," then such documents would be exempted from. s. 119.07(1), F.S., by virtue of the application of said rule. As to the power of the Legislature to exempt by House or Senate rule legislative records not subject to the "police secrets rule" from s. 119.07(1), *see and compare Johnson v. State*, 336 So.2d 93 (Fla. 1976), and AGO 075-282."

As noted above, AGO 075-282 provides that in the absence of a House rule of procedure to the contrary, the Public Records Law is applicable to records made or received by legislators in the course of transacting their official business. *Johnson v. State* involves a situation where the legislature attempted by statute, not by House or Senate rule, to force the judiciary to destroy records of its judicial acts. It does not involve a situation where the legislature attempted to pass a House or Senate rule to exempt legislative records from §119.07. In that case, the court stated that the Legislature clearly has the power to enact substantive law, and that it is the duty of the courts to enforce such substantive law where constitutional. The Legislature intended the word "expunge," as used in that statute, to mean to destroy or obliterate, to annihilate physically, to strike out wholly. The court stated that the Legislature intended by the law in question to eliminate all public records relating to the cases of those persons coming within its terms, so that no inquiring person could ascertain that these defendants had even been the subject of criminal prosecutions. This law created a substantive right to the degree that it protected the accused who was acquitted or released without being adjudicated guilty from having his record left open for public inspection in the Criminal Division of the Circuit Court. On the other hand, the statute attempted to establish procedure for the accomplishment of this new, substantive right. The court held that to do so was an unconstitutional encroachment by the legislature upon the judicial function. To permit a law to stand wherein the Legislature requires the destruction of judicial records would permit an unconstitutional encroachment by the legislative branch on the procedural responsibilities granted exclusively to the Court. *Johnson*, at 336 So.2d 95.

The legislature itself chose the wording of the Public Records Law and the legislature could have exempted itself. Instead, the legislature chose the following definitions in §119.011 which clearly indicate an intent to include everything within the term:

> (1) "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.
>
> (2) "Agency" means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government

> created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

Thus, "agency" means any state officer. Any state officer includes legislators. "Public records" means everything made or received pursuant to law, even records made pursuant to monies received under §11.13(4), or in connection with the transaction of official business by any state officer (an "agency"), including legislators. In addition, the legislature defined the custodian of the public records in §119.021 as including the elected state officer "charged with the responsibility of maintaining the office having public records." Thus, the legislature clearly contemplated including itself within Chapter 119, for without that inclusion, the public can hardly know how its business is being conducted. To say that Chapter 119 applies only to the Executive Branch is thus absurd. What is an open government if only one of the three branches is open?

LOCKE states that this chapter is applicable only to "a unit of government created or established by law," one phrase lifted out of context from one section of this chapter. §119.011(2).

LOCKE failed to notice §119.01 which states:

> 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. (All emphasis provided throughout this brief.)

"All state records"--powerful, all-encompassing language which cannot be construed to exclude from the law the body which has the greatest impact on the lives and affairs of the people of the state of Florida.

LOCKE also failed to notice §119.011(1) which states:

> "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

The use of the disjunctive conjunction "or" is key: made or received pursuant to law or ordinance or made or received in connection with the transaction of official business by any agency. Grammatical rules show the legislative intent to have alternate application. In this case, the records were made or received pursuant to law, that is, pursuant to §11.13(4) of the Florida Statutes.

LOCKE further failed to notice §119.02 which states:

> A public officer who knowingly violates the provisions of s. 119.07(1) is subject to suspension and removal or impeachment and, in addition, is guilty of a misdemeanor of the first degree, punishable as provided in x. 775.082 or s. 775.083.

"Impeach" is commonly defined as "to charge a high public official before a legally constituted tribunal with crime or misdemeanor in office." *The Reader's Digest Great Encyclopedic Dictionary.* The use of the word "impeachment" certainly indicates the legislative intent to include the highest elected public officials within the scope of this chapter--and the legislators certainly would fit into this category.

Neither does LOCKE address other relevant sections:

§119.021: The elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his designee, shall be the custodian thereof.

§119.041: Every public official shall systematically dispose of records no longer needed subject to the consent of the records and information management program of the Division of Library and Information Services of the Department of State in accordance with § 257.36.

§119.07(1)(a): Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or his designee.

A breakdown of the definition of "agency" in §119.011(2) into grammatical subdivisions also indicates the legislative intent to include the members of the legislative branch within this law:

> "Agency" means any:
> (1) state, county, district, authority, or municipal officer,
> (2) department,
> (3) division,
> (4) board,
> (5) bureau,
> (6) commission, OR
> (7) other separate unit of government created or established by law
> AND any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

Obviously the first "any" modifies each of the seven words/phrases numbered above and not the last phrase ("any any other public or private agency..." makes no sense). Obviously the word "officer" is modified by all the modifiers connected by the disjunctive conjunction "or" and appearing just before the

word "officer." "State" cannot modify each of the enumerated phrases/words ("any state other separate unit of government" makes no sense). Thus, in order to make any grammatical sense at all, the seven items in the series modified by the first word "any" must be divided by the appropriate comma as listed above. Any other grammatical construction is "tortured." It is interesting to note that the Attorney General agrees with HAWKES: "This act is applicable to, *inter alia, any* state officer. Since the act is all-encompassing in its terms, it is applicable to any and all state officers, including legislators. The use by the Legislature of a comprehensive term ordinarily indicates an intent to include everything within the term." Op. Atty. Gen. 075-282, November 18, 1975. *See also*, Op. Atty. Gen. 077-10, February 7, 1977.

For further support of this proper grammatical construction, one needs to look to a representative sampling of those departments, divisions, boards, bureaus, and commissions which were not created or established by law but rather were created or established by the Florida Constitution to see if the judiciary has found Chapter 119 to be applicable. If the phrase "created or established by law" modifies all seven of the above-enumerated items, then Chapter 119 cannot be applicable to those entities which were created or established by the Constitution. The Florida Constitution provides:

(1) Article IV, Section 6:
All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution.

(2) Article IV, Section 9:
There shall be a game and fresh water fish commission, composed of five members appointed by the governor subject to confirmation by the senate for staggered terms of five years.

(3) Article V, Section 17:
In each judicial circuit a state attorney shall be elected for a term of four years. Except as otherwise provided in this constitution, he shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law; provided, however, when authorized by general law, the violations of all municipal ordinances may be prosecuted by municipal prosecutors. A state attorney shall be an elector of the state and reside in the territorial jurisdiction of the circuit. He shall be and have been a member of the bar of Florida for the preceding five years. He shall devote full time to his duties, and he shall not engage in the private practice of law. State attorneys shall appoint such assistant state attorneys as may be authorized by law.

(4) Article VIII, Section 1(d):
There shall be elected by the electors of each county, for terms of four years, a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of the circuit court...

(5) Article VIII, Section 1(e):
Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five or seven members serving staggered terms of four years.

(6) Article IX, Section 4:
(a) Each county shall constitute a school district; provided, two or more contiguous counties, upon vote of the electors of each county pursuant to law, may be combined into one school district. In each school district there shall be a school board composed of five or more members chosen by vote of the electors for appropriately staggered terms of four years, as provided by law.

The list can go on and on. In fact, the entire legislative branch was created by the constitution (Article III); the entire executive branch was created by the constitution (Article IV); the entire judicial branch was created by the constitution (Article V); the entire local government system was created by the constitution (Article VIII); and the entire educational system was created by the constitution (Article IX). All were created by the state constitution which is the organic and fundamental law of the State. None were created by statute. Therefore, using the logic of LOCKE and THE HOUSE, Chapter 119 cannot apply to anyone. Why even have the statute if it is applicable to no one? And how could it possibly be directed to the executive branch alone since the executive branch is created by the same law as the legislative branch?

Courts have applied Chapter 119 to these constitutionally created entities [*see i.e., Brunson v. Dade County School Board*, 525 So.2d 933 (Fla. 3d DCA 1988), (Chapter 119 applies to Dade County School Board); *Mills v. Doyle*, 407 So.2d 348 (Fla. 4th DCA 1981), (Chapter 119 applies to Palm Beach County School Board even though the Board had contracted with the Classroom Teachers Association to keep grievance records confidential); *Coleman v. Austin*, 521 So.2d 247 (Fla. 1st DCA 1988) (certain of the documents in a state attorney's case file are subject to Chapter 119; the court additionally held that application of Chapter 119 to the state attorney's office does not mean that the legislature is dictating judicial procedure in violation of the state constitution because access to public records is a

substantive right which the legislature has power to confer; the challenged provision in this case did not establish judicial procedure and is within the realm of proper legislative authority.); and Op. Atty. Gen. 073-30, February 22, 1973 (salaries of assistant state attorneys are subject to Chapter 119]. Op. Atty. Gen. 073-30 gives a helpful analysis:

> A state attorney is authorized to appoint such assistants as may be authorized by law. Article V, §17, State Const. He is also authorized to set the salary of his assistants, not to exceed 90 percent of his own salary, and the salary of assistant state attorneys must be paid from funds appropriated for that purpose. Section 27.181(4), F.S. (1972 Supp.). . . . Finally, it should be noted that the payrolls of the state attorneys' offices are handled through a central office maintained by the Judicial Administrative Commission. *See* §43.16 F.S. These payroll procedures are based upon information furnished by the state attorneys. It can thus be seen that the records of a state attorney's office concerning the salaries of assistant state attorneys are records made "pursuant to law" and consequently are public records within the meaning of §§ 119.01 and 119.011, F.S.

Such is the case here. Like the Judicial Branch, the Legislative Branch of government is created by the constitution. And like state attorneys' salaries, legislators' intradistrict expense money is authorized by statute (§11.13(4)). Any records made or received pursuant to §11.13 (4), or in connection with the transaction of official business by this state officer, therefore, are public records within the meaning of §§ 119.01 and 119.011, F.S.

LOCKE asserts that Chapter 119 is applicable to the executive branch alone (in spite of the fact that the executive branch was created by the constitution) and as support he cites §119.14, otherwise known as the "Open Government Sunset Review Act." This section, however, does not support LOCKE's contention, but rather it strengthens HAWKES' argument. This section lists the dates for automatic review of the exemptions to Chapter 119 (Public Records Law) and Chapter 286 (Sunshine Law). The legislature stated in §119.14(2):

> It is the intent of the Legislature that exemptions to s. 286.011 and chapter 119 shall be maintained only if:
> (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
> (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
> (c) The exemption affects confidential information concerning an entity.
> Thus, the maintenance or creation of an exemption must be compelled as measured by these criteria.

This section does not list exemptions. However, §119.07 lists the exemptions. Noticeably absent from the exemptions is a category entitled "members of the House of Representatives and members of the Senate." Again, if the legislature had intended to include the legislative branch in this list of exemptions, it would have simply said so. It did not and such inclusion may not be implied. The mention of one thing in a statute connotes the exclusion of the other. Where a statute enumerates the things on which it is to operate, it is to be construed as excluding from its operation those things not mentioned. And nowhere in Chapter 119 does the legislature list the members of the legislature as an exemption.

Neither does Chapter 119 exempt the judiciary. In *Johnson v. State*, 336 So.2d 93 (Fla. 1976), discussed above the court stated that the Legislature intended by the law in question to eliminate all public records relating to the cases of those persons coming within its terms, so that no inquiring person could ascertain that these defendants had ever been the subject of criminal prosecutions. This law created a substantive right to the degree that it protected the accused who was acquitted or released without being adjudicated guilty from having his record left open for public inspection in the Criminal Division of the Circuit Court. The legislature clearly has the power to enact substantive law which is applicable to judicial records. On the other hand, the statute attempted to establish the procedure for the accomplishment of this new, substantive right. Because the judiciary has the power to establish its own rules of procedure, to permit a law to stand wherein the Legislature requires the destruction of judicial records would permit an unconstitutional encroachment by the legislative branch on the procedural responsibilities granted exclusively to the Court. *Id.*, at 336 So.2d 95.

Another case upon which LOCKE relies is *In Re Advisory Opinion Concerning the Applicability of Chapter 119, Florida Statutes*, 398 So.2d 446 (Fla. 1981). In that case the Supreme Court was asked to determine the narrow issue of whether the unauthorized practice of law investigative files are "public records" subject to inspection by members of the press under the authority of Chapter 119, Florida Statutes. LOCKE, however, asserts that this case stands for the proposition that Chapter 119 is

inapplicable to the judiciary in all circumstances. In fact, however, that case specifically holds that Chapter 119 could be applicable to the judiciary:

> The definition of "public records" in section 119.011(1), Florida Statutes (1979), and the definition of the term "agency" as contained in section 119.011(2) are far reaching, and broad enough to include the records of judicial branch entities. It is fundamental that all the legislative power of the state which is not withheld or vested elsewhere by the constitution resides in the legislature.

However, because the Florida Constitution by its express terms vests exclusive jurisdiction in the Supreme Court to regulate the unauthorized practice of law, any legislative action which attempts to regulate the unauthorized practice of law is an unconstitutional encroachment by the legislature upon the judiciary. The unauthorized practice of law investigative files of The Florida Bar, as an official arm of the Supreme Court, are subject to the control and direction of the Supreme Court and not to either of the other branches of the government. However, when probable cause appears that someone is engaged in the unauthorized practice of law, the bar initiates litigation. From that point all records are open for a public inspection, for the litigation is not shielded from public scrutiny. Chapter 119 does apply to judicial litigation, for no constitutional provision provides otherwise; in order for judicial litigation files to be exempt from Chapter 119, the legislature must have enumerated the specific exemption in §119.07. Chapter 119, however, does not apply to The Florida Bar's Unauthorized Practice of Law investigation files--a constitutional provision so provides. *Id.*, at 448.

Case law thus holds that Chapter 119 includes records of judicial branch entities. LOCKE and THE HOUSE agree that Chapter 119 includes records of executive branch entities. Both branches are created by the supreme law of Florida--our state constitution. How, then, can LOCKE and THE HOUSE reasonably argue that Chapter 119 cannot apply to records of the legislative branch because it is created by the constitution?

LOCKE quotes the senate staff analysis of the addition of §119.14 as conforming law to the recent Florida Supreme Court case *Moffitt v. Willis*, 459 So.2d 1018 (Fla. 1984), regarding the Court's power to determine legislative rules. The senate staff apparently concluded that the *Moffitt* case effectively exempted the legislature from Chapter 119 and §286.011. HAWKES respectfully begs to

differ with this Senate staff analysis. Chapter 119.07(3)(a) provides that "all public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, are exempt from the provisions of subsection (1)." As pointed out above, the Public Records Act was enacted in 1909. However over a period of seventy years following its enactment, a series of decisions, attorney general's opinions, and statutory exemptions resulted in the steady erosion of the public policy embodied in the Act. In 1975, the legislature amended Chapter 119, substituting the general exemption for records "deemed by law" to be exempt with an allowance for only those exemptions which were "provided by law." At this point in time the legislature itself did not provide an exemption for itself, even though it could have done so. Since that 1975 amendment, the courts have consistently held that the law precludes judicially-created exceptions to Chapter 119--that all documents falling within the scope of the Act are subject to public disclosure unless specifically exempted by an act of our legislature. *See, State ex. rel. Veale v. City of Boca Raton*, 353 So.2d 1194 (Fla. 4th DCA 1977); *News-Press Publishing Co., Inc., v. Gadd*, 388 So.2d 276 (Fla. 2d DCA 1980); *Miami Herald Publishing Company v. City of North Miami*, 452 So.2d 572 (Fla. 3d DCA 1984).

The addition of the automatic review dates in §119.14 to review the exemptions did not add to the list of exemptions. Instead, its purpose was to provide for careful review so that more exemptions were not provided than were absolutely necessary according to the given criteria. Thus the senate staff analysis provided by LOCKE is not an accurate analysis of the *Moffitt* case. In fact, the *Moffitt* case contains no holding whatsoever concerning the applicability of Chapter 119 to the legislature. A careful reading of that case reveals that the plaintiffs in the complaint did not complain of or challenge any specific act or law promulgated by the legislature. Rather, the complaint was that the house and senate violated their own rules of procedure. Therefore, the court declined to rule on something which was not even before it: "While the judiciary certainly has the power to determine what effect a statute has and to whom it applies as well as its constitutionality, that is not the issue before us today. We are not confronted with whether a statute applies, rather we are asked to allow the courts to determine when and how legislative rules apply to members of the legislature." *Moffitt*, 459 So.2d at 1021-22.

LOCKE points out at page 17 of his Initial Brief that legislative intent is the polestar by which the court must be guided in ascertaining the scope of Chapter 119. He then asks the court to determine legislative intent for a law that was passed in 1909 and to which was added the definitions of "public record" and "agency" in 1967 (which definitions remain substantially unchanged). For aid in determining legislative intent in 1909 and in 1967, LOCKE cites House Rule 1.11 which was passed on November 22, 1988, after this lawsuit was filed, and which was not adopted for and during the Regular Session 1988 and bills which were filed but which were not passed in 1978 and 1989! HAWKES asserts that even if this court could consider such material as applicable to determining legislative intent (and he certainly does not contend that it is applicable), such potential language would simply clarify what the legislature had intended since 1909--that all records are open for inspection, and all means all, including the records of the members of the legislature. Certainly simply because there was an attempt to clarify does not mean that the law was not applicable prior to the attempt to clarify. The 1909 statute reads in its entirety:

> Section 1. That all State, county and municipal records shall at all times be open for a personal inspection by any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen.
>
> Section 2. That any official who shall violate the provisions of Section 1 of this Act shall be subject to removal or impeachment.

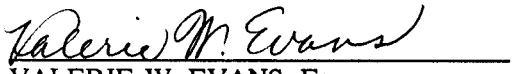
In 1920, the legislature provided for photographing the records. In 1967, the legislature provided the definitions of "public records" and "agency" (these definitions are substantially unchanged). Subsequent changes have done nothing but expand the public's access to the documents of their government, not restrict it. The legislature never amended Chapter 119 to read as follows: "For executive branch agencies, all records are open except when exempted; for the legislative branch, only records specifically delineated by rule are open for inspection."

What this court can consider is what the legislature actually did do--not just what a few legislators attempted to do. In 1975, the legislature amended Chapter 119 to require that all exemptions to this law be expressly provided by law. Exemptions must be expressly written into the law and these

exemptions to not live forever, but rather are subject to automatic review--to sunset. At any point during the last eighty years, the legislature could have expressly exempted itself, but it chose not to do so. For what is an open government if the legislature is closed?

CONCLUSION

This case presents no separation of powers argument whatsoever. To say that the legislature does not have the power to pass a statute which is applicable to the legislature because the constitution created the legislature makes no sense whatsoever. Then to say that the legislature can pass a statute which is applicable to the executive branch alone when the executive branch is also created by the constitution is illogical. Finally, to say that the judiciary cannot interpret, construe, or enforce statutes passed by the legislature is to remove the powers of the judiciary. Additionally, the legislature passed a statute which requires that all exemptions added to that statute must be made strictly through amendment that statute. The attempt by the House of Representatives to exempt itself and the Senate (the entire legislative branch) by passing a rule in its organizational session is in defiance of that very statute designed to allow the citizens of the state of Florida to know what their elected officials are doing and to guarantee that knowledge through acceleration of the court system. Such an attempt is illegal. Respondent HAWKES, therefore, respectfully requests that this Supreme Court safeguard the substantive rights of the citizens of the state of Florida provided since 1909 by assuring the swift action provided by the legislature itself in Chapter 119 by affirming the decision of the District Court of Appeal.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to KEVIN X. CROWLEY, Esquire, Attorney for Petitioner Locke and Amicus Curiae The Florida House of Representatives, 315

South Calhoun Street, Suite 500, Tallahassee, Florida 32301, by United States Mail, on this 15th day of December, 1990.

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