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DEC 27 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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

SUPPLEMENTAL BRIEF OF RESPONDENT PAUL M. HAWKES FILED PURSUANT TO THE ORDER OF DECEMBER 3, 1991 OF THE SUPREME COURT OF FLORIDA

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CITATION OF AUTHORITIES

ARGUMENT

This brief is filed as a supplemental brief as ordered by this Court on December 3, 1991. Therefore, Hawkes requests that this court also reconsider in its entirety his Answer Brief dated December 15, 1990, as well as Hawkes' arguments as presented February 4, 1991, during Oral Argument and any other arguments presented by Hawkes orally or in writing. Additionally, Hawkes hereby incorporates into this brief his Motion for Rehearing and For Clarification and attaches said Motion to this brief as Appendix A. Hawkes respectfully requests that all questions posed in that Motion be answered and all the concerns verbalized in that Motion be addressed by this Court. In the body of this supplemental brief, references will be made to this Motion by page number (i.e., A-11 would refer this court to page 11 of Appendix A).

Hawkes asks: Is the right of the people of Florida to open records a substantive right? This court declined to answer this question in its opinion of November 7, 1991. At page 4-5 of the opinion, this court noted:

> We must address two questions to resolve this issue. First, was chapter 119 intended to apply to the independent branches of government established by the constitution, and, second, does the separation of powers doctrine of the constitution prohibit the judicial branch from construing chapter 119 to apply to the legislature?

This court then proceeded to address the first question. Then at page 6-7 as to the second question, this court held:

> We find that we do not need to address the constitutional question because we interpret the term "agency," as used in the statute, to not include members of the legislature.

Hawkes contends that the two questions are intertwined and both must be answered by this Court to let the people of Florida know where they stand on the issue of their ability to know what their government is doing.

This Court answered Question 2 in 1976 in *Johnson v. State*, 336 So.2d 93 (Fla. 1976):

> Clearly, the Legislature has the power to enact substantive law, and it is the duty of the courts to enforce such substantive law where constitutional.

The question then evolves: Can the legislature constitutionally enact a substantive law which applies to the legislature? Admittedly, a negative answer is simply beyond comprehension. How could the doctrine of separation of powers prohibit the legislature from enacting substantive legislation applicable to the legislature? The answer, using all reason and logic, must be that the legislature can constitutionally enact substantive legislation which is applicable to the legislature and the courts then have the duty to enforce and construe such substantive law. Obviously this Court believes that it has the power to construe a statute, for it did construe this statute in its November 7, 1991, decision. For this Court to hold that it cannot construe a statute would be to overrule the history of the court system--courts, including this one, construe statutes on a daily basis. And also obviously, this Court believes that it has the power to construe this particular statute to NOT apply to the Legislature. Why then, could this Court not construe this particular statute to apply to the Legislature? Again, the answer turns on whether by passing Chapter 119 the Legislature enacted substantive law. Many courts have held that "access to public records is a substantive right which the legislature has power to confer." *Coleman v. Austin*, 521 So.2d 247 (Fla. 1st DCA 1988). For this Court to hold otherwise would overrule those courts in the past which have held that it is a substantive right. Hawkes contends that access to public records is substantive law and that constitutionally the legislature can enact substantive law applicable to all three branches of government, including the legislature. Hawkes further contends that the legislature in 1967 expanded the substantive right of access to public records by requiring that access to be immediate; and if the public officer did not comply immediately, then the person requesting had the substantive right of immediate redress through the court system.

Next, Hawkes asks: Historically, exactly what has this substantive right of access to public records encompassed? In its decision of November 7, 1991, this Court in effect held that the legislature in 1967 severely limited the right of the public to access to public records. The court stated at page 7 of that decision:

> Our construction does not severely limit the application of chapter 119. It remains applicable to all "agencies" of government, but the term [agency] does not include the governor, the cabinet, members of the legislature, or judicial officers.

If the November 7 decision did not severely limit the application of chapter 119, then the massive amendments in 1967 must have. In 1909 when it first became law, the Public Records Act (Ch. 5942, 1909 Fla. Laws 132) read in full as follows:

> Section 1. That all State, county and municipal records shall at all times be open for a personal inspection of 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.

Hawkes asks: How would this Court construe the 1909 Public Records Act? Would it include the legislature? Would this Court say that it could not construe Ch. 5942 without violating the separation of powers doctrine? Would this Court say that Ch. 5942 could be construed to NOT include the legislature but that it could not construe Ch. 5942 to include the legislature? Would this Court say that the term "all State, county and municipal records" does not include the records of the Governor, the Governor's cabinet, the justices of the Supreme Court, the judges of the district courts of appeal, circuit courts, and county courts, and the members of the House and Senate? And if this Court would so hold, what is the rationale? Hawkes contends that there is nothing in Ch. 5942 to support this exclusion and that this Court would not find such an exclusion.

At RGS §§ 424-426 (1920), we note that Ch. 5942 remained unchanged except provisions were made for photographing the public records. At §1, ch. 17173, 1935, we note the addition of further penalty. Violations now constituted a misdemeanor punishable by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding three months. At §1, ch. 57-66, we note the addition of the procedures for photographing and destruction of public records. But in 1967 at Ch. 67-127, we note massive additions. Ch. 5942 (1909), however, remained intact. Ch. 119, Fla. Stat. (1967) includes:

> 119.01: All state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen.
>
> 119.02: Any official who shall violate the provisions of §119.01 shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon

conviction shall be punished by a fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding three months.

Additonally, the 1967 legislature provided two definitions in the new §119.011:

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

In 1980 this Court addressed the first definition in *Shevin v. Byron, Harless, Schaffer, Etc.*, 379 So.2d 633 (Fla. 1980). In that case, this Court noted:

> Prior to the enactment of section 119.011(1) in 1967, this Court, in *Amos v. Gunn*, 84 Fla. 285, 343, 94 So. 615, 634 (1922) said: "A public record is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done." This limited definition obviously embraced very few documents, most of which could be found in the official record book at the courthouse. In enacting section 119.011(1), the legislature broadened the class of public records.

Id., at 640. This Court construed the term "public records":

> To give content to the public records law which is consistent with the most common understanding of the term "record," we hold that a public record, for purposes of section 119.011(1), is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type. To be contrasted with "public records" are materials prepared as drafts or notes, which constitute mere precursors of governmental "records" and are not, in themselves, intended as final evidence of the knowledge to be recorded. Matters which obviously would not be public records are rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation. Inter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business.

Id.

Thus, the Supreme Court in 1980 held that the 1967 legislature broadened the class of public records. Now, this Supreme Court is holding that even though the 1967 legislature broadened the class of public records, the 1967 legislature in reality severely limited the application of Ch. 119 by providing the definition of "agency." The legislature giveth and the legislature taketh away--all with one stroke of the mighty legislative pen. How sad.

And even more sad is that no one even knew what the 1967 legislature was doing. This Court held on November 7 that "agency" does not mean "any state, county and municipal officer" as had been in effect since 1909. This Court held that "agency" means "any state, county and municipal officer created or established by [statutory] law." This Court held that the modifier "created or established by law" does not modify "other separate unit of government" but rather that this modifier modifies the entire phrase: "officer, department, division, board, bureau, commission or other separate unit of government." This Court held that this grammatical construction must be the correct construction and that no other grammatical construction would be appropriate (even though it would be appropriate grammatically)--because the 1967 legislature intended to severely limit the application of the 1909 Public Records Act while at the same time broadening the class of public records.

Yet others since 1967 have thought the correct grammatical construction was that the phrase "created or established by law" modified only the phrase "other separate unit of government." In *Petition of Kilgore*, 65 So.2d 30 (Fla. 1953), this Court was petitioned by representatives of the press suggesting that this Court adopt the practice of treating requests from the Governor under Section 13, Article IV of the Constitution, including the Advisory Opinion in response thereto, as public records subject to inspection by the press and the public as contemplated by Section 119.01, Florida Statutes. This Court held:

> The request by the Governor for an advisory opinion of this Court may be withdrawn at any time. During the period it is within the breast of the Court, it is not subject to public inspection or inquiry. Thus, the request for an advisory opinion does not become a part of the public files of this Court except, unless and until the reply thereto, which contains the request, is delivered to the Governor, at which time it is filed with the Clerk of this Court and thereafter is open to the press and public for inspection as are other opinions of this Court when so filed.

Id., at 30-31. This request would not have been made had anyone believed that neither the governor nor the justices of the Supreme Court nor the Clerk of the Supreme Court were subject to Ch. 5942 (1909). (See A-6 for a discussion as to why the Clerk of the Supreme Court is excluded from Ch. 119 pursuant to the November 7, 1991, decision.) Justice Terrell, concurring specially, noted: "I am in perfect accord with the philosophy of Mr. Jefferson that one of the first essentials of democratic

Government is a free press and the widest prblicity to official conduct at every level." *Id.*, at 31. He concluded:

> When the request with the opinion is filed with the Clerk of this Court and by him transmitted to and lodged in the Governor's office and filed by him, I think it is then subject to inspection by the press or the public in the same manner that Section 119.01, Florida Statutes, F.S.A., provides for inspection of any other public document.

Id., at 32. Thus, in 1953, Ch. 119 applied to the governor, the Supreme Court, and to the Clerk of the Supreme Court.

In *News-Press Pub. Co. v. Wisher*, 345 So.2d 646 (Fla. 1977), this Court again addressed the scope of application of Ch. 119. The request involved the Lee County Board of County Commissioners. As discussed at A-9, the boards of county commissioners are created either by the constitution or by county charter, but never by enactment of the legislature. These boards, therefore, pursuant to the November 7, 1991, decision are not subject to Ch. 119. However, this Court in 1977 did not even consider that problem. This Court in 1977 instead held: "In relevant part the law declares that the policy of this state favors open and accessible public records for all 'public records', with certain exceptions." *Id.*, at 647. This Court continued:

> The policy of this state as expressed in the public records law and the open meeting statute eliminate any notion that the commission was free to conduct the county's personnel business by pseudonyms or cloaked references. We cannot allow the purpose of our statutes to be thwarted by such obvious ruses.

Id., at 648. This Court, therefore, held that the petitioner was entitled to a writ of mandamus commanding the county administrator to produce the name of the county employee against whom public action was taken by the Lee County Commission and the document or documents of warning which were placed in his or her file on direction of the Commission.

In *Browning v. Walton*, 351 So.2d 380 (Fla. 4th DCA 1977), the District Court of Appeal was asked to judicially engraft an exemption to the Public Records Act self-imposed by employees of the City of Plantation. The Court refused to do so, holding that "the purpose of this Statute was to open the records so the citizens could discover what their government was doing." *Id.*, at 381. Even after 1967, the citizens had a right to discover what their government is doing.

In *Coleman v. Austin*, 521 So.2d 247 (Fla. 1st DCA 1988), the appellant was an attorney who requested inspection of a state attorney's case file for a charge which had been nolle prossed. The trial court reviewed the contents of the file and, based on a determination that some of the documents were public records, the court allowed appellant a limited inspection, ruling that the "handwritten notes and memoranda ... are not public records and need not be disclosed...." The District Court of Appeal did not hesitate in deciding that the state attorney was subject to Ch. 119. According to this Court's November 7, 1991, decision, however, state attorneys are not subject to Ch. 119 as discussed at A-7. Appellee had argued that an application of Ch. 119 to the state attorney's office would allow the legislature to dictate judicial procedure in violation of the state constitution. The DCA held, however, that "access to public records is a substantive right which the legislature has power to confer. The challenged provision does not establish judicial procedure and is within the realm of proper legislative authority." *Id.*, at 248, citations omitted. The court further held:

> The contested documents involved in the present case include preliminary notes which are not public records under the standard announced in *Byron, Harless, etc.* and *Orange County.* But the various inter-office and intra-office memoranda which formalized knowledge and communicated information between public employees are public records under *Shevin* and *Orange County* and are thus subject to public inspection. In denying access to these materials the court's order was overbroad and failed to comport with Chapter 119, Florida Statutes.

Id., at 249. Thus the First District Court of Appeal believed that the state attorneys were subject to Chapter 119, even though they are constitutionally created, and that Chapter 119 does not establish judicial procedure violative of the separation of powers doctrine.

In *Downs v. Austin*, 522 So.2d 931 (Fla. 1st DCA 1988), the DCA, again working with the same state attorney Ed Austin, ordered disclosure of the results of four polygraph tests. The DCA gave explicit guidelines for construing the Public Records Act:

> Promoting access to public records is the overarching feature of the Act, and this fact is illustrated by the expressions of virtually every Florida appellate court which has been called upon to interpret the statute. "The Public Records Act is to be liberally construed in favor of 'open government to the extent possible in order to preserve our basic freedom, without undermining significant government functions such as crime detection and prosecution....' Exemptions from disclosure are to be construed narrowly and limited to their stated purposes. "[W]hen in doubt, the court should find in favor of disclosure rather than secrecy."

Id., at 933-934 [citations omitted]. The DCA court held that for several reasons, disclosure of the polygraph results would not thwart the purposes of the exemption found in section 119.07(3)(j). The judges of the First District Court of Appeal actually thought that the legislature in 1967 intended for open government to preserve our basic freedom.

Finally, the Governor and his cabinet have been operating since 1967 under the assumption that Chapter 119 did apply to them. Only after this Court's November 7, 1991, decision, did they find out otherwise. As a result, they passed a motion as presented to this court by the attorney for Dick Locke and the Florida House of Representatives as an attachment to their Reply to the Motion for Rehearing and For Clarification filed by the Respondent, Paul M. Hawkes, and which reads:

> In keeping with the spirit of the openness that is the basis of the state's public records law set out in Chapter 119, Florida Statutes, the Governor and the Cabinet will hereby continue [e.s] to abide by that law and will use the provisions of Chapter 119 as guidelines in handling public records matters. The purpose of this motion is to return to the status quo of how the Governor and the Cabinet members have handled public records prior to the Florida Supreme Court decision in Locke v. Hawkes and Florida House of Representatives v. Gordon that was decided on November 7, 1991.

And none of these public officials since 1967 even knew that the 1967 legislature pulled the wool over their eyes and excluded them from the application of Chapter 119. If they had known it, surely the Governor would not have signed it into law. Or surely the governor and his cabinet would have passed this motion 24 years ago. Surely.

In their Reply to the Motion for Rehearing and For Clarification Filed By the Respondent, Paul M. Hawkes, Locke and the Florida House of Representatives assert that "it matters not whether the unit of government is mentioned [e.s.] in the Constitution.... The key is ... whether the administration [e.s.] of the unit of government (including the direction and control of its papers) is dependent upon a statutory scheme." Locke and the Florida House seem to be arguing that the word "mention" is synonymous to the word "create" or the word "establish." Additionally, Locke and the Florida House argue that the word "administer" is synonymous to the word "establish" and that the word "create" is to be ignored. Perhaps *Black's Law Dictionary* (6th Ed. 1990), however, is the preferred source of definitions. *Black's* defines "administer":

> To manage or conduct. To discharge the duties of an office; to take charge of business; to manage affairs; to serve in the conduct of affairs, in the application of things to their uses; to settle and distribute the estate of a decedent. Also, to give, as an oath; to direct or cause to be taken.
> To "administer" a decree is to execute it, to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language.
> To "administer" trusts is to manage, direct or superintend affairs of such trusts.
> To apply, as medicine or a remedy; to give, as a dose of something beneficial or suitable. To cause or procure a person to take some drug or other substance into his or her system; to direct and cause a medicine, poison, or drug to be taken into the system.
> [citations omitted]

Black's defines "create":

> To bring into being; to cause to exist; to produce; as, to create a trust, to create a corporation.

Black's defines "establish":

> This word occurs frequently in the Constitution of the United States, and it is there used in different meanings: (1) To settle firmly, to fix unalterably; as to establish justice, which is the avowed object of the Constitution. (2) To make or form; as to establish uniform laws governing naturalization or bankruptcy. (3) To found, to create, to regulate; as: "Congress shall have power to establish post-offices." (4) To found, recognize, confirm, or admit; as "Congress shall make no law respecting an establishment of religion." *See* Establishment clause. (5) To create, to ratify, or confirm, as "We, the people . . . do ordain and establish this Constitution."
> To settle, make or fix firmly; place on a permanent footing; found; create; put beyond doubt or dispute; prove; convince. To enact permanently. To bring about or into existence.
> [citations omitted]

Thus, according to *Black's*, "create" and "establish" are synonymous; "administer" has an entirely different meaning, however, and cannot be used interchangeably with "establish."

In fact, the Supreme Court has already addressed the issue in *State v. Fernandina Port Authority in Nassau County*, 32 So.2d 328 (Fla. 1947). In that case, the Court had to determine the constitutional validity of a special act in so far as it authorized the Fernandina Port Authority to acquire and operate a ferry or ferry connections. The constitutional provision called into question was Section 20, Article 3:

> The Legislature shall not pass special or local laws in any of the following enumerated cases: that is to say, regulating the jurisdiction and duties of any class of officers * * * and for the *establishment of ferries*.

Also in question was Section 21, Article 3 which provided that "in all cases enumerated in the preceding Section, all laws shall be general and of uniform operation throughout the State." This Court held:

> Casual inspection of these constitutional provisions, in so far as applicable to this case, discloses that they inhibited the legislature from passing any law for the "Establishment of ferries" except it be a general law. By all the lexicographers the word "establish" means to

> found, create, originate or institute. If we were permitted to indulge in a play on semantics, an interesting discourse might be injected here on the evolution of the word "establish," but we think its plain meaning and application conclude the point. [citations omitted]

The Court continued:

> There is a marked distinction between establishing a ferry and operating one already created and being administered. The terms of the act under assault do nothing more than authorize the operation of a ferry already created or that may be hereafter *lawfully* created and that only as incident to the main powers conferred. . . . We held the act [a different act in a prior case] to be in violation of Sections 20 and 21, Article 3, of the Constitution, because it was a local law and provided for the establishment rather than the administration of a ferry previously created or hereafter *lawfully* established.

Thus, this Court has previously held that there is a major difference between "administered" and "established" and the same Court in that case used the terms "establish" and "create" interchangeably. There is absolutely nothing to support the assertion of Locke and the Florida House in that Reply that "'Established' in this sense [§119.011(2)] means being statutorily given the status of a functioning unit of the executive branch or of local government." This definition is simply not there.

Now to the word "mentioned": it is not even listed in *Black's* 6th edition. The common meaning according to *The Reader's Digest Great Encyclopedic Dictionary* is "to refer to incidentally, briefly, or in passing." This definition hardly is synonymous with "created" or "established."

Hawkes realizes that this Court can give words any definitions it so desires and that word will then take on that meaning by law. However, Hawkes requests that this Court use some semblance of reason and history when assigning meanings to the words "create" and "establish" in this case. Locke's definitions simply are unacceptable by all standards of reason. And as stated in Hawkes' Motion attached as Appendix A, there are numerous provisions whereby "agencies" are created and established by the constitution; just because the constitution authorizes the administration of these agencies through statutory law does not abolish their constitutional creation or establishment so that they then may be "created" or "established" once more by statute.

This Court additionally noted as further support for its November 7, 1991, decision that "each of these constitutionally established branches of government have, in various ways, made their records open to the public." The Legislature, however, is being rather verbal during this special session of the

Legislature concerning the possibility of the Legislature opening its records to the public in light of the November 7, 1991, decision. The Wednesday, December 11, 1991, issue of *The Orlando Sentinel* (Appendix B) states that "many senators were upset that most of their records--including drafts of bills, personal memos and correspondence from constituents--would be opened under the Margolis proposal. 'The members have the right to decide which of their thoughts are public and which are not,' said Sen. Jack Gordon, D-Miami Beach." Certainly this attitude does little to secure and sustain the public trust against abuse. (A-11) Hawkes asserts that there is nothing the Legislature does which should be kept hidden from the people of the State of Florida. What memos and correspondence would a Senator be receiving from a constituent of which other constituents should not be aware? Why should constituents not know the contents of the drafts of bills at a time when those constituents could let a representative know he is not representing the constituents? Why should this representative not have to let his constituents know what he is doing as the process develops rather than forcing them to wait until the process is completed and not changeable? How does letting the public know what the government is doing impede the government? Why should an employer (the people of the state of Florida) not know what its employees (<u>all</u> of its employees) are doing with the employer's time and money? The 1967 Legislature intended to keep an open government in Florida--and even intended to make clear the broad scope of Chapter 119--by defining "public records" and "agency" so that the court system would not continue to erode that broad scope of openness.

CONCLUSION

Hawkes requests that this Court not severely erode the open government of Florida which has been practiced in the State of Florida since 1967 by holding that the phrase "created or established by law" modifies all of the enumerated items in the series. Grammatical construction legitimately calls for the holding that the disputed phrase modifies only the final item in the series: "other units of government." History demands open government, especially openness from our highest elected and appointed officials; the people demand open government. The people must look to the Supreme Court for help because the Legislature does not want to be accountable. Alternatively, if this Court will not hold for open government, especially openness from our governor, his cabinet, the justices of the Supreme Court, judges of the district courts of appeal, circuit court, and county courts, and members of the House and Senate, then Hawkes requests that this Court apply the same logic and language which gives exemptions from Chapter 119 for all the top elected and appointed officials as the means to clarify exemptions for other constitutionally created or established officers in accordance with the arguments presented in Appendix A at pages A-1 through A-11. The people deserve to know now the scope of the applicability of Chapter 119 without having to litigate on a regular basis every time a request is made.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing Supplemental Brief of Respondent Hawkes was served by mail this 27th day of December, 1991, upon the following:

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