IN THE SUPREME COURT OF FLORIDA

DICK LOCKE,

Petitioner,

v. CASE NO. 76,090

PAUL M. HAWKES,

Respondent.

FLORIDA HOUSE OF REPRESENTATIVES,

Petitioner,

v. CASE NO. 76,803

JON I. GORDON, JUDGE, ETC.,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT, JUDGE JON I. GORDON

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STATEMENT OF THE CASE

This case is before the Court as a result of several motions for clarification filed on behalf of various respondents addressing the opinion of this Court entered on November 7, 1991. Locke v. Hawkes, 16 F.L.W. S716 (Fla. November 7, 1991). The motions were granted on December 3, 1991, and parties were directed to filed supplemental briefs no later than December 30, 1991. This brief is filed on behalf of the Honorable Jon I. Gordon.

The issue originally presented in the consolidated cases before the Court involved the application of Chapter 119, Florida Statutes, the Public Records Law, to members of the Florida Legislature. In its November 7, 1991, opinion, the Court held that the judiciary is without jurisdiction to compel production of legislative records since such action would violate the separation of powers doctrine embodied in Article II, Section 3 of the Florida Constitution. In reaching its conclusion that the Legislature was vested with exclusive control over the internal records of its members, the Court relied on prior precedent holding that the public records law was inapplicable to the judiciary.

The Court's decision, however, was not limited to the narrow question presented to it. The Court extended its ruling to apply to each of the three branches of government. In

apparent reliance on separation of powers principles articulated in previous decisions affecting the judicial branch, the Court ruled that the Public Records Law was "not intended to apply to the constitutional officers of the three branches of government or to their functions." The Court thus construes the definition of "agency" found in section 119.011, Florida Statutes, to include only those entities which are established or created by law.

Although the Court may have intended to issue a complete and dispositive ruling on the authority of the Legislature to prescribe requirements relating to access to records in the three branches of government, in fact the opinion raises many more questions than it answers. Although the various motions for clarification outline many of these issues, this brief will focus on the confusion the decision creates for constitutional officers, particularly the Executive Branch.

SUMMARY OF THE ARGUMENT

With limited exceptions, Chapter 119, Florida Statutes, applies to records of constitutional officers in the Executive Branch of government. The instant decision appears to conflict with a prior decision of this Court, Lewis v. Bank of Pasco County, 346 So.2d 53 (Fla. 1976), regarding the scope of application of Chapter 119 in this context. Accordingly, the decision should be clarified to evidence that the court did not intend to provide complete discretion regarding release of public records to each constitutional officer.

ARGUMENT

ISSUE

DOES CHAPTER 119, FLORIDA STATUTES, APPLY TO RECORDS OF CONSTITUTIONAL OFFICERS IN THE EXECUTIVE BRANCH OF GOVERNMENT?

An examination of the November 7 opinion reflects that the Court had little difficulty in concluding that the records of the judiciary and the Legislature were not subject to Chapter 119, Florida Statutes. This conclusion appears to have resulted from the Court's belief that the powers of the judiciary and the Legislature flow exclusively and directly from the Constitution. Hence, the Court's conclusion that the internal records of the court system and the Legislature must, in light of the separation of powers clause, be subject to the sole control of each of these branches of government.

However, this analysis fails when applied to the executive branch. The functions of the Cabinet members and of the Governor are defined in general and expansive terms in the Constitution.[1] However, each is also vested with statutory

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[1] The supreme executive power of the state is vested in the Governor. Section 1, Art. IV, Fla. Const. The Attorney General is the chief state legal officer. Section 4, Art. IV, Fla. Const. Under the State Constitution, the Comptroller is the chief fiscal officer of the state. Id. The Treasurer keeps and disburses state funds. Id. The Commissioner of Agriculture has "supervision of matters pertaining to agriculture except as otherwise provided by law." Id. The Commissioner of Education "shall supervise the public education system in the manner prescribed by law." (e.s.) Id. The Secretary of State keeps the official acts of the legislative and executive departments. Id.

responsibilities which often are simply a more detailed implementation of those powers outlined in the Constitution.[2] Accordingly, the Court's conclusion that access to records relating to constitutional functions is subject to the sole discretion of the constitutional officer while access to records relating to statutory functions is controlled by Chapter 119, is difficult, if not impossible, to carry out.

Historically, the Court has been reluctant to vest such discretion in the hands of officers of the executive branch. For example, in Lewis v. Bank of Pasco County, 346 So. 2d 53, 55 (Fla. 1976), the Court held that a statute giving "the Comptroller unrestricted and unlimited power to exempt particular records and items of information" was an invalid delegation of legislative power and thus unconstitutional. Yet in the instant case, the Court has effectively allowed the Comptroller to possess the same unbridled discretion with regard to any records relating to his constitutional function as "chief fiscal officer of the state."

It is submitted that perhaps the Court did not intend to provide such complete discretion with regard to all functions of constitutional officers. For example, several court decisions and Attorney General's opinions have recognized that where the Constitution delegates a **specific** function to the Governor or

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[2] Each member of the Cabinet heads an agency with statutorily prescribed duties. See generally, Chapter 20, Florida Statutes.

members of the Cabinet (such as clemency), the open meeting and open records laws do not apply.[3] To apply the open government laws to such functions would constitute an unwarranted intrusion by the Legislature into matters which the Constitution has specifically assigned to certain constitutional officers.

These specific and express grants of constitutional responsibilities, however, are few and far between. In most cases, there is only a general acknowledgment of the various roles played by the constitutional officers in the executive branch of government, which authority is fully implemented by the Legislature through the adoption of legislation. In such cases, the open government laws do apply and it is the Legislature which determines which records are to be confidential and which are to be open--not the individual officer who happens to have custody of them. Under this analysis, the will of the people with regard to access to public records can most effectively be accomplished. To leave the question of access to information to the unbridled discretion of a single officer is contrary to the spirit of the

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[3] See, e.g., In re Advisory Opinion to the Governor, 334 So. 2d 561 (Fla. 1976) (Constitution sufficiently prescribes rules for manner of exercise of gubernatorial clemency power; therefore, legislative intervention is unwarranted); 1986 Op. Att'y Gen. Fla. 086-50 (May 30, 1986) (materials collected by Parole and Probation Commission pursuant to direction of the Governor and Cabinet for pardons and other forms of clemency authorized by Art. IV, s. 8[a], Fla. Const., are not subject to Ch. 119). Compare, Turner v. Wainwright, 379 So. 2d 148 (Fla. 1st DCA 1980), affirmed and remanded, 389 So. 2d 1181 (Fla. 1980) (Parole Commission, which Constitution recognizes may be created by law, is subject to s. 286.011, Florida Statutes, in carrying out its statutory duties relating to parole).

Lewis case and countless other decisions of this Court. See, e.g., Chiles v. Children A, B, C, D, E and F, 16 F.L.W. S708 (Fla. October 29, 1991), and cases cited therein.

In addition, the Court's use of the term "constitutional officers" at 16 F.L.W. S717 has created confusion with regard to the applicability of the Public Records Law to a host of other officers, such as sheriffs, clerks of court, state attorneys, and public defenders, set forth in the Constitution.[4] The courts have historiclly considered such officers to be subject to the requirements of Chapter 119, Florida Statutes. See, e.g., State v. Kokal, 562 So. 2d 324 (Fla. 1990), and Coleman v. Austin, 521 So. 2d 247 (Fla. 1st DCA 1988) (Public records law applies to state attorneys); Bevan v. Wanicka, 505 So. 2d 1116 (Fla. 2d DCA 1987) (sheriff); Brunson v. Dade County School Board, 525 So. 2d 933 (Fla. 3d DCA 1988) (school board). The Court's decision must be clarified to ensure the continued application of the Public Records Law to these officers and their functions.

The confusion surrounding the November 7 opinion has also resulted in concern with regard to possible liability relating to release of information. Constitutional officers face a double edged sword. They must determine whether the records they hold as constitutional officers are exempt from regulation by the

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[4] See, e.g., State Attorneys, Section 17, Art. V; Public Defenders, Section 18, Art. V; County Sheriffs, Section 1(d), Art. VIII; Clerks of Court, id.; School Boards, Section 4, Art. IX.

Legislature or whether the records are subject to Chapter 119, Florida Statutes. Misjudging the applicability of the Public Records Law, however, can subject a public official to significant monetary liability through the payment of attorney fees. See, State v. Kokal, 562 So. 2d 324 (Fla. 1990), and News and Sun Sentinel v. Palm Beach County, 517 So.2d 743 (Fla. 4th DCA 1987) (attorneys fees are recoverable against governmental agencies in actions to obtain public records regardless of good faith belief by government agency that documents are exempt from disclosure).

CONCLUSION

For the foregoing reasons, Respondent urges this Court to clarify its prior ruling to ensure that the public's right of access under the open government laws of this state is not impaired through inadvertence or misconception of public officials.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **BRIEF OF RESPONDENT, JUDGE JON I. GORDON**, has been furnished to **KEVIN X. CROWLEY**, 315 South Calhoun Street, Suite 500, Tallahassee, Florida 32301; **PHILIP M. GERSON**, 100 Chopin Plaza, Suite 1310, Miami Center, Miami, Florida 33131; **CHARLES P. HORN**, Post Office Box 2066, Crystal River, Florida 32629; **PARKER THOMSON**, Thomson, Muraro, Bohrer & Razook, P.A., 1700 AmericFirst Building, One Southeast Third Avenue, Miami, Florida 33131; and **VALERIE W. EVANS**, 1808 Kalurna Court, Orlando, Florida 32806, by U. S. Mail this 30th day of December, 1991.

WALTER M. MEGINNISS