

THE BRECHNER REPORT

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New law closes autopsy photos

TALLAHASSEE – A bill that closed autopsy photos to public scrutiny powered through the Florida Legislature and was signed into law by Gov. Jeb Bush. At least two newspapers have since filed suit to get the court system to put the brakes on.

The House bill passed the Senate at 10 a.m. on March 29, and it was signed into law less than six hours later.

The new statute bars anyone other than public officials and relatives from seeing, copying or distributing autopsy photographs. A judge can unseal the photographs if a plaintiff shows “good cause.” The law was designed to apply

AGO: County clerk can't attend closed meetings

TALLAHASSEE – The county clerk of the court is not allowed to attend a closed attorney-client meeting of a county commission under Florida's Sunshine Laws, the attorney general said in an opinion.

Nassau County Attorney Michael S. Mullin had requested an opinion from Attorney General Bob Butterworth after an appeals court in a Vero Beach case ruled a city clerk could not attend closed meetings.

J.M. “Chip” Oxley, clerk of the circuit court in Nassau County, attended 18 closed meetings of the Nassau County Commission between April 1996 and December 2000.

Butterworth's opinion said Florida statutes specify who can attend a closed attorney-client meeting, and the law does not list clerks of the court among those who may attend.

Mullin said Oxley would not be allowed to attend closed commission meetings in the future.

(2/28/01 – 3/7/01; AGO 2001-10)

retroactively.

Anyone who violates the law can be charged with a felony, which has a potential penalty of five years in prison and a \$5,000 fine. The penalty is the strongest in the state for any records violation.

The *South Florida Sun-Sentinel* and the *Orlando Sentinel* filed a lawsuit the next day, asking the court to declare the law unconstitutional and allow the papers to inspect various autopsy photos they requested in several counties in anticipation of the law's passage.

(3/30/01 – 3/31/01)

(Editor's Note: See related Back Page opinion piece)

Court upholds closed parental rights hearings

TALLAHASSEE – In a 5-2 decision, the Florida Supreme Court upheld a statute that requires hearings to terminate parental rights be closed.

The statute requiring the closed hearing doesn't violate the public's right of access to court proceedings, the Court ruled. “There is no constitutional requirement that juvenile proceedings be presumptively open to the public,” Justice Peggy Quince wrote for the majority.

Kathy and Craig Bush challenged the statute after Kathy was convicted of child abuse, and the Department of

Sunshine Law complaint delays airport contract

MIAMI – Concerns that a bidding process didn't follow the state's Sunshine Law prompted a Miami-Dade judge to issue an injunction that bars Dade County from executing a contract.

The contract with Secure Wrap would have hired a permanent contractor to wrap luggage at the Miami International Airport. However, the two losing

Newspapers sue for Earnhardt pictures

DAYTONA BEACH – As part of a settlement with racing legend Dale Earnhardt's widow, a head-trauma expert looked at Earnhardt's autopsy photos on behalf of the *Orlando Sentinel*. However, the *Independent Florida Alligator*, a student-run newspaper, was allowed to challenge the settlement that sealed the photos.

Judge Joseph Will, 7th Judicial Circuit, in allowing the lawsuit to proceed, said that others are not bound, by the agreement signed by the *Sentinel* and the Earnhardt family. The *Alligator* is also challenging the new state law passed to bar access to autopsy photos. (4/6/01)

Children & Families moved to sever their legal rights to their 13-year-old daughter, Jennifer.

A jury found Kathy Bush guilty of deliberately making Jennifer ill to get attention for herself. The abuse is the result of a psychological disorder known as

Munchausen syndrome by proxy. She was also convicted of fraud and was sentenced to five years in prison.

The Bushes said that closing the hearing violated Kathy Bush's right to an open trial. Their attorney said the couple plans to appeal the decision. (2/23/01)

ACCESS
RECORDS

ACCESS
MEETINGS

Bill would make leaking names a crime

TALLAHASSEE – A proposed House bill would not only keep university and college presidential searches secret until the end, it also would make it a crime to reveal a candidate's name.

The bill (HB1535), sponsored by Evelyn Lynn, R-Ormond Beach, would keep applicants for presidential positions, as well as education commissioner, secret until the committee selects a finalist. It would make it a first-degree misdemeanor to disclose a candidate's name.

Judge refuses gag order in Gifford libel case

WEST PALM BEACH – A judge refused a gag order request in a libel lawsuit filed by Frank and Kathie Lee Gifford against a Florida-based tabloid.

The Giffords are suing the Boca Raton-based American Media Operations, owner of *The National Examiner*, on behalf of their son Cody. The family is suing over an article from Feb. 8, 2000, titled "Kathie Lee's Turning Poor Cody into a Monster."

The Giffords' lawyer asked Judge Timothy McCarthy, 15th Judicial Circuit, to bar either side in the case from speaking publicly about the case.

ADVERTISING

Campaign ad source of alleged violations

FT. MYERS – A campaign ad run in *The News-Press* of Fort Myers has landed former Lee County Sheriff John McDougall in trouble with the Florida Elections Commission.

He is accused of 69 violations of the state's elections law. The ad in question ran in September during his unsuccessful re-election bid and didn't carry the required disclaimer of "paid political advertising."

It ran 23 times and violated three sections of Florida Statutes each time it ran.

McDougall faces fines up to \$13,800. He says the newspaper should share the blame for the mistake because newspaper employees failed to add the disclaimer to the ad.

But *News-Press* officials say the McDougall campaign approved the final proof of the ad. (3/9/01)

While the secrecy was recommended by the task force looking into higher education reforms, the criminal penalties were added by Republican lawmakers sponsoring the bill. (*Brechner Report*, February 2001)

The measure may find less support in the Senate. Senate Education Chairman Ken Pruitt told *The Tampa Tribune* that he doesn't like the idea of search secrecy and wouldn't support an exemption effort in the Senate. (3/23/01 – 3/29/01)

McCarthy denied the request at a hearing in March.

At an earlier hearing, McCarthy granted a request by both sides for a blanket seal in the case, then changed his ruling when he realized that the lawyers must give public notice when they want to seal records.

The lawyers must now publish a legal notice and have a hearing in front of McCarthy every time they want to seal part of the court record.

The judge also ordered the two sides to enter mediation before mid-September. (1/19/01 – 3/17/01)

Concern over public records halt Bush e-mails

WASHINGTON – Friends of President George W. Bush won't be getting any more mail from G94B@aol.com after the president discovered in January that his e-mails could be considered public record.

Bush often sent e-mail from the now-defunct AOL address during the campaign. However, the president's lawyers advised him that his e-mail from the White House could become the

Library computer taken to fill records request

WHITE SPRINGS – A councilwoman's computer was taken from the White Springs Library after a resident made a public records request and alleged that the councilwoman was violating the Sunshine Law. Resident Joe Griffin filed a request in January to see city records supposedly contained on Tracy Woodard's staff computer at the library.

Suwannee River Regional Library Director Danny Hale said he removed the computer because it was easier than reviewing files at the library. (2/6/01)

INTERNET

Court won't allow AOL lawsuit

TALLAHASSEE – The Florida Supreme Court ruled in March that a Florida mother cannot sue America Online for allowing one of their subscribers to sell a video of her son being sexually assaulted.

In 1994, schoolteacher Richard Lee Russell made a video of himself and two other boys having sex with the woman's 11-year-old son. Russell then marketed the video to pedophiles through an AOL chat room. The mother sued AOL for \$8 million for allowing Russell to use the chat room to sell the video.

A trial court dismissed the lawsuit, and the 4th District Court of Appeal upheld the dismissal. The state Supreme Court also upheld the dismissal in a close 4-3 decision. According to the majority opinion, the federal Communications Decency Act protects Internet service providers like America Online from lawsuits concerning material generated by Internet users. (3/8/01 – 3/9/01)

subject of public records requests.

His farewell message, obtained under a public records request, went out to 42 people including his mother, Barbara Bush; Condoleezza Rice, the national security adviser; Andrew Card, the White House chief of staff; and golfer Ben Crenshaw. He told his friends he would miss their "ideas and encouragement" and said he would talk to them by phone. (3/19/01 – 3/21/01)

DECISIONS ON FILE

Copies of case opinions, Florida Attorney General opinions, or legislation reported in any issue as "on file" may be obtained upon request from the Brechner Center for Freedom of Information, College of Journalism and Communications, 3208 Weimer Hall, University of Florida, Gainesville, FL 32611-8400, (352) 392-2273.

University presidents' group examined

GAINESVILLE – State attorneys are investigating whether 10 Florida university presidents violated the Open Meetings Law in a series of private meetings.

The presidents formed the State University Presidents Association in November and have met at least four times in secret. (*Brechner Report*, April 2001)

Contracts prompt Open Meetings probe

TALLAHASSEE – State investigators are looking into whether former Florida Agriculture Commissioner Bob Crawford violated the Sunshine Law in awarding contracts for the state fair to Ed Gregory, a friend who received a presidential pardon.

Gregory was awarded a contract to be the sole midway operator for the Florida State Fair in Tampa. He made political

The same presidents also make up a group called the Council of Presidents, which advises the state's Board of Regents. The council conducts its business publicly.

Even though the Board of Regents is likely being abolished, eliminating the presidents' advisory role, critics say that the group should still be operating under the Sunshine Law. (3/18/01)

donations to Crawford's campaigns as well as to Sen. Hillary Clinton's campaign. In March 2000, Gregory and his wife, Vonna Jo, were given pardons by Clinton for bank fraud convictions.

State investigators are probing whether Crawford, now the director of the state's Department of Citrus, arranged the contracts in private rather than in public meetings. (3/8/01)

Former councilman sues over censure

CRYSTAL RIVER – A former councilman is claiming his First Amendment rights were violated when the city council censured him in July and also charges that three council members violated the Sunshine Law.

Alex Ilnyckyj was found guilty of disorderly conduct for two incidents at council meetings, was censured by the council and fined a month's pay – approximately \$436. Ilnyckyj is suing for \$650 in Citrus County Small Claims Court.

He alleges as part of the case that three council members violated the state's Open Meetings Law when they discussed the financial health of the city in private meetings.

The city considered settling the case but decided to fight it instead. (2/28/01)

Former reporter wins defamation lawsuit against Florida Today

TITUSVILLE – Former *Florida Today* reporter Kathy Reakes won \$400,500 in a lawsuit against the newspaper and its corporate owner, Gannett Co. Inc.

Reakes and former reporter John McAleenan were fired by the newspaper in 1996 after they went inside the vacant apartment of a jailed murder suspect. A grand jury investigated the incident, but

no criminal charges were ever filed against the two reporters.

Reakes later sued for defamation, claiming that Managing Editor Melinda Meers told another editor that Reakes had committed a criminal act.

The lawsuit also claimed Phil Currie, senior vice president of news at Gannett Co. Inc., defamed Reakes during a speech to other editors four months

after the firing.

Reakes testified during the trial that the two statements made it impossible for her to find newspaper work. The jury found for Reakes and ordered Meers and *Florida Today* to pay her \$400,000 and ordered Currie to pay her \$500.

A newspaper attorney said the company plans to appeal the verdict. (3/7/01 – 3/16/01)

DEFAMATION

NEWS NOTES

Jeffrey Toobin to speak at June 23rd conference

The Florida Bar's 27th Annual Media-Law Conference in June will feature legal analyst, journalist, lawyer and author Jeffrey Toobin as the keynote speaker.

A staff writer at *The New Yorker*, Toobin has written a best-selling book about the O.J. Simpson trial. His new book, *Too Close to Call: The 36-Day Battle to Decide the 2000 Election*, will be published by Random House in the fall of 2001.

Toobin also has been a legal analyst for ABC News since October 1996. He was previously an assistant U.S. states attorney in Brooklyn, N.Y.

Scheduled for 9 a.m. to 5 p.m. on June 23, the conference will also

feature workshops on election day news coverage, the impact of the Internet on coverage of the election case, cameras in the courtroom, privacy and defamation on the Internet, copyright and trademark issues, news and video vetting, and the public records issues raised by the recent ballot count.

The conference will be held at the Orlando World Center Marriott. The media law luncheon, featuring Toobin, requires a \$32 ticket.

Registration material and additional details about the conference are available by contacting Toyca Williams of The Florida Bar at (850) 561-5766 or by e-mailing her at twilliam@flabar.org.

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Earnhardt Act should be ruled unconstitutional

The “Earnhardt Act” creating a public records exemption for autopsy photographs is unconstitutional and should be struck down. An act creating such an exemption “shall state with specificity the public necessity justifying the exemption and shall be no

The Back Page

By Jon Kaney

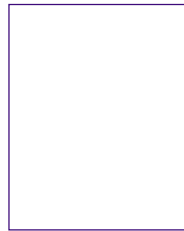
Article I, §24(c), Fla. Const. This act is, at once, unjustified, overbroad and underinclusive.

The act declares that autopsy photographs “are highly sensitive depictions ... of the deceased which, if heard, viewed, copied or publicized could result in ... emotional injury to the immediate family of the deceased as well as injury to the memory of the deceased.” It then provides that “a photograph or video or audio recording of an autopsy in the custody of the medical examiner is confidential and exempt” from the Public Records Law. The act allows free access to the surviving spouse, or other family members where no spouse survives, and allows a governmental agency to obtain access “in furtherance of its official duties.” Anyone else may gain access by suing in circuit court and showing good cause. It applies retroactively to all existing photographs. A violation of the act is a felony. (See Laws of Florida (2001), Chapter 2001-1.)

To sustain an exemption, the Legislature must identify a public necessity that justifies the exemption. This is a balancing standard. The public necessity must be sufficiently compelling to override the foundational value of public access to governmental records. Here, the stated necessity is not that weighty. The act says the necessity for the exemption is the state’s interest in protecting the family from discomfort resulting from any exposure to the images of the deceased without regard to whether the exposure is outrageous or reasonable. It pays no attention to the severity of the resulting distress, treating even the slightest emotional distress resulting from the most reasonable and sensitive portrayal as sufficient to override the public right of access. This is unjustifiable. While we must be sensitive to the emotions of the grieving, such extreme solicitude for that interest is unbalanced.

The act belies its inadequate justification by creating an open-

broader than necessary to accomplish the stated purpose of the act.”



Jon Kaney

ended exemption. It authorizes the courts to grant access based on a showing of “good cause.” When the Legislature recognized that good cause routinely would exist for access to these records, it conceded that there is no public necessity to deny all access to the records under all circumstances.

In deferring to the courts to curtail the overbreadth of the exemption, the Legislature breached its duty to narrowly tailor the exemption. In *Halifax Hosp. Med. Center v. News-Journal Corp.* 724 So. 2d 567, 570 (Fla. 1999), the Supreme Court refused to save an overbroad exemption with a narrowing construction, holding “**the task of enacting a more limited statutory exemption appropriately belongs to the [L]egislature.**” Here, the Legislature has painted the exemption with the broadest possible brush while implicitly conceding the exemption is radically overbroad. There is no conceptual difference between the overbroad exemption in *Halifax* and the overbroad exemption here, and there is no obvious reason why the Court should look more favorably on this particular form of overbreadth.

Even though the act is overbroad, it is also irrationally underinclusive. Because it applies only to autopsy photographs of the medical examiner, it excludes many other photographs of a deceased, such as photographs taken at the scene of death, photographs taken during the autopsy by police investigators, and similar materials. Since the act is so specifically aimed at the particular controversy arising out of the tragic death of racecar driver Dale Earnhardt, it irrationally ignores other circumstances. Such underinclusiveness exposes the lack of necessity for the act and undermines the arguments for the bill under the Constitution.

The true purpose of this act is to protect families against outrageous public display of the mordant images. It is unfortunate that the Legislature refused to tailor the exemption narrowly to that purpose.

Jon Kaney is a media attorney and partner in Cobb Cole & Bell in Daytona Beach. He is counsel to the First Amendment Foundation and the Florida Society of Newspaper Editors as amici curiae in one of the suits challenging the constitutionality of the Earnhardt Act.