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# THE BRECHNER REPORT

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## Expertsexamine Harris' computers

TALLAHASSEE – Computer experts hired by the media found that files had been erased from four computer drives released by Secretary of State Katherine Harris but said there was no evidence of wholesale, intentional deletions.

Harris turned over four computer hard drives, first to her own expert and then to the media, which wanted to examine the drives to see if records from the 2000 election had been erased.

Harris first refused media requests to access the computers, but then

**ACCESS  
RECORDS** relented. The media request also sparked a disagreement between

Harris and Attorney General Bob Butterworth about what is public record under the state's Sunshine Law.

The computer drives became an issue after *The New York Times* wrote an article that suggested Republican political consultants, who used the computers to write public statements, helped shape how ballots were counted.

Harris hired expert William G. Morgan of Bradenton to check the hard drives. Ontrack Data International Inc. examined the computers on behalf of 13 media organizations. Neither expert found evidence of wholesale file erasure. Harris said that all the public records have been preserved and released. But Harris' lawyer said that personal e-mails stored on the state computers were not released.

Butterworth, however, advised Harris that the material on the computers was considered public record. "It remains the position of this office that material on state-owned computers is public record unless it falls under specific legislative exemption," Butterworth wrote in a letter to Harris. (7/17/01 – 8/8/01)

## Papertoappealautopsyruing

DAYTONA BEACH – A student-run newspaper plans to appeal a judge's ruling that bars release of NASCAR driver Dale Earnhardt's autopsy photographs.

Judge Joseph Will, 7th Judicial Circuit, denied requests from *The Independent Florida Alligator* and a DeLand-based Web site to access the autopsy photos. He also ruled that a new state law that restricts access to all

autopsy photos is constitutional. (*Brechner Report*, July 2001)

The newspaper asked for a new trial, saying that 77 pieces of evidence were wrongly excluded from the first hearing. The request for a new trial was denied, and Tom Julin, the newspaper's attorney, said the *Alligator* plans to appeal the decision to the 5th Circuit Court of Appeal. Julin said the appeal should be ready in October. (7/24/01 – 8/1/01)

## Judgejailsjournalistforcontempt

HOUSTON – The 5th U.S. Circuit Court of Appeals upheld the jailing of a journalist on a contempt citation, saying that the qualified privilege does not protect journalists from grand jury subpoenas unless the journalists can show government harassment.

At the Justice Department's request, U.S. District Judge Melinda Harmon found Vanessa Leggett, a crime writer and a lecturer at the University of Houston, in contempt for refusing to turn over taped interviews and investigative materials.

Leggett was ordered jailed without bond. If Leggett does not turn over the

material to the Justice Department, she could face up to 18 months in jail.

According to the Associated Press, the 5th Circuit upheld the decision, saying "this court takes a narrow view of the journalist's privilege in criminal cases, particularly in grand jury proceedings."

The Justice Department last had a journalist jailed in 1991. U.S. Rep. Sheila Jackson Lee, D-Houston, said she wants Attorney General John Ashcroft to look into the case because she feels the department has not followed its internal procedures for having journalists jailed. (7/25/01 – 8/18/01)

## REPORTER'S PRIVILEGE

## Courrulesforfreelancersincopyrightcase

WASHINGTON – The U.S. Supreme Court ruled that newspaper and magazine publishers violated the copyrights of freelance writers when they made their works available through electronic databases without the freelancers' permission.

The case involved work freelance writers did for the print editions of newspapers and magazines that was then reproduced in an electronic format in databases such as LEXIS-NEXIS. The question for the Court was whether the

electronic database was a new work, which would mean the freelancers controlled the rights, or was a reproduction of a collected work, which would mean the publishers controlled the rights. The Court, in a 7-2 decision, sided with the freelancers, saying stories published in databases were "disconnected from their original context" and therefore were not reproductions of a collected work. The case was sent back to the U.S. District Court in Manhattan. (6/25/01 – 7/16/01)

## COPYRIGHT

# Opinion: Autopsy photos can be used during training

TAMPA – Medical examiners can show autopsy photographs as part of training for public agencies but not for private agencies, according to an opinion by Attorney General Bob Butterworth.

Butterworth responded to six questions from Hillsborough County Attorney Emeline C. Acton about the state's new law exempting autopsy photographs and recordings from the Public Records Law. Medical examiners face a third-degree felony charge if they violate the law.

Butterworth wrote that medical

examiners do not need a judge's order to show autopsy photographs to governmental agencies as part of a training program. The same records could not be shown to a private entity, such as a private university, without a court order, according to the opinion.

While autopsy photographs can be shown during criminal and administrative proceedings, anyone wanting to submit autopsy photos as part of a civil trial would have to first get a court order, Butterworth wrote. Anyone seeking a court-ordered release must

also "make a reasonable effort" to find the next of kin, he said.

Crime scene photographs are not considered autopsy photographs or recordings and are not subject to the exemption, according to the opinion.

When using autopsy photographs in an official capacity, Butterworth wrote that medical examiners must take steps to protect the identity of the deceased, including keeping the names confidential and placing a black strip over the eyes of the deceased.

(7/11/01 – 7/14/01; AGO 2001-47)

## Paper copies records for Palm Beach

WEST PALM BEACH – Instead of requesting a record from the Palm Beach County Elections Office, *The Miami Herald* gave the office a copy of an election record.

Palm Beach officials wrote over computer files that capture images of every punch-card ballot during an election. The files serve as a backup on election night.

Although election rules do not require officials to save the file, many counties kept copies of the file because of media requests. After the 2000 presidential election, many media

members requested the files as a way to study ballot trends without looking at the more than 400,000 punch-card ballots.

When the *Chicago Tribune* requested a copy of the files recently, the elections office discovered the files had been overwritten during the county's municipal elections in March. *The Herald*, however, still had a copy it had requested before March and gave a copy to the elections office. Theresa LePore, the county's supervisor of elections, said she copied the files for the *Tribune* and is keeping another copy in case of more requests. (8/1/01 – 8/7/01)

## County wants fees up front

POLK COUNTY – People requesting copies of public records in Polk County will now have to pay for them before the records are released.

The county developed the policy after a union requested and then failed to pay for or pick up more than \$4,000 worth of copies.

Copying charges will be collected before records are released. If the estimated copying costs are more than \$100, then the requester will be required to pay before the copies are made.

The county will give requesters a form, which contains the estimated cost of the copies and the date the copies will be prepared. People requesting records will also be permitted to examine the records before copies are made. (7/3/01)

## Judge seals discovery material in murder trial

ST. AUGUSTINE – A circuit court judge has sealed pre-trial discovery materials in the case of a Ponte Vedra Beach woman charged with killing her two sons.

Judge Robert Mathis, 7th Judicial Circuit, ruled that he would examine the materials offered during the discovery phase of the murder trial before

deciding whether or not to release the documents.

Attorneys representing Leslie Ormandy Demeniuk asked the judge to bar the public release of documents such as police reports and interviews because they felt publicity from the release of the evidence could damage Demeniuk's right to a fair trial. (7/6/01 – 7/11/01)

## 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, P.O. Box 118400, University of Florida, Gainesville, FL 32611-8400, (352) 392-2273.*

## AGO: Some foster home abuse records are open

TALLAHASSEE – According to an opinion from Attorney General Bob Butterworth, some state records of child abuse, neglect and abandonment in foster homes are public while information that identifies a victim remains exempt.

The Florida Department of Children and Families requested the opinion to settle issues regarding its incident reports, which summarize, among other things, investigations of abuse claims in foster homes. Investigation records of

child abuse, neglect or abandonment are closed under state law.

Butterworth said that the incident reports are open to public scrutiny because they are used for quality assurance purposes and for licensing foster homes and are "separate and distinct" from investigative records.

Information, however, that reveals the identity of the victim should be redacted from released reports, according to the opinion. (7/23/01 – 7/25/01; AGO 2001-54)

# PRIVACY

## Ybor City face-scanning system draws privacy protests

TAMPA – Tampa will keep a face-scanning surveillance system in place in Ybor City despite protests and opposition from the American Civil Liberties Union, U.S. House Majority Leader Dick Arme, R-Texas, and other privacy advocates.

The system allows police to take images from crowds in Tampa's Ybor City section and compare those images to a computer database of criminals and missing people. The city is getting the

## Commissioner issues emergency rule

TALLAHASSEE – Florida Treasurer and Insurance Commissioner Tom Gallagher issued an emergency rule in July to protect information about a citizen's income, credit history and mental health status.

The rule prevents insurance companies from releasing personal health data without first seeking a consumer's permission. Insurers are also required to inform consumers before using or sharing their personal

software for free on a one-year trial basis.

The camera system has drawn protestors, who marched in Ybor City wearing masks. Arme called for congressional hearing on the system.

"These surveillance systems are ineffective and will lead the police to stop people who have done nothing wrong. We believe the privacy risk outweighs any benefits that these devices may offer," Arme and the

financial information.

The emergency rule is valid through the end of September.

The agency is working on a rule that will be enacted permanently as authorized by legislation passed during the 2001 session.

"My goal is to ensure that the final rule implemented is simple, unobtrusive and fairly protects the privacy of health and financial information," Gallagher said in a statement. (7/2/01 – 7/19/01)

ACLU said in a joint statement.

Mayor Dick Greco, who is the only one with the power to cancel the contract with the system's supplier, supports the system. In a mostly symbolic vote in early August, the Tampa City Council decided 4-3 to keep the cameras.

"There is not reasonable expectation of privacy on a public street," said Councilman Charlie Miranda. (6/30/01 – 8/3/01)

## Driver's family sues Website over photos

BUNNELL – The family of NASCAR driver Rodney Orr is suing a DeLand-based Web site for posting autopsy photos of Orr.

Website.com posted 38 autopsy photos of Orr either naked or in bloodied racing gear and 48 autopsy photographs of driver Neil Bonnett. The two men were killed in 1994 during practice sessions for the Daytona 500.

The family filed a lawsuit in Flagler County to get the site to remove the photos. The Orr family also may ask for punitive damages. The Web site also is trying to access Dale Earnhardt's autopsy photos. Orr family members testified for the Earnhardts, saying the Web site's display of the photos caused them anguish. (5/25/01 – 5/26/01)

## ACCESS RECORDS CONTINUED

### Pawnbroker database to remain exempt

TALLAHASSEE – Records of pawnbroker transactions that are included in a statewide database remain confidential and exempt from the state's Public Records Law, according to an opinion from the attorney general.

James T. "Tim" Moore, commissioner of the Florida Department of Law Enforcement, requested the opinion from Attorney General Bob Butterworth because the state is about to bring online a

centralized database of local pawnbroker transactions. Funded during the 2000 legislative session, the database allows investigators to find stolen property pawned elsewhere in Florida.

Pawnbroker records collected by local law enforcement are exempt from Public Records Law. Butterworth said the records will remain exempt when they are entered into a new statewide database for law enforcement officials. (AGO 2001-51)

### AGO: Ballots should be sorted by machine

TALLAHASSEE – An opinion from Attorney General Bob Butterworth said election officials must use optical scanning equipment to separate ballots as part of a public records request even if the ballots have already been separated by hand.

Thomas V. Dannheisser, the Santa Rosa county attorney, requested the opinion after the county's supervisor of elections was asked to separate the overvotes and the undervotes from the 2000 presidential ballots.

The ballots were separated by hand,

but the New York Times Co. then asked for the ballots to be separated by the optical scanning machines because the hand count produced 17 percent fewer overvotes and 22 percent fewer undervotes than on election day.

Butterworth said that election officials should honor requests for a machine count as long as the requestor pays the sorting costs. Unlike punch cards ballots that might lose chads, optical scanner ballots are unlikely to be changed by the sorting process, he said. (5/22/01, AGO 2001-37)

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# Definition of journalist needs to be broadened

For a host of good reasons, American journalists have always resisted suggestions of a licensing system. Licensing journalists smacks suspiciously of bureaucracy, red tape and governmental intrusion and works against the essential independence of the press.

However, a lack of a licensing system means that defining who is and who is not a journalist is sometimes

## The Back Page

By S. Camille Broadway

a tricky proposition. But defining who is a journalist is central in deciding who qualifies for First Amendment and state-mandated protections for the press. In the case of Vanessa Leggett, a Texas journalist jailed for contempt for refusing to turn over notes and interviews, it was argued that she was not eligible for the qualified journalistic privilege of protecting her sources because she was a freelance writer and not a member of the institutional press (*See story, page 1*).

According to the Associated Press, the 5th U.S. Circuit Court of Appeals noted in an opinion upholding Leggett's jailing that she was "a virtually unpublished freelance writer, operating without an employer or contract for publication." In the end, however, the appeals court's decision did not hinge on whether Leggett was a journalist but on whether journalists have any qualified privilege against answering grand jury subpoenas. The 5th Circuit ruled that journalists do not.

While the appeals court failed to rule definitively on whether it considered Leggett and others like her to be journalists, the case still reminds us how difficult defining "card-carrying" journalist can be. The increased development of the Internet as a news outlet will only continue to blur the distinctions.

Traditional news media have staked a claim in cyberspace with ever increasing numbers of Web sites, but they are far from the only online news sources. Web sites like Salon.com, TheStreet.com, stateline.org, and CNET.com report news, provide information and offer commentary but exist only in the bits and bytes of cyberspace. They act like media organizations. They look like media organizations. But the people who work for them may not have the same protections as other media organizations because Web sites often do not fall into the traditional definitions for media.



S. Camille Broadway

Florida's shield law defines a professional journalist as someone who is regularly engaged in collecting or reporting news while working as a "salaried employee of, or independent contractor for, a newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine." The statute specifically excludes book authors from the definition of professional journalist and makes no mention of the Internet as a medium.

A new state law that governs access to accident reports takes an even more narrow view of who is a journalist. The journalists who can access accident reports within 60 days of filing are defined as being from radio and television stations licensed by the Federal Communications Commission, newspapers qualified to publish legal notices, and free newspapers with a general circulation that publish once a week or more often. Wire services, news magazines, news journals, networks and, of course, Web sites are not mentioned.

First Amendment scholar Clay Calvert has examined a series of appellate court decisions that attempted to define "journalist" for the purpose of qualified privilege. He notes that some federal courts seem to be moving away from defining journalists based on the organizations for which they work or the medium in which their information is published. Instead, the courts are ruling that non-traditional journalists seeking protections must prove that they were, from the beginning of the investigative process, actively seeking information for the purpose of producing some type of news.

Indeed, the 5th Circuit said that if it had taken up the issue of whether Leggett was a journalist, it would have examined whether she intended to release information to the public at the time she collected the materials and conducted the interviews.

In considering future protections for journalists, Florida also may need to focus on safeguarding newsgathering as a function rather than on the press as a medium or an institution. As the ranks of journalists grow, it becomes important to broaden our descriptions and to argue for protections for those that do not seem to fit existing definitions.

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