
THE BRECHNER REPORT

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Corporations, not journalists, make most requests

WASHINGTON – Contrary to one of the most popular misconceptions about who uses FOI laws, a new study showed corporations made 40 percent of all freedom of information requests at four federal agencies during the first six months of 2001, while journalists made only 5 percent of the requests, according to a survey by the Heritage Foundation's Center for Media and Public Policy.

The center requested the FOIA logs of the General Services Administration, the Environmental Protection Agency, the Health Care Financing Administration, the U.S. Department of

Some Reagan era records to be released

WASHINGTON – The National Archives and Records Administration has scheduled the release of about 8,000 documents from the administration of President Ronald Reagan. The papers are part of 68,000 documents that were scheduled for release almost one year ago under the Presidential Records Act of 1978. That release was blocked by an executive order by President George W. Bush that redrafted procedures for releasing records of former presidents. (*Brechner Report*, December 2001)

Historians and freedom of information advocates filed a federal lawsuit to gain access all the Reagan documents. The lawsuit claims that the executive order, which gives both the sitting president and former president the right to withhold records, violates the law. The Presidential Records Act made presidential records the property of the government, subject to release 12 years after the end of the president's term of office. This release will not affect the lawsuit, according to the plaintiffs. (1/3/02)

Education and the U.S. Department of Transportation. By late November, the Health Care Financing Administration had not responded to the request.

Corporations accounted for the largest segment of FOIA requests sent to the four other agencies during the first six months of 2001, approximately 910 of the 2,285 requests. After corporations, lawyers made up the biggest group with 567 requests. Individuals who did not identify their employer made 373 requests, or approximately 16 percent of the total, followed by individuals representing non-profit organizations

with 181, or 8 percent of the requests. Media members made the least amount of FOIA requests at 119.

Only the GSA and the EPA responded to the center's request within 20 working days, a requirement of the FOIA. The Education Department did not even log the June 15 request until Aug. 7 and produced the requested documents on Oct. 10 only after a series of phone calls. The Transportation Department's log arrived on Nov. 1 with much of the information redacted. The HCFA had not produced any documents. (11/30/01; Study available at http://www.heritage.org/media_center/studies/113001.html)

ACCESS RECORDS

Writer released after 168 days in custody

HOUSTON – Writer Vanessa Leggett was released from jail on Jan. 5, after 168 days in custody for contempt of court. (*Brechner Report*, January 2002)

Leggett, who is working on a book about a 1997 murder, has refused to turn over notes sought by prosecutors in the case. The 5th U.S. Circuit Court of Appeals upheld the contempt ruling, but Leggett was released automatically when the term of the federal grand jury that had

subpoenaed her expired.

Her release may only be temporary. The U.S. attorney's office noted in a court filing, "The United States intends to renew its request of Leggett to provide the previously requested material and will pursue available proceedings to require Leggett's cooperation." On Jan. 2, Leggett's lawyer, Mike DeGuerin, asked the U.S. Supreme Court to review her case on both First and Fifth Amendment grounds. (1/2/02 – 1/5/02)

REPORTER'S PRIVILEGE

FDLE commissioner admits 'mistake'

ORLANDO – FDLE Commissioner Tim Moore admitted it was a mistake to close a portion of a Nov. 29 meeting of the state's Domestic Security Advisory Council in Orlando. When he closed the meeting, Moore said that sensitive intelligence matters would be discussed, making the meeting exempt from Florida's Open Meetings Law. He later said that the Israeli anti-terrorism experts who spoke

during the closed portion of the session had safety concerns. Reporters protested and were allowed to re-enter the meeting after Moore consulted with lawyers. When the reporters returned, the experts were almost finished with their presentation.

In a letter responding to an *Orlando Sentinel* complaint, Moore stated, "We made a mistake – plain and simple." (12/19/01)

ACCESS MEETINGS

School board questions importance of open records

BROOKSVILLE – Several members of the Hernando County School Board used a December meeting to express their reservations about the broad reach of Florida’s Sunshine Laws. Board member Jim Malcolm stated that he would “delay giving out copies of that stuff if it’s detrimental to the organization.”

The board has not denied any specific

request for information, but Malcolm and other members used the occasion to voice their opinion that preliminary internal communications should not necessarily be considered public information. Robert Wiggins, a board member and county government employee, stated that in his opinion any document could be withheld from public view if it has “draft” stamped on it.

Malcolm later clarified that he was in no way advocating that the superintendent break the law, but reaffirmed that he would risk legal action to keep certain documents private.

In 1992, all five Hernando School Board’s members, none of whom still serve, were indicted for open meetings violations. (12/17/01 – 12/18/01)

Aisenberg tapes will be released

TAMPA – Federal prosecutors have withdrawn their objection to the release of 35 tapes made from court-approved bugs in the home of Steven and Marlene Aisenberg during an investigation into the disappearance of their daughter.

The Aisenbergs were indicted in 1999 for lying about the disappearance of their infant daughter Sabrina from their Valrico home in 1997. The case, based on court-approved bugs in the couple’s kitchen and bedroom, was dropped in February 2000 when a magistrate ruled the tapes inaudible.

The Tampa Tribune, WFLA-TV Channel 8 and WTSP-TV Channel 10, as

well as Aisenberg defense attorney Barry Cohen, had argued that the tapes be made public. Assistant U.S. Attorney Ernest Peluso originally argued their release could compromise the continuing investigation. Aisenberg attorneys plan to file a motion to ensure that the prosecutors release the tapes in their entirety, and not simply the excerpts they planned to play in court.

The Aisenbergs are currently seeking reimbursement for their legal fees under the Hyde Amendment, which allows those who have been victimized by “bad-faith” prosecutions to recover legal fees. (11/23/01 – 1/5/02)

COURTS

Accused accomplice wants trial televised

WASHINGTON – Lawyers for the first person indicted in the September 11 hijackings are asking for the trial to air on television. Television networks have joined lawyers for Zacarias Moussaoui, the accused accomplice of the September 11 hijackers, in seeking to overturn a ban on cameras in federal courts.

“The entire nation has a direct interest in these proceedings, if not the entire world,” argued Lee Levine, an attorney representing the television networks.

Justice Department Attorney Elizabeth Collery told U.S. District Judge Leonie Brinkema that televising the trial might affect testimony. In 1996, the Judicial Conference of the United States stated that each court of appeals may decide to allow broadcasts in its geographic area, while urging courts to continue the ban.

During the hearing, two small cameras were used to televise the proceedings to a nearby overflow room, and the judge noted that new technology made cameras less intrusive. Moussaoui faces the death penalty if convicted on six counts of conspiracy. (1/9/01)

Marion County libraries offer restricted access

OCALA – The Marion County Public Library system will now offer two borrowing options for children: full access and restricted access. Parents of children under the age of 17 can opt to limit their children’s access to only those titles with call letters “E” and “J,” which are generally available in the children’s section of the library.

Children will have full access to

library materials unless their parents designate restricted access on the minor’s library card. The new policy applies only to materials that are checked out of the library. Minors still have unfettered access to materials while in the library.

The new regulations come after months of debate over access to some sex education titles that a number of parents deemed inappropriate. (11/2/01)

FIRST AMENDMENT

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.

Harry Potter survives parental challenge

NEW PORT RICHEY – A Mitchell High School teacher can continue to read *Harry Potter and the Prisoner of Azkaban* to her class – for now.

Responding to a parent’s charge that the book taught the religion of witchcraft, principal Tina Tiede asked a panel of six parents to read the book, and make recommendations. Her decision was that the book was “pure fantasy” and “not religious.”

William Niland, the parent of an eleventh grader whose teacher was

reading the book aloud to her class, said the book clashed with his son’s Christian beliefs. The boy was allowed to leave the class during the reading sessions. Niland now plans to appeal the principal’s decision to the school board.

Meanwhile, in Pinellas County, School Superintendent Howard Hinesley upheld a committee’s decision to ban *The Chocolate War*, the story of a high school student ostracized by his classmates, from the middle school curriculum. (11/28/01 – 12/01/01)

Fire commissioners cleared of violation

SPRING HILL – The state attorney’s office cleared fire commissioners Bob Kanner, Gene Panozzo and Jeff Hollander of charges that they violated Florida’s open meetings law on several occasions. The charges were filed by former fire chief Mike Morgan.

According to Morgan, the inspectors often met in private. Morgan also said that they had discussed his retirement plans in private.

The commissioners say that they often dine together, but do not discuss district business at those dinners.

Hollander recently received an e-mail from Morgan asking him to help him put together a retirement package. Morgan requested that the message not be made public, but Hollander put a copy of it in the district’s public records file.

Morgan told the *St. Petersburg Times* about the alleged violations, some as far back as 1995, the day after the Spring Hill Fire and Rescue District Commission voted 4-0 to force Morgan to accept early retirement, and to deny him \$17,000 in accrued sick leave. (11/20/01 – 12/15/01)

Code enforcement board member cleared

NORTH PORT – North Port City Attorney Rob Robinson found it was “impossible to determine” if an alleged non-public meeting about an upcoming meeting of the North Port Code Enforcement Board violated the state’s Sunshine Laws and “will therefore take no further action.”

Board member Paul Gantz complained to Robinson that fellow board member Fred O’Dell asked for his support for a no-confidence vote against board attorney William Salomone

before a Sept. 24 meeting. Gantz says that he did not know what a no-confidence vote was, and that O’Dell explained it to him.

Following the alleged discussion, O’Dell made the no-confidence motion, which passed. Gantz voted against it. Salomone resigned within the week.

According to a letter from North Port City Attorney Rob Robinson, “It is impossible to determine whether a violation of the Sunshine Law in fact occurred.” (12/7/01)

NEWSGATHERING

Judge denies Flynt request for front-line access

WASHINGTON – U.S. District Court Judge Paul Friedman supported the Pentagon’s decision not to allow reporters access to front-line troops in Afghanistan. Larry Flynt, the publisher of *Hustler*, initiated the lawsuit seeking an official ruling that journalists have a First Amendment right to cover war coverage on the front lines.

The government argued that reporters do not have a right of access to combat situations. However, the judge did not

close the door on that possibility in his ruling. “The court is persuaded that in an appropriate case there could be a substantial likelihood of demonstrating that under the First Amendment the press is guaranteed a right to gather and report news involving United States military operations on foreign soil subject to reasonable regulations.” Friedman noted that in this case, the press has been granted access to cover the war. (11/20/01 – 1/9/02)

FIRST AMENDMENT CONTINUED

Zephyr hills backs off anti-gossip provisions

ZEPHYRHILLS – City officials have backed off an anti-gossip clause in the employee manual. City Manager Steve Spina drafted a new rule to protect city employees from workplace gossip.

The original draft of the clause read: “Employees shall not criticize the city or its policies, programs, actions or officers or perform any acts or make

any written or oral statements which tend to bring them into disrepute or ridicule. ... Employees shall not gossip about any other member or employee....” After citizens and employees expressed First Amendment concerns, the manual now requires employees to “...treat co-workers, the public and others with respect and courtesy.” (9/14/01 – 9/23/01)

Prosecutors won’t charge school official

PALM BEACH COUNTY – The state attorney’s office will not file criminal charges against a Palm Beach County School District administrator who was accused of releasing confidential documents. Ed Oppel, chief of facilities, gave a preliminary audit report to a vendor whose business was the subject of the audit. Audits do not fall under the Public Records Law until they are complete.

Oppel told investigators that he thought the audit was complete and the document was a public record. An investigator in the State Attorney’s Office said that Florida’s criminal laws only punish those who withhold public records, not those who give out exempt documents. (10/2/01)

County to request Sunshine opinion

BARTOW – The Polk County Commission is asking the Florida Attorney General’s office for an official opinion of whether the governing board of the Central Florida Development Council falls under the state’s Sunshine Law.

The development council consults with the county’s tourism and development staff. Theron Stangry, the incoming president of the CFDC, said he would welcome clarification of the Sunshine issues. (9/6/01)

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REPORT

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A black hole at the White House

Add a new category to the Guinness Book of World Records: Longest Delayed Presidential Veto, 23 years, set by George W. Bush.

Strictly speaking of course, Bush's executive order adding roadblocks to key provisions of the 1978 Presidential Records Act doesn't count as a veto. Still, what else should we call an edict that essentially cancels

The Back Page

By Ian Marquand

Let me say at the outset that I may never take the opportunity to delve deep into the papers of Ronald Reagan, George H.W. Bush, Bill Clinton or any other president, including the current occupant of the White House. However, as a journalist, an admirer of historians and an American who believes in the power of information to reveal truth, I want to be assured that the records of our former chief executives are open to examination and analysis, even if it happens years after they have left the White House.

In 1978, Congress passed the Presidential Records Act, which required that most presidential (and vice-presidential) papers be subject to the federal Freedom of Information Act five years after the president had left office. Presidents may withhold certain records for an additional eight years – plenty of time, thought Congress, for issues of immediate concern to be no past importance. According to the Act, once the 12-year period ends, the withheld documents fall under FOIA and are subject to public requests.

The records of President Ronald Reagan and Vice President George H.W. Bush were the first to be subject to the PRA. This past January, the 12-year privilege period ended for their papers, triggering their availability under FOIA.

Or so we thought. Two months after taking office, new President Bush asked that the Archivist of the United States delay the release of some 68,000 Reagan-Bush papers. The new Bush team wanted to think about legal issues surrounding the material, as well as what processes should be employed for its release. After requesting two more delays during the summer months, the other shoe finally dropped on Nov. 1, when Bush issued an executive order granting former presidents a virtual veto over the release of their papers.

Now, either a sitting or former president can block release. Reagan's 1989 order directed the archivist of the United States to



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notify the sitting president when 12-year privilege expired. The new Bush order goes further. Now, the archivist must notify the former President (or his estate) as well as the sitting president when a request is made for those records. If the former president blocks access, the sitting president cannot unilaterally grant it. Conversely, if the former president grants permission for the release, the sitting president can overrule him. In other words, both presidents have to agree on which records can be released.

It also delays release far beyond FOIA provisions. Once a former president is informed of a request, he has 90 days to grant or deny access to the records sought. (If Congress asks, the time is reduced to 21 days.) During that time, there will be no access to the records. The former president also can ask for an extension of the 90-day period. Again, there will be no access during that period.

The bottom line is that the order allows sitting and former Presidents to supercede FOIA without the consent of Congress. On that basis alone, the order should not stand.

Adding to the intrigue is the unavoidable family connection. It also isn't hard to imagine members of the current president's team who served in the Reagan-Bush years asking for consideration. Fortunately, reaction to the executive order has attracted a lot of attention. On Nov. 6, Rep. Stephen Horn's House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations held a hearing on the issue.

Editorials have decried the order. The *Los Angeles Times* said it would "nudge the nation's highest office back toward democracy's dark ages, when history could effectively be kept from the public." A coalition has filed suit to have the executive order overturned. Whether or not you revere the memory of the Reagan years and legacy, the idea that a president could undo a long-standing public law with the stroke of a pen should arouse the constitutional defender in all of us.

So, the Reagan documents remain unavailable. Only the most optimistic of us believe they'll be open for inspection anytime soon. If the good guys win, however, and Americans end up learning things the Bushes wish we didn't, George the son still has an ace up his sleeve.

Dad could always get a pardon.

Ian Marquand is the Freedom of Information Chair for the Society of Professional Journalists.