THE
BRECHNER REPORT

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Four county commissioners indicted on open meetings violations

PENSACOLA – Four of the five Escambia County commissioners were arrested on charges of bribery, racketeering, theft, and violating the state's Sunshine Law. Gov. Jeb Bush suspended Mike Bass, former state senator W.D. Childers, Willie J. Junior and Terry Smith, and must now appoint four interim commissioners to serve for those arrested.

ACCESS MEETINGS

The commissioners were indicted along with local real estate agent Joe Elliot in conjunction with an ongoing grand jury investigation into questionable land purchases. Elliot reportedly made a gross profit of $700,000 by selling two properties to the county. Elliot's wife, Georgeann, was also indicted.

All four commissioners were charged with multiple misdemeanor counts of violations of the state's Open Meetings Law. Each misdemeanor count is punishable by a maximum of 60 days in jail and/or a $500 fine.

According to witness statements, the four commisisoners talked about public business in telephone conversations and in front of employees. In taped statements, witnesses said that the commissioners discussed public business over a lunch of country-fried venison in W.D. Childers' district office.

The cases have been assigned to Okaloosa County Judge T. Patterson Maney in order to avoid any conflict of interest on the part of Escambia County judges. Jury selection is set to begin June 24. (5/1/02–5/3/02)

Attorney's fees more difficult to collect

WASHINGTON – The D.C. Circuit Court of Appeals decided that agencies that comply with a freedom of information request before a court order compels the release of the records are not liable for the FOI requester's attorney's fees, even if the requester has already filed suit to get access to the records. The ruling is based on a case filed by the Oil, Chemical and Atomic Workers International Union against the United States Enrichment Corp., a government corporation that produces enriched uranium, in an attempt to get records related to the government's attempts to privatize the company. The agency finally provided the records sought by the union two years after they were originally requested, but before a judge had ruled on the request.

ACCESS RECORDS

Some FOI advocates worry that this ruling removes the only practical sanction available to requesters under the FOI Act. While the law does provide for the discipline of federal employees who are "arbitrary and capricious" in processing FOI requests; in reality, that provision is rarely invoked. Robert Becker, the Sunshine Project Chair for the Society of Professional Journalists in D.C., said, "The net effect is that agencies send the message that it's going to cost you big bucks to get this info, and we're going to prevent you from recouping those costs. That's a pretty powerful disincentive to litigating FOI cases." (5/15/02)

Marion Brechner honored for FOI work

Mrs. Marion Brechner was honored by the National Freedom of Information Coalition at its annual convention in Orlando, Fla., May 3. Mrs. Brechner was recognized for her outstanding commitment and unwavering dedication to freedom of information and the work of the Brechner Center for Freedom of Information. The Center was named for Marion's late husband, Joseph L. Brechner. The Brechners' generous gifts fund the endowment for the Brechner Center, the Marion Brechner Citizen Access Project and five graduate student fellowships in the College of Journalism and Communications at the University of Florida. Above, Tom O'Hara, NFOIC president and managing editor of Cleveland's Plain Dealer, thanked Marion on behalf of the national access community.

Employees decide if e-mail is private

CLEARWATER – Florida's 2nd District Court of Appeal upheld the trial court's ruling that two Clearwater city employees could decide whether or not e-mails sent between them were public records. A reporter from the *St. Petersburg Times* requested the e-mails, which were retrieved by the workers on city computers. According to city policy, the two were allowed to sort through and determine which were public records. Those messages deemed public records by the employees were given to the *Times* on CD-ROM.

The *Times* sued for access to the rest of the e-mails. However, Judge Chris Alterbernd said, "private or personal e-mail simply falls outside the current definition of public records," because it is "not made or received pursuant to law or ordinance." He rejected the idea that when e-mail is stored on a municipal computer it becomes a public record.

Judge Alterbernd found no problem with the city allowing the employees to act as official records custodians. Custodians are required by law to determine which records are public. "Nothing in this provision limits who the elected officer may designate ... to review requested records." Finally, the opinion noted, "We make no assumptions about the specific government employees who were the target of the *Times*' investigation. However, a government employee who spends most of the day working on private matters and personal correspondence or viewing websites for personal entertainment can currently respond to a public records request by declaring that the records of it are not public." (5/10/02)

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,

Federal courts try online record access

WASHINGTON – Eleven federal courts are participating in a pilot program that will provide public access to criminal case files via the Internet. Some of the courts participating in the pilot program had begun providing such online access, but the practice was suspended by the Judicial Conference of the United States, the policy-making arm of the federal court system, in the wake of the Sept. 11 terrorist attacks.

The courts participating in the pilot program include the 8th U.S. Circuit Court of Appeals and 10 district courts: the Southern District of California, District of Columbia, Southern District of Florida, Southern District of Georgia, District of Idaho, Northern District of Illinois, District of Massachusetts, Northern District of Oklahoma, District of Utah and Southern District of West Virginia. The records will be available through the courts' Public Access to Court Electronic Records system, or PACER, at a cost of 7 cents per page. (5/8/02–5/13/02)

FOI request for animal records denied

WASHINGTON – Saying that animals kept by the National Zoo have a "physician-patient" relationship that protects their privacy, Lucy Spelman, director of the National Zoo, denied a freedom of information request from *The Washington Post*, which sought information on the death of a giraffe.

In an e-mail to *Washington Post* reporter D'Vera Cohn, Spelman wrote, "Certainly the privacy rules that apply to human medical records, and the physician-patient relationship, do not apply in precisely the same way to animal medicine at a public institution like the National Zoo. But we believe they do in principle." Spelman also cited the public's inability to understand the autopsy data and the possible disruption of scientific research in her FOI denial.

The National Zoo, which is a part of the Smithsonian Institution, claims it is not an executive branch, and therefore not subject to the FOI Act. Nevertheless, it asks for interested parties to file FOI requests for information. (5/6/02)

Sunshine battle continues in Chiefland

CHIEFLAND – The Chiefland City Commission voted to use taxpayer funds to finance the personal defenses of four city commissioners and the city manager named in a Sunshine lawsuit, as well as their defense in a separate recall lawsuit. The suit names the commissioners – Kelby Andrews, John Hart, Betty Walker and L.R. Hunter – as well as City Manager Earl Cannon as individuals, as well as in their official capacities.

Commissioner Sunshine Bayard claims the other four commissioners violated the Sunshine Law during the debate over dissolving the Chiefland Police Department. After the suit was filed, the other commissioners voted to begin impeachment proceedings against Bayard.

The commission voted to authorize Cannon to secure joint legal representation for the five. However, this raised additional open meetings questions. City Attorney Lindsey Lander is reviewing whether or not the five can legally meet with their lawyer in private. (4/18/02–4/25/02)

Harris e-mails sought for fundraising

SARASOTA – The 750,000 e-mails received by Katherine Harris in the days following the 2000 presidential election have become an important source for fundraising information in the District 13 congressional race. The state charges $170 for copying the e-mails, which are public records. Harris' campaign requested a copy of the list, and offered correspondents a place on her e-mail list. Later, Brad Weigle, a Democrat running for the same seat, obtained the list, since he thought some of those that e-mailed Harris might be interested in supporting her competition.

Chester Flake, a Republican challenger, originally said that Harris was exploiting her role in the 2000 election by using the e-mails. Since that time, he has also requested the public records, but has not said how he plans to use them. (5/4/02)

Bulletin board discussions violate Sunshine Law

BROOKSVILLE – Attorney General Bob Butterworth says that online discussions by the Peace River Basin Board violate Florida's Sunshine Law. In a letter to Sonny Vergara, executive director of the board, Butterworth said, "The use of the bulletin board for discussions of the basin board places a burden on the public to constantly monitor the site in order to participate meaningfully in the discussion taking place there and extends the burden over the course of days, weeks or months." The discussions in question extended over a period of 22 days. Butterworth said Internet meetings might pass Sunshine Law muster, however, in cases where discussion occurred at a particular time, and the public was permitted direct participation in the discussion.

The Peace River Basin Board is a subdivision of the Southwest Florida Water Management District and considers water issues affecting Polk, Hardee, Highlands, DeSoto and Charlotte counties. The board provided public access computer terminals for citizens wishing to participate in the bulletin board discussions to allow public participation in the decision-making process without taking up time at monthly board meetings. (4/24/02)

Mayor cleared in Sunshine case

KEY WEST – Monroe County Mayor Sonny McCoy will not face charges in connection with an allegation that he violated Florida's Sunshine Law when he had a private discussion with County Commissioner Murray Nelson during a Tourist Development Council meeting. Ann Henson, a reporter for the *Upper Keys Reporter*, reported the incident to the Monroe County state attorney's office in November.

Henson reportedly warned McCoy to be careful about what he was discussing with Nelson, since the matter was likely to come up for a vote. McCoy later admitted that he replied, "To hell with the Sunshine Law."

The state attorney general's office upheld the decision of the Monroe County state attorney's office. However, Attorney General Counsel Patricia Gleason sent a seven-page letter to Monroe County State Attorney Mark Kohl, offering guidance on conduct for commissioners. Gleason said, "It is recommended that board members conduct all discussions, regardless of how brief or insubstantial, that concern matters on which foreseeable action could be taken by the board, in a public meeting of that board held in compliance with the Sunshine Law." (4/17/02)

FIRST AMENDMENT

Supreme Court sends COPA back to lower court

WASHINGTON – The U.S. Supreme Court chose not to strike down the Child Online Protection Act, sending it back to the 3rd U.S. Circuit Court of Appeals in Philadelphia for further review. The mixed decision, written by Justice Clarence Thomas, held that COPA's use of a "community standard" to identify material harmful to minors did not in itself render the law substantially overbroad. The decision continues the injunction on the law that has kept the government from enforcing the law since 1999.

COPA's use of a community standard to determine what is harmful to minors drew fire from civil liberties groups, which contend that the law will ultimately have the effect of granting a "heckler's veto" to the most conservative communities in the U.S. In the sole dissenting opinion, Justice John Paul Stevens said, "Community standards become a sword, rather than a shield. If a prurient appeal is offensive in a Puritan village, it may be a crime to post it on the World Wide Web."

Thomas defended the idea of an Internet community standard. "The publisher's burden [to abide by a community standard] does not change simply because it decides to distribute its material to every community in the nation." Justices Sandra Day O'Connor and Stephen Breyer both supported some kind of national community standard.

The plurality decision illustrates the Court's divide on the issue of free speech rights and pornography. Justices William Rehnquist and Antonin Scalia concurred completely with Thomas' decision. Justices Anthony Kennedy, Ruth Bader Ginsburg and David Souter said in a separate opinion that while COPA is likely unconstitutional, the lower court needs to provide a "comprehensive analysis." (5/13/02)

LIBEL

Miami radio battle

MIAMI – WPOW-FM (Power 96) has filed a $10-million defamation suit against upstart competitor WPYM-FM (Party 93). The suit claims that the new station is trying to "steal listeners and advertisers" by airing "fraudulent" advertisements that exaggerate the number of commercials Power 96 plays.

Party 93 launched its new name and format in January 2002. Mike Disney, general manager of Party 93, admits that from the beginning its commercials have targeted market-leader Power 96 because "they were the station playing the most commercials." Disney says that Party 93 has been accurately counting the number of spots on Power 96. (4/17/02-4/19/02)

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Brechner Center for Freedom of Information
3208 Weimer Hall, P.O. Box 118400
College of Journalism and Communications
University of Florida, Gainesville, FL 32611-8400
http://www.jou.ufl.edu/brechner/
e-mail: brechnerreport@jou.ufl.edu

Sandra F. Chance, J.D., Director/Executive Editor
Colleen Connolly-Ahern, Editor
Lisa Colesanti, Production Assistant
Courtney Rick, Production Assistant

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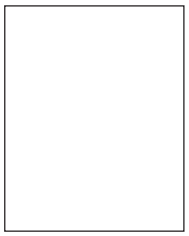
Journalists must strive to preserve the light

The *Arkansas Democrat-Gazette* received the 2001 Brechner Award for its handling for its efforts to fight a gag order – efforts that ended in a court room victory. I think it is important to reflect on what we learned from fighting that case through the Arkansas court system, and what may lie ahead for press freedom generally.

The Back Page

By Griffin Smith



Griffin Smith

First, an obvious but easily overlooked point: the outcome of the case depended on the actions of judges. We're glad we prevailed. But we would be wise not to congratulate ourselves too much on a victory. The Arkansas Supreme Court decision was very narrow, on very specific factual grounds. But it was still judges, not simply the law, that rescued us. If four judges had found against us, what recourse would we have had. A writ of certiorari to the U.S. Supreme Court? Would they even take a case involving a $100 fine? Maybe. Maybe not. But even there, it would still be up to judges.

I never cease to be astonished by journalists who say of some governmental outrage, "They can't do that – it's against the First Amendment." As journalists we must understand that the First Amendment, by itself, won't save us. In practice what matters is what judges do with it. And over time, judges' actions don't exist in a vacuum. They are shaped by public sentiment. In the end it's public sentiment, not just or even chiefly law, that is the foundation on which our liberties rest.

I stress this point because journalists are all too prone to seem arrogant and dogmatic about our special rights. We think we're safer than we are.

We seem to be entering an era when privacy claims are overtaking libel actions as the greatest menace to press freedom – a historic shift. Public sentiment is changing and judges have begun to reflect that. We have noticed that since Sept. 11 the cherished old verities about civil liberties are no longer perceived quite as securely in the public square.

Judge Richard Posner, a respected jurist on the U.S. Court of Appeals for the 7th Circuit said this about the legal landscape after Sept. 11: Civil liberties "should be curtailed, to the extent that the benefits in greater security outweigh the costs in reduced liberties." He added that Congress and the courts should "weigh the costs as carefully as the benefits."

We make a great mistake if we just deplore such statements and go on thinking we're safe in our 110-story constitutional tower repeating our mantra of "the public's right to know."

As public sentiments change, our old explanations aren't guaranteed to work anymore. We cannot just lecture the public into submission. It is public sentiment that will ultimately protect us, not the other way around. We have to work within it to secure what is important.

The recurring imagery of press freedom is light. Journalists, according to William Woo, the former editor of the *St. Louis Post-Dispatch*, have a "sense of themselves as keepers of a noble flame." The development of print journalism in 18th century England, said Mitchell Stephens in *History of the News*, "was like turning on a light: dragon sightings got farther from London as the light grew." And there was that climatic passage in Tom Stoppard's great play *Night and Day*. It's set in fictionalized post-colonial Africa but it's really about journalism. A brash young reporter is senselessly killed in the bush. The woman who loved him angrily confronts the man who was with him at the front, an older journalist who managed to get away. Why is journalism worth dying for, she demands to know, bitterly reciting the kind of absurd excesses that flourish in the tabloid press. The old newsman listens, and then he says:

> I've been around a lot of places. People do awful things to each other. But it's worse in places where everybody is kept in the dark. It really is. Information is light. Information, in itself, about anything, is light. That's all you can say really.

As our world becomes a darker place and public sentiments change around us in ways we cannot even foresee, our responsibility is to notice, to listen, and to do as best we can those things that preserve the light.

Griffin Smith is the executive editor of the Arkansas Democrat-Gazette.