THE BRECHNER REPORT

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Judge bans crime scene photos of slain Sarasota girl

SARASOTA – A judge banned the release of autopsy and crime scene photos taken of 11-year-old Carlie Brucia after her body was found in some woods behind a Sarasota church.

Dan Dannheisser, attorney for Carlie's father, asked for the restriction because "inappropriate, disreputable magazines and Internet locations" would publish the photos. He said he would prefer that all public access to the photos be denied, claiming photos of sexual battery victims are not public record.

PRIVACY

Circuit Judge Andrew Owens agreed, ruling that no photos could be released until there was a further order by the court. Then, he instructed Dannheisser to draw up an order restricting access to the photos and circulate it among the local media.

Following the hearing, Dannheisser added that having the photos published on the Internet or in a tabloid "would be a further tragic intrusion into the lives" of Carlie's family.

Carlie was abducted Feb. 1 as she walked home from a friend's house. A car wash surveillance system captured the images of a man leading her away. Joseph P. Smith was arrested and faces first-degree murder, kidnapping and sexual battery charges in the case.

Dannheisser said he was willing to work with the media and allow reporters access to the photographs, although the judge would decide who would get to view them.

"The compromise seems to fit everyone's interest," according to media attorney Gregg Thomas, of Holland & Knight. Thomas added that his client, the *Sarasota Herald-Tribune*, would never print such photographs. (6/23/04)

Jury decides county commissioner violated law, but no criminal intent

PENSACOLA – An Escambia County grand jury decided that County Commissioner Janice Gilley and a task force violated the state's Sunshine Law by failing to properly advertise meetings, but jurors cleared them of criminal wrongdoing.

ACCESS MEETINGS

In February, complaints filed with the State Attorney's Office alleged that the task force, which was initiated by Gilley to deal with volunteer firefighters, purposefully failed to notify the public of its fall and winter meetings. During these meetings, the task force dealt with the recruitment and retention of volunteer firefighters.

Florida's Sunshine Law requires elected officials and government boards to advertise their meetings to the public in a timely manner.

The grand jury's report blamed Gilley for failing to ensure that proper public notice was given before the meetings, but also said that other county officials knew about the meetings and failed to ask if they were advertised according to the Open Meetings Law. The jury also noted that Gilley was not a member of the task force and merely had a support role. Therefore, she could not be held criminally liable for the committee's actions.

"We find that there was no purposeful failure on anyone's part to comply with the notice provision of the Government in the Sunshine Law," the report said. "Once it was brought to the attention of county administration that this breakdown in communication had occurred, new procedures were established so that this would not happen again." (5/28/04)

Prosecutors drop two public records violation charges against former chief

ORLANDO – Prosecutors dropped two serious charges of public records violations against Harold W. "Hal" Worrall, the former Orlando-Orange County Expressway Authority chief.

In exchange, Worrall pleaded no contest to obstructing inspection of a public record, which is a noncriminal infraction. He was fined $500 and must pay court costs.

ACCESS RECORDS

Originally, Orange-Osceola State Attorney Lawson Lamar's office charged Worrall with falsifying public records and obstructing inspection of a public record. Worrall was investigated after reports surfaced that he ordered his executive assistant to erase part of an audio tape of a January Expressway Authority staff meeting. Florida statutes prohibit public officials from altering or falsifying public records.

On the tape, Worrall reportedly complained about Expressway Authority Chairman Allan Keen, Orange County Chairman Rich Crotty and General Counsel Kenneth W. Wright. Ultimately, the scandal led to his resignation as the authority's executive director.

Chief Assistant State Attorney Bill Vose said dropping the charges was consistent with similar cases that involved government officials and the Public Records Law.

"We thought that a civil infraction was a just resolution," Vose said. "He made a mistake in the heat of the moment.

Thomas D. Sommerville, Worrall's lawyer, said his client was satisfied with the outcome. (7/14/04)

Dentist files libel lawsuit against *St. Petersburg Times*

ST. PETERSBURG – A dentist who faced a Medicare fraud charge that was later dropped filed a libel lawsuit against the *St. Petersburg Times*.

In her lawsuit, Dr. Allena Burge named the newspaper and reporter Candace Rondeaux, alleging libel, false light, invasion of privacy and tortious interference. She's seeking more than $15,000.

LIBEL

In June 2002, Pinellas prosecutors charged Burge with Medicaid fraud, saying she made improper Medicaid claims in a four-year timeframe. In 2003, they dismissed the charge after discovering Burge billed Medicaid in a way that was recommended by someone at the Agency for Health Care Administration (AHCA).

According to Bob Lewis, a prosecutor for State Attorney Bernie McCabe's office, Burge's billing was wrong, "but she was doing it under [the AHCA's] guidance and under their instruction."

The newspaper's attorney, Alison Steele, said the *Times*' decision to publish stories based on the criminal charges was protected under the U.S. Constitution.

Burge's lawsuit says the paper's stories exposed her to ridicule, contempt and distrust. The suit claims the *Times* failed to wait before publishing the stories until "the truth could be investigated and ascertained by the proper authorities." In addition, the suit says the newspaper failed to admit "inaccurate and false representations in a timely manner." (6/30/04)

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.

Supreme Court rules Court of Appeals must reexamine Cheney task force case

WASHINGTON – The Supreme Court ruled that the U.S. Court of Appeals in Washington, D.C. must reexamine the case for access to Vice President Dick Cheney's energy task force records under the Federal Advisory Committee Act.

In July 2003, the appeals court ruled it would not hear the case unless Cheney and the other government defendants either asserted executive privilege or complied with the trial court's discovery orders.

In a 7-2 decision, Supreme Court justices said that the court of appeals should rule on the case before further proceedings in the trial court, primarily because the case involves important questions of separation of powers and because of the burden that would be placed on the executive branch to comply with the discovery order.

"As this case implicates the separation of powers, the Court of Appeals must also ask, as part of this inquiry, whether the District Court's actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties," Justice Anthony Kennedy wrote for the majority.

The suit stemmed from the creation of the National Energy Policy Development Group by President George W. Bush in 2001. The energy task force, chaired by Cheney was considered exempt from the open meetings and open records requirements set forth by the Federal Advisory Committee Act if it consisted entirely of government officials.

Public interest groups Judicial Watch and Sierra Club filed separate lawsuits claiming that some participants of the task force were members of the energy industry, making it an advisory committee subject to the act's openness requirements.

Cheney and the other government defendants argued to dismiss the case because it would violate the constitutional separation of powers. The trial court refused and ordered the defendants to assert a claim of executive privilege or proceed with the discovery phase.

The defendants then appealed to the U.S. Court of Appeals, which refused to hear the case, and then to the Supreme Court.

Now, even if the appellate court rules against the administration, the case would be tied up in appeals well past the presidential elections in November.

Meanwhile, in a separate lawsuit, a judge ordered the release of thousands of the energy task force's documents under the Freedom of Information Act. (6/24/04)

Board did not violate Sunshine Law

TALLAHASSEE – The State Attorney's Office completed its review of allegations that Lee County School Board members violated the Florida Sunshine Law, determining that the accusations were unsupported.

ACCESS MEETINGS

Former Internal Auditor Martha Roberts testified in March that school board members had broken the state's Open Meeting Law and ethics rules. The State Attorney's Office reviewed sworn depositions of at least 18 witnesses and monitored board meetings before saying the accusations were insufficient to warrant a full investigation.

"The only allegations of wrongdoing were in the form of uncorroborated and contradicted hearsay, and a claimed incident by a single person which was contradicted by numerous other sworn statements," Dean R. Plattner, assistant state attorney for special prosecutions, said. "This does not provide sufficient basis to support either a more formal investigation or any other action."

According to the *Naples Daily News*, Roberts testified in a federal case involving former Safety Director Ernie Scott, where she said that school board members conspired behind closed doors to fire former Superintendent John Sanders. She also accused them of accepting campaign contributions from unaccountable contractors and using e-mails and cellular phones to avoid public records laws.

Following the allegations, school board members maintained their innocence and said they welcomed the independent investigation. (6/26/04)

Delray Beach citizen sues Mayor for access to publishing venture documents

DELRAY BEACH – A citizen sued Delray Beach Mayor Jeff Perlman for access to documents detailing his publishing venture with the Palm Beach County School Board.

Deborah Bennett asked a judge to force Perlman to release copies of documents pertaining to *Education Today*, a newsletter the board paid Perlman to produce last year.

A contract between the board and Perlman's company, Magnum Publishing, said he would produce six editions in 2003 that would be mailed to "leaders and education advocates in Palm Beach County, South Florida and throughout the Sunshine State and nation."

Bennett claimed that because the contract awarded Perlman nearly $70,000 in public money, documents detailing the project should be made public, according to Florida's Public Records Law.

"Magnum is an agency subject to the public records act because it published and distributed *Education Today* on behalf of the school board," Bennett's attorney, Martin Reeder, wrote in the lawsuit.

Perlman asked the judge to dismiss the suit, arguing that he is a private contractor and the requested documents are exempt because they contain proprietary business information.

Controversy over the issue sparked when Bennett asked why, after the newsletter became self-sufficient at the contract's end, Perlman never reimbursed any of the $69,140 he received. A draft of the contract said he would refund the district's money with advertising or sponsorship donations, but that line did not appear in the signed version of the contract.

School board officials claimed they have no documentation about Perlman receiving advertising revenues for the six issues they paid for. According to spokesman Nat Harrington, they did not receive any reimbursement, nor did they expect to.

"If I can't get these records, it's kind of sad that any time they put a contractor in, the public can't get the records," Bennett said. "Sometimes you've got to stand up. It seems like the government is finding out more about us and we can find out less and less about them." (7/07/04)

Organization sues city, claims violation

BOCA RATON – The League for Educational Awareness of the Holocaust (LEAH) filed a lawsuit against the city of Boca Raton and The Rouse Co., claiming they violated the state's Open Meetings Law.

The city's Community Redevelopment Agency (CRA) chose a plan submitted by Rouse to renovate an old cartoon museum. LEAH submitted a competing proposal, which it said was dismissed in an unfair process that favored Rouse.

"We believe that the court can take a look at this and see LEAH's was the only proposal that met the criteria," LEAH's lawyer, Joseph Rebak, said.

The nonprofit group had proposed renovating the building's space for a humanities and arts museum, a gourmet grocery store and studio space for Boca Raton Educational Television.

The group is asking the courts to stop negotiations between Rouse and the city, award it the building lease and pay its legal fees.

ACCESS MEETINGS

In addition to accusations of discrimination, the lawsuit detailed claims that the city violated the state Sunshine Law when it failed to provide public notice of its sessions. Furthermore, CRA staff allegedly "refused to permit LEAH to attend the evaluation and ranking of the proposals."

According to the Sunshine Law, state and local agencies and officials must conduct their business in public and give reasonable notice of such meetings.

While officials didn't comment on the allegations of Sunshine Law violations, CRA Chairwoman Susan Whelchel emphasized that LEAH's proposal was not selected because of its "discrepancies and problems on the first floor [plan]."

Former CRA Chairman Dave Freudenberg, who voted against LEAH's proposal, added that the organization "could not show the financial backing" of its plan. (7/13/04)

Judge rejects claim against Fidelity Federal Bank

WEST PALM BEACH – A federal judge rejected a $1.4 billion claim against a West Palm Beach bank that bought thousands of names from the Florida Department of Highway Safety and Motor Vehicles.

In four years, Fidelity Federal Bank & Trust had purchased about 565,000 names of motorists in Palm Beach, Martin and Broward counties, paying the department a penny for each name. The bank used the information to mail letters to motorists suggesting they refinance their car loans.

But the federal Driver Privacy Protection Act makes it illegal for states to sell motorists' information without specific permission to do so. According to *The Palm Beach Post*, bank officials said they were unaware of the statute.

Broward County resident James Kehoe, who received one of Fidelity Federal's solicitations, was the lead plaintiff in the case against the bank.

U.S. District Judge Daniel T.K. Hurley rejected the lawsuit on grounds that Kehoe didn't suffer damages as a result of Fidelity Federal buying his name and address from the state.

"You must knowingly violate the statute," Louis Mrachek, the attorney representing Fidelity Federal, said. "Clearly, Fidelity did not know that the state was selling information in violation of federal law." (6/16/04)

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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., Exec. Director/Exec. Editor
Laura Flannery, Editor
Alana Kolifrath, Production Coordinator
Katie McFarland, Production Assistant

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Internet court records: Privacy vs. open government

The Back Page

By Jon Kaney

Jon Kaney

The Supreme Court appointed a committee on Privacy and Electronic Access to Records and charged it with making recommendations concerning the electronic accessibility of court records. The Court asked the committee to consider whether it should draw a distinction between "manual" electronic access and remote electronic access to nonexempt records, whether it should curtail rules requiring disclosure of information and whether it should recommend further exemptions to the Legislature.

The appointment, preceded by several years of judicial and legislative committee work, was driven by concern that the Internet has created a debate over public access to court records.

On one side of the debate are access advocates, including the news media and many businesses that have become heavily dependent on Information Age technology for doing business.

On the other side are privacy advocates, including advocates for many elements of society that are susceptible to harm from the widespread dissemination of personal information.

Too often, privacy advocates argue that the Internet has up-ended our understanding of public access to information in the government's hands. Before the Internet, they say, records were "practically obscure." With the Internet, however, the records stream into private computers anonymously all over the world. Thus, they say the demise of practical obscurity in itself justifies restraint on access to public records.

This argument stumbles because its proponents cannot show that practical obscurity has ever been a predicate of the doctrine of open government. The argument rejects the value of open government in favor of practically obscure government.

Access advocates contend that only those records that are exempt from traditional public access should be excluded from Internet access. This argument lacks persuasive power because it assumes existing statutory exemptions comprise a reasonable system for distinguishing between information that should be exempt on grounds of informational privacy and information that should not be exempt. No access advocate could sincerely believe that our present statutory exemptions rationally draw this distinction.

Our state policy is clear that government records are expected to be open but not clear on the standard by which that presumption is overcome. It is not enough for an access advocate to oppose the creation of an exemption by citing the presumption of openness. A coherent argument against an exemption should address the strength or weakness of the argument for overriding the presumption in that case.

Just as it is inappropriate to justify suppression of access on grounds that only those with a "need to know" should see public records, it is also inappropriate to ignore the undeniable fact that the interest in informational privacy sometimes justifies exemptions and that the Internet emphasizes the inadequacy of our exemptions structure.

Each argument fails to consider the competing interests underlying the position of the other side. It is illogical for access advocates to scorn the value of informational privacy only where public records are concerned, when these same advocates generally oppose the aggregation of personal data by private and governmental interests. Efforts by the United States government to amass a database on its citizens have been widely attacked in media opinion columns on grounds that such an effort invades the privacy of citizens. Yet, when Florida public records are at stake, access advocates do not readily agree that nonexempt information should be protected from aggregation and widespread dissemination, even when it infringes on the interest of privacy.

An argument for Internet access that ignores the value of privacy is not persuasive, but the contrary argument that advocates practical obscurity fails to consider the competing values–accountability, social capital and communities that are served by open government.

The Court's committee will struggle with this issue in the coming months. It should be followed closely and both sides of the debate should focus on the proper juncture between the interest in informational privacy and the interest in open government.

Jon Kaney is General Counsel for the First Amendment Foundation and a member of the Supreme Court Committee on Privacy and Electronic Access to Records. He is also an attorney at Cobb & Cole in Daytona Beach, Fla.