THE BRECHNER REPORT

Volume 28, Number 12 ■ *A monthly report of mass media law in Florida*
Published by The Brechner Center for Freedom of Information ■ *College of Journalism and Communications* ■ *University of Florida*

December 2004

Appeals court rules records were properly seized

WEST PALM BEACH – A state appeals court ruled that prosecutors did not violate radio show host Rush Limbaugh's privacy when they seized his medical records during an investigation on his alleged drug use.

PRIVACY

In November 2003, investigators searched the offices of Limbaugh's doctors looking for information on whether the radio commentator illegally "doctor shopped," or obtained painkillers from multiple doctors.

In a 2-1 written opinion, the three-judge panel of the 4th District Court of Appeal rejected Limbaugh's argument that his privacy rights trumped the investigator's power to seize his records.

The court also said prosecutors did not have to notify him of the warrants or give him an opportunity to challenge them.

"The state's authority to seize such records by a validly issued search warrant is not affected by any right of privacy in such records," the panel ruled.

Limbaugh, who admitted he became addicted to painkillers, has not been charged with a crime. His lawyer, Roy Black, has appealed and the case is now going before the state Supreme Court.

"We strongly disagree with the decision of the court majority because it does not recognize a patient's right to medical privacy that Congress, the Florida Legislature and the citizens of Florida have granted to patients such as Mr. Limbaugh," Black said.

SPECIAL REPORT

The Brechner Center's Annual Freedom of Information Report is included in this issue, p. 1B-4B.

Ex-commissioner's appeal denied, conviction for law violation stands

TALLAHASSEE – A three-judge panel of the 1st District Court of Appeal upheld the conviction and jail sentence for former State Senate President W.D. Childers, who violated Florida's Open Meetings Law by secretly meeting with other officials.

ACCESS MEETINGS

Childers, also a former Escambia County commissioner, was convicted by a jury in 2002 after he discussed public business in secret with fellow commissioner, Terry Smith. Judge T. Patterson Maney sentenced Childers to the maximum penalty for the conviction: 60 days in jail, a $500 fine and $3,600 in court costs. According to the *St. Petersburg Times*, he has already served 38 days of his jail sentence.

The violation was discovered during a criminal investigation by the State Attorney's Office into corruption allegations on the Escambia Board of County Commissioners. Currently, Childers is also appealing felony bribery charges related to that investigation.

The state Sunshine Law requires that meetings between two or more elected officials be held in public with proper notice given and minutes taken.

According to the *Pensacola News-Journal*, if a further appeal is not sought, Childers will be back in court about the remaining days of his jail sentence.

Childers is the first public official to serve jail time for violating the open meetings section of the Sunshine Law.

Federal judge rules Patriot Act provision is a Constitutional violation

NEW YORK – A federal judge in New York struck down an important provision of the USA Patriot Act, ruling that it violated the Constitution by allowing the FBI to demand information from Internet service providers without judicial oversight or public review.

ACCESS RECORDS

U.S. District Judge Victor Marrero ruled in favor of the American Civil Liberties Union (ACLU), which filed a lawsuit on behalf of an unidentified Internet service provider. The ruling was the first to uphold a challenge to the surveillance section of the Patriot Act, which was adopted in October 2001 to expand the surveillance power of federal law enforcement.

The Internet provider, whose name is being kept secret by the court, received a national security letter from the FBI, demanding it produce customer information, according to *USA Today*. National security letters do not require court approval and prohibit companies from revealing that such demands were ever made.

"In general, as our Sunshine Laws and judicial doctrine attest, democracy abhors undue secrecy," Marrero wrote. "Hence, an unlimited government warrant to conceal…has no place in our open society."

He ordered the Justice Department to stop issuing the letters, but then delayed the injunction by 90 days to give the government a chance to appeal or fix the law.

"This is a wholesale refutation of the administration's use of excessive secrecy and unbridled power under the Patriot Act," ACLU lawyer Ann Beeson said. "It's a very major ruling, in our opinion."

Group sues for access to rejected applications

WEST PALM BEACH – A nonprofit organization filed a lawsuit against the Palm Beach County elections supervisor, claiming she violated the Public Records Law when she refused to provide copies of rejected voter registration applications.

America's Families United, an organization that supports voter registration throughout the United States, claims the state law allows public access to rejected registration applications.

Elections Supervisor Theresa LePore says the law allows public examination, but not copying, of the applications.

Information including applicants' telephone numbers, drivers license numbers or partial Social Security numbers is on the voter registration applications.

In July, the nonprofit group filed a public records request with the election supervisor's office seeking registration applications that were denied "for any and all reasons" in addition to pending applications.

"I have to follow the law and the law is very specific," LePore said, defending her refusal of the release.

Attorney Judith Browne, in a follow-up request from the Advancement Project, acknowledged that state law limits public access to voter registration lists.

But, she argued, that law does not apply to rejected applications.

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.

Melbourne Airport Authority approves move, requests records stay private

MELBOURNE – The Melbourne Airport Authority approved a move to ask federal officials to restrict the public's access to security-related records.

Group members were divided over whether or not the request would obstruct the public's right to records. Despite the concern, the request passed in a 4-3 vote.

Prior to the decision, Jim Johnson, Melbourne International Airport executive director, proposed to the federal Transportation Security Administration (TSA) that documents detailing the airport's master plan and emergency response plan be withheld from the public.

He also asked the agency to create a clearinghouse in which requesters of certain information would be identified if they didn't provide a reason for needing the documents.

The Melbourne City Council responded to Johnson's proposal, strongly urging him to withdraw the request. He said he would, only if the Melbourne Airport Authority directed him to do so.

Johnson said the request stemmed from concerns that information in the documents, such as the location of the airport's electrical vault, could fall into the wrong hands.

"I think those are the things we don't want to get into the terrorists' hands," he said.

Critics of the decision say that citizens need access to airport information.

"This takes the public out of a very important part of the public discussion," Melbourne Village Mayor Rob Downey said. "I think it's a misuse of the Homeland Security Act."

Downey also referred to a state law passed after the Sept. 11, 2001 terrorist attacks that gives airports the right to restrict some information.

This law, he said, "would prevent people from getting things that could be dangerous."

Johnson argued the law is too vague, but pointed out that the TSA could, altogether, reject his request.

"These are things I think about all the time," he said. "I don't know for sure if we'll hear back from TSA on these requests."

FCC stops giving public access to outage reports, cites security concerns

WASHINGTON – Citing concerns about national security, the Federal Communications Commission (FCC) decided to stop giving the public access to information about past telephone network outages.

The decision upset several consumer advocates and state regulators, who say the information is critical to evaluate phone service reliability around the country.

According to the *Sarasota-Herald Tribune*, such records typically include information about the cause of an outage, how long it lasted and how many customers it affected. State regulators, consumer groups and consultants use the reports to determine which companies are most reliable. Large companies also use the information to decide where to build their own networks.

Such information "is essential to your ability to understand what is going on," said Brian Moir, a lawyer who represents large business customers.

In addition, those opposing the FCC's decision said the commission's concern over national security is overstated.

"If you look at 99 percent of incidents that trigger reports, they are not what I call Osama [bin Laden] issues," Moir said.

But an FCC official who was involved in the decision said a report of a downed line that results in a major outage could help terrorists pinpoint weaknesses in a large network.

"What the national security guys are telling us is that it is a mistake going forward to make outage report[s] available publicly," said Fred Thomas, chief of staff with the FCC's Office of Engineering and Technology.

THE BRECHNER CENTER
ANNUAL FREEDOM OF INFORMATION REPORT

Published by The Brechner Center for Freedom of Information ■ College of Journalism and Communications ■ University of Florida
2004

Florida Legislature approves 14 new access exemptions during session

LEGISLATURE

The Florida Legislature passed 14 new public records exemptions during the 2004 legislative session. This number represents considerably more exemptions than have been passed in the past few years.

During the session, the Legislature passed a bill prohibiting the government and private persons, with limited exceptions, from compiling or keeping any record of privately-owned firearms. Furthermore, the bill required the destruction of any such list or registry by July 12 (§ 2004-155).

Another bill passed by the Legislature revised an exemption for personal information contained in a motor vehicle record. This revision exempts personal information from such records unless the subject elects to make his or her record subject to the public disclosure (§ 2004-1737).

In addition, the Legislature passed a bill that exempts personal identifying information contained in records of U.S. Attorneys and Judges.

Home addresses, telephone numbers, Social Security numbers and photographs of current or former attorneys and judges, their spouses and their children are all exempt under this bill. It also creates an exemption for their spouses' places of employment and the names and locations of the schools and day care facilities attended by their children (§ 2004-348).

The eleven other public records exemptions that passed during the legislative session include:

- An exemption for building plans and blueprints held by a public agency relating to specific facilities (§ 2004-317).
- An exemption for personal information of certain hospital employees (§ 2004-464).
- An exemption for information that would identify or help locate a child who participates in government-sponsored recreation programs (§ 2004-635).
- An exemption for information contained in patient safety data or other records maintained by the Florida Patient Safety Corp. (§ 2004-702).
- An exemption from public records and public meetings requirements for the Florida Institute for Human and Machine Cognition, Inc. (§ 2004-951).
- An exemption for manuscripts or other archival materials held by an official archive of municipality or county (§ 2004-1626).
- An exemption for written valuations of state-owned land determined to be surplus land (§ 2004-1833).
- An exemption for specified records of military installations and missions subject to the U.S. Department of Defense Base Realignment and Closure 2005 process (§ 2004-2496).
- An exemption for personal identifying information of a child held by a children's service council or juvenile welfare board (§ 2004-2704).
- An exemption for certain records obtained by the Department of Revenue under insurance claim data exchange system (§ 2004-2826).
- An exemption for user identifications and passwords held by the Department of State (§ 2004-3006).

SPECIAL UPDATE

A new legislative section has been added to the Brechner Center's Web site. Visitors can now see if their representatives and senators voted against any of the 14 new public records exemptions. Click on your district at www.brechner.org.

Audit: Agencies refuse to comply with requests

ACCESS RECORDS

A statewide investigation revealed that a large percentage of Florida agencies refuse to comply with records requests according to the Open Records Law.

In January, reporters and other media employees from about 30 Florida newspapers posed as citizens at 234 local agencies in 62 Florida counties.

They asked for records such as 911 call logs from sheriff's offices, city manager job reviews, county administrator e-mails and school superintendent cell phone bills.

The goal of the investigation was to see how regular citizens are treated when asking for public records.

The study revealed that 43 percent of the agencies audited made unlawful demands or refused to comply with records requests. Many officials demanded to know who the volunteers represented and what they planned to do with the information, which are clear violations of the law.

"The results were disappointing for a state that prides itself on being a leader in open government," State Attorney General Charlie Crist said. "My hope is that once the results of the audit become known, this will become an educational opportunity."

The Florida Public Records Law guarantees citizens access to public records. The public can inspect any document generated by the government unless it carries a specific exemption.

The audit was organized by the Florida First Amendment Foundation, the *Sarasota Herald-Tribune* and the Florida Press Association. The *Herald-Tribune* analyzed the results of the audit.

Suspected felons list released, errors found

In July, a state court judge ruled that the Florida board of elections must release a list of nearly 50,000 suspected felons to Cable News Network (CNN).

Access Records

CNN had sued Florida's Division of Elections for access to the list, which contained the names of people who were possibly ineligible to vote in the presidential election because they were felons, had multiple registrations or died since the last election. The state responded to the lawsuit, claiming the list was preliminary and should not be released publicly.

The list is a public record, but according to state law, only certain people and groups such as political parties or candidates can get copies. CNN, in addition to members of the general public, was invited to view the records at the division's headquarters, only under the condition that there was no photocopying or note-taking.

"The right to inspect without the right to copy is an empty right indeed," Leon County Circuit Judge Nikki Clark said. "Whether the public chooses to inspect or copy [the list] is not the choice of the governmental agency which has custody of the record. It is the choice of the person who has requested access."

A few days after the ruling, Secretary of State Glenda Hood said she was scrapping the controversial list. An error in the list failed to identify thousands of Hispanics who were registered to vote but possibly had criminal histories, she said.

In the 2000 election, Florida state officials purged voter rolls of more than 173,000 names identified as felons or otherwise ineligible to vote. According to CNN.com, many civil rights activists and county election supervisors have charged that those lists contained numerous errors and that these errors prevented thousands of voters from casting ballots in the election. Nearly all of the people wrongfully purged from the voter list were Democrats and more than half were African-Americans, said BBC reporter Greg Palast. President Bush edged opponent Al Gore in Florida by a margin of 537 votes to win the state and the national election.

State Attorney General addresses Open Meetings Law issues

The state's Open Meetings Law applies to a nonprofit corporation established by the Legislature to lease and manage the correction work programs of the Department of Corrections, according to Florida Attorney General Charlie Crist. Prison Rehabilitative Industries and Diversified Enterprises (PRIDE) must give reasonable notice, open its meetings to the public and record minutes (AGO 04-44).

Attorney General Opinions

This was just one of many access opinions Crist issued during 2004. Other opinions pertaining to the state's Open Meetings Law included:

▪ **Volunteer fire department board meetings** (AGO 04-32) – The Open Meetings Law applies to the board of directors of volunteer fire departments because they hold "official corporate governance meetings" and "provide firefighting services to and use facilities and equipment acquired with public funds from Escambia County." The departments aren't subject to the law merely because they receive county funding, but because their purpose is accomplished through an arrangement with the county to provide a service to county citizens.

▪ **Volunteer Firemen's Association, Inc. meetings** (AGO 04-32) - The Firemen's Association is an organization that solely provides an opportunity to discuss common concerns, and therefore, its forum would not, by itself, be subject to the Open Meetings Law.

▪ **Risk management committee meetings** (AGO 04-35) – A meeting by a city's risk management committee is exempt from the Open Meetings Law only when such a meeting is held to review certain proposed claim settlements under the city's risk management program.

Other notable access-related opinions

▪ **Copies of voted ballots** (AGO 04-11) – Designated persons are not required to provide photocopies of the actual optically scanned ballots cast in a municipal election to comply with a public records request.

▪ **Audio recording of staff meetings** (AGO 04-15) – Audio tape recordings of Expressway Authority staff meetings made by a secretary to prepare minutes, when requested by the executive director, are public records subject to the Public Records Law. Even when the meetings are not subject to the Government in the Sunshine Law and there is no legal requirement that minutes be kept, any records made at the request of the executive director is considered an independent record of the proceedings, thereby subject to the law.

▪ **Anonymous letters** (AGO 04-22) – The state law requires officials to disclose anonymous letters alleging employee misconduct, even if the author is unknown and village leaders say the accusations are false and malicious.

▪ **Disclosure of name and address of security system owner** (AGO 04-28) – The names and addresses of applicants for alarm permits, all people and businesses cited for violation of the city's alarm ordinance and the addresses of all police runs to alarms are private information. Releasing such information would reveal the existence of security systems, which would violate the state law.

▪ **Forwarding mail to private residences of the mayor** (AGO 04-43) – Mail addressed to the mayor or a city council member at City Hall should not be forwarded, unopened, to the private residences of the official. Rather, the original copy of the mail, which constitutes a public record, should be maintained at city offices for public inspection and copying.

▪ **Records obtained by the police** (AGO 04-51) – Besides obscene material, any materials seized by a police department that are part of a criminal investigation are public records.

▪ **Sheriff's offices and the motor vehicle records exemption** (AGO 04-54) – In the 2004 session, the state Legislature passed a bill that exempts disclosure of personal information contained in motor vehicle records. This exemption applies only to personal information contained in motor vehicle records of the Department of Highway and Safety and Motor Vehicles. It does not authorize a sheriff's office to exempt such information from its records.

2004 lawsuits focus on Florida's Open Meetings Law

During 2004, there were several important cases relating to Florida's Sunshine Law. Below are summaries of the year's most notable lawsuits.

- In April, the 4th District Court of Appeal ruled that a Palm Beach County grievance panel violated the state Sunshine Law when it decided to fire a senior secretary behind closed doors. The appellate panel decided the Palm Beach County's Department of Community Services' grievance committee "exercised decision-making authority," which makes them subject to the Sunshine Law. Since the ruling, two additional former Palm Beach County employees have filed a lawsuit seeking to overturn the firings of nearly 300 county workers in the past four years.
- In April, North Bay Village Mayor Alan Dorne and City Commissioner Armand Abecassis resigned after being arrested on second-degree misdemeanor charges of violating the Open Meetings Law. The two men were accused of meeting privately to discuss firing City Manager James Vardalis because of his cooperation with an investigation of former police Chief Irving Heller. Both wrote one-line letters to Gov. Jeb Bush announcing their departures and city commissioners appointed replacements for both Abecassis and Dorne in late April.

Access Cases

- In June, the State Attorney's Office cleared Lee County School Board members of any Sunshine Law violations. Board members were accused of conspiring to oust former Superintendent John Sanders and replace him with current Superintendent James Browder. The allegations were made by a former board employee, but the State Attorney's Office review found only "uncorroborated and contradicted hearsay" in witness depositions, said Dean R. Plattner, assistant state attorney for special prosecutions. Plattner said there was no evidence to support a more formal investigation.
- In August, Sugarmill Woods residents Teddi Bierly and Robert Roscow won a lawsuit against the state for holding secret meetings about Suncoast Parkway 2. The lawsuit charged the Florida Turnpike Enterprise with violating the Sunshine Law by allowing an advisory committee to meet behind closed doors. Opponents of the parkway said the Environmental Resource and Regulatory Agency Group (ERRAG) had influence over the proposed route of the toll roads, which should make the meetings public, Bierly said. Circuit Court Judge Janet Ferris made it clear that the ERRAG arm of Turnpike Enterprise is covered under the Sunshine Law. The state was ordered to pay the legal expenses of Bierly and Roscow.

Series on super-sealing wins 2004 Brechner Award

A groundbreaking series by the *Daily Business Review* won the 2004 Joseph L. Brechner Center for Freedom of Information Award.

The articles, written by federal court reporter Dan Christensen, exposed how federal judges were suppressing civil and criminal cases by wiping them off the public record.

At the core of Christensen's reporting were two cases in the U.S. District Court in South Florida – one, a terrorism-related investigation and habeas corpus petition, the other a narcotics case.

Typically, even sealed cases appear on the public docket, but in these instances, judges tried to conceal their existence from the public.

The practice, referred to as super-sealing, hides cases completely by veiling even the case numbers that would normally allow them to be tracked on the court's docket.

"Christensen and the *Review* attacked one of the most serious yet under-reported problems affecting First Amendment rights since 9/11: Secrecy in the courts, in which the judiciary and the executive are complicit," said Richard J. Peltz, a Brechner Award judge and associate professor at University of Arkansas' William H. Bowen School of Law.

Christensen discovered the practice of super-sealing when he happened upon the case of Mohamed Kamel Bellahouel, a young Arab man detained by authorities following the Sept. 11, 2001, terrorist attacks.

Bellahouel was a waiter at a South Florida restaurant frequented by several Sept. 11 hijackers. He was imprisoned for five months on an immigration charge until authorities decided he was not a threat and released him. Bellahouel's habeas complaint, filed while he was in custody and sealed by a judge, continued on in secrecy.

Christensen reported on similar practices in federal cases relating to Fabio Ochoa's narcotics trial in Miami, where one defendant was prosecuted, convicted and imprisoned in complete secrecy.

Christensen's reporting fueled an intense, nationwide public discussion of the previously-unknown brand of secrecy.

The *Review*'s coverage led to the formation of a public-interest coalition of 23 media, legal and labor organizations that sought to intervene in Bellahouel's case in order to protect public access to court proceedings.

Similarly, coverage of issues in Ochoa's drug case prompted several groups to file separate friend-of-the-court briefs opposing the use of secret dockets.

"The articles sparked editorials in newspapers around the country, a legal challenge by lawyers representing the press and public and debate over a practice that threatens to undermine government accountability, the separation of powers and public confidence in an independent judiciary – all of which are essential to our democratic tradition," said Seth Rosenfeld, a Brechner Award judge and *San Francisco Chronicle* reporter. "Christensen's vigilant coverage of the court beat unearthed a major national story that he and his paper then pursued with enterprise."

"This series of stories is a bone-chilling reminder of what can happen when we sacrifice civil liberties for the perception of security," said Anthony L. Fargo, Brechner Award judge and assistant professor at Indiana University's School of Journalism. "This story needed to be told."

The annual award was established by the late Joseph L. Brechner, an Orlando broadcaster.

Previous winners include: *The San Francisco Chronicle*, *The Washington Post*, the *St. Petersburg Times*, *The Dallas Morning News* and the *South Florida Sun-Sentinel*.

Order causes clerks to take online records off Web sites

The Florida Supreme Court issued an order in February, calling for a moratorium to online access of court records.

The order attempted to clarify a November 2003 order for clerks who "overreacted" by shutting down their Web sites and for other clerks who did not restrict access enough, said First Amendment Foundation attorney Jon Kaney.

The order made it clear that clerks who were providing Internet access to court case documents must stop the practice due to privacy concerns. Clerks may only provide documents through a terminal in the clerk's office or in response to an e-mail request for a document. In response, Sarasota County Clerk of Court Karen Rushing and Manatee County Clerk of Court R. B. "Chips" Shore terminated Internet access to public records through their sites.

ACCESS RECORDS

"It looks like the Web's got to come down," Rushing said.

Both counties had been in the forefront of making court records available online for the public.

According to clerks, having records online eliminated the long lines of people seeking records. Professionals such as attorneys, journalists, apartment managers and employers used the Web sites daily.

"I've just always felt they're the public's records and the public should have access to them," Shore said.

The order is in effect until a committee develops new rules for access to online court records, which is not set to happen before July 2005.

Federal courts review Freedom of Information cases

This year, the U.S. Supreme Court and U.S. District Courts reviewed several cases dealing with access issues. Below are the most important cases the courts reviewed or ruled on during 2004.

▪ In January, the Court declined to hear an appeal by groups seeking access to the government's records on hundreds of foreigners detained after Sept. 11, 2001. The decision allowed the government to continue withholding the names of detainees and information about their arrests.

The Center for National Security Studies, the American Civil Liberties Union and several media organizations had petitioned for the release of the information, claiming the Bush administration was violating the Freedom of Information Act (FOIA) and their freedom of the press rights.

Government officials argued that they needed to withhold the information so that terrorist organizations wouldn't discover their strategies and tactics in the war against terrorism.

In 2003, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit agreed that the administration's claim to protect the information from terrorists was "reasonable."

▪ In February, the Court declined to hear the case of Mohamed Kamel Bellahouel, an Algerian native whose legal status was kept secret because of the government's war on terrorism.

Bellahouel waited tables at a restaurant in Delray Beach at the same time that several terrorists were training in South Florida for the Sept. 11, 2001, attacks. Federal agents detained him in October 2001 on an immigration hold, believing he may have served two hijackers food and possibly attended a movie with one of them. FBI agents investigated him and found no reason to charge him.

ACCESS CASES

Bellahouel was released on an immigration bond, but his entire case was kept off of public records. His case number did not even officially exist.

His case was accidentally discovered by a reporter for the *Daily Business Review* and has been closely watched by civil libertarians since.

▪ In March, the Court rejected attorney Allan Favish's attempt to show postmortem photos of Clinton administration lawyer Vince Foster, claiming privacy concerns supersede public disclosure when it comes to death pictures. Favish sought the photos, claiming they might prove Foster was murdered as part of a White House cover-up.

The Court's decision weakened the FOIA, which allows reporters and others to obtain some unclassified federal records. Justices ruled for the first time that a part of the law that allows the government to withhold records applies to survivors. They said that when requested information contains visuals or details that could cause pain to someone's survivors, there must be proof of government wrongdoing to justify the invasion of privacy.

Both Foster's family and the Bush administration battled to keep the pictures private.

▪ In April, U.S. District Judge Paul L. Friedman ordered the Bush administration to release thousands of pages of records on Vice President Dick Cheney's energy task force deliberations. Friedman ruled that records kept at the Energy and Interior departments must be disclosed to the public under the Freedom of Information Act.

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.

The lawsuit argued that Cheney and his team met behind closed doors with non-government officials such as lobbyists from the oil, coal, gas and nuclear industries

▪ In June, the Court ruled that the U.S. Court of Appeals in Washington, D.C. must reexamine a case involving two lawsuits filed by public interest groups Judicial Watch and Sierra Club for access to Cheney's energy task force records.

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, the 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.

PRIVACY

Government orders airlines to turn over millions of passenger records

WASHINGTON – The federal government ordered airlines to turn over millions of passenger records so it can test a computer program that screens for terrorists.

The program, Secure Flight, is the government's latest computer-assisted passenger screening system. It would fulfill one of the recommendations given by the National Commission on Terrorist Attacks Upon the United States – also known as the 9-11 commission - to conduct better checks of airline passengers. Airlines and privacy advocates recently fought off a similar system, known as CAPPS II, claiming it would violate passengers' privacy.

Secure Flight would require airlines to provide passenger information such as names, flight information, addresses, telephone numbers and even meal orders, which could indicate a person's ethnicity, according to *USA Today*.

Federal agents would match this information against the FBI's terrorist watch lists.

A major difference between Secure Flight and CAPPS II is that the new program will not scan passenger records for violent criminals and people with outstanding warrants, the Transportation Security Administration (TSA) said.

But some privacy advocates said the new plans for Secure Flight have not eased their concerns.

"[Homeland Security] Secretary [Tom] Ridge said that a stake had been driven into the heart of CAPPS II, but it now appears that the vampire is crawling out of the coffin," said Barry Steinhardt, a privacy expert with the American Civil Liberties Union.

TSA issued public notices on Sept. 21, beginning its process to collect all domestic passenger information for June 2004 from the nation's 77 airlines, by mid-November.

According to *The Washington Post*, TSA said it will use the information to test the system for 30 days and then develop a more specific plan to advance the program.

Two reporters refuse to disclose confidential sources, held in contempt

WASHINGTON – U.S. District Judge Thomas Hogan ordered *Time* magazine reporter Matthew Cooper and *The New York Times* reporter Judith Miller jailed for refusing to disclose information about their confidential news sources.

REPORTER'S PRIVILEGE

Both reporters were asked to testify during the government's investigation into the leak of undercover CIA operative Valerie Plame's identity, but refused to break their confidentiality agreements with sources. Hogan stayed their sentences of imprisonment and fines of $1,000 a day, pending their appeals.

This is the second time Hogan has held Cooper in contempt in the investigation.

In August, Cooper was held in contempt but later testified after Lewis "Scooter" Libby, Vice President Dick Cheney's chief of staff and Cooper's confidential source, gave him permission to do so.

On Sept. 14, he was subpoenaed again, for notes about his other confidential sources.

About one week earlier, Hogan also held Miller in contempt for refusing to reveal her anonymous sources. Miller researched, but never wrote, a story on the Plame situation.

"I'm very disappointed that I've been found in contempt of court for an article I never wrote and *The Times* never published," Miller said. "I find it truly frightening that journalists can be put in jail for doing their jobs.

"I must protect my sources, and I will."

Citing a 1972 U.S. Supreme Court decision in *Branzburg v. Hayes*, Hogan said that reporters do not have an absolute First Amendment privilege not to testify about confidential sources. He added that special prosecutor Patrick J. Fitzgerald had exhausted other sources before subpoenaing Miller.

"Miss Miller has no right to decline to answer these questions," he said.

INDECENCY

FCC issues CBS record $550,000 indecency fine

WASHINGTON – The Federal Communications Commission (FCC) fined CBS $550,000 for violating federal indecency standards during the Super Bowl halftime show.

The five-member commission found that Janet Jackson's partial nudity during her performance with singer Justin Timberlake, during a sporting event, was a violation of broadcast indecency standards.

According to FCC Commissioner Michael Copps, the $550,000 penalty is the largest fine ever for television indecency. The fine represents the maximum allowed under current law, $27,500, for each of the 20 CBS stations operated by the network's owner, Viacom. The commission decided not to fine CBS's more than 200 affiliate stations because they were apparently not involved in the selection, planning and approval of the program.

CBS said it was disappointed with the FCC's decision.

"While we regret that the incident occurred and have apologized to our viewers, we continue to believe that nothing in the Super Bowl broadcast violated indecency laws," the network said in a statement. "Furthermore, our investigation proved that no one in our company had any advance knowledge about the incident."

THE BRECHNER REPORT

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The Brechner Report is published 12 times a year under the auspices of the University of Florida Foundation. *The Brechner Report* is a joint effort of The Brechner Center for Freedom of Information, the University of Florida College of Journalism and Communications, the Florida Press Association, the Florida Association of Broadcasters, the Florida Society of Newspaper Editors and the Joseph L. Brechner Endowment.

New coalition helps focus fight for open government

The Back Page

By Pete Weitzel

Not quite a year ago, I became coordinator for a coalition of national journalism organizations troubled by increasing government secrecy and hoping their voices might be more effective if raised collectively. The Brechner Center is among our 30 members.

The open government activities of the member organizations fell in four areas – self education, public education, government relations, and litigation — and all agreed, whatever their individual accomplishments, that collective improvement is needed in at least the first three.

Pete Weitzel

The self-education involves both training and culture change. Reporters and editors are not always as familiar with laws and regulations providing or restricting access as they should be. Many are not schooled in the most effective ways to deal with access issues in their reporting and in their story-telling. Newsrooms are not always as aggressive in pressing for access.

It's worth reminding readers in the Sunshine State that media aggressiveness helped pull back Florida's government curtains.

Public education is equally important, because citizen support for open government is something of a paradox. Voters have given ringing endorsements to measures which protect transparency and accountability. Yet political leaders still unblinkingly support specific and immediate demands for confidentiality when packaged as matters of personal privacy or security. The withholding of once-public information is particularly pronounced at the federal level, where access is more a commodity than a right, and "national security" has become a pretext for all manner of closure.

The third area where more effort and attention is needed is government relations – in the ability to influence transparency in the government, in the laws and regulations that are written and, ultimately, in practice.

Washington secrecy has become more pronounced since last March. In the spring, the Department of Homeland Security decided security against theoretical terrorist activities is more important than citizen's safety from potential environmental hazards. It published a set of regulations preempting public hearing and involvement requirements of the National Environmental Planning Act. It set new confidentiality provisions for information in any way related to airport and seaport security.

In August, DHS utilized a little-noticed and never-debated provision in the 2003 Homeland Security Act to require each of its 180,000 employees to sign an agreement not to disclose any information hidden behind a series of secrecy-marking acronyms such as SBU — Sensitive But Unclassified. One small problem: By the department's own definition, SBU includes information that any citizen can get by submitting a Freedom of Information request. Yet the employee can be disciplined, or fined, or jailed for talking about it with an unauthorized person.

In its closing days before Thanksgiving, Congress came breathtakingly close to approving a major overhaul of the nation's intelligence operations, the first since 1947. It's fair to say that few, if any, members of Congress would have had time to read, let along digest, the 500-page bill. To make matters still worse, the small negotiating team working out House and Senate differences stripped out many of the original legislation's oversight provisions, safeguards strongly recommended by the 9/11 Commission.

Separately, more than a dozen journalism organizations had joined in a letter to conferees urging still stronger oversight to prevent unintended and undiscussed consequences, including new secrecy measures. The journalist organizations felt the authority being given the new Director of National Intelligence to "protect" information was so broad it invited abuse

The bill fell apart not because of open government or oversight concerns but because of in-fighting among turf-conscious elements of the intelligence community. It was another demonstration of how the legislative and rule-making processes move forward in Washington while providing no more than lip service to open government.

Many of the coalition's member organizations have stepped up their freedom of information programs in the past year, but much more progress is needed before we're likely to see a change in Washington.

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