

# THE BRECHNER REPORT

Volume 29, Number 11 ■ 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  
November 2005

## Board members cleared of meetings violation

PALATKA – Two Putnam County

School Board members have been cleared of violating the state's Open Meetings Law.

The school board's attorney investigated members Tom Townsend and Lisa Parsons after questions arose about their attendance at a meeting to discuss a school official.

### ACCESS MEETINGS

The complaints asserted that the board members were present at political and community forums that were sponsored by private individuals.

However, the inquiry found that neither board member discussed school board business while in attendance at the forums.

The Sunshine Law does not prohibit two or more members of the same board from attending another meeting so long as they do not discuss board business.

Attorney Jim Padgett did suggest in a memorandum to the school board that members analyze attendance at such meetings to determine whether it might be inappropriate.

## 11th Circuit won't reconsider decision in shield law action

BIRMINGHAM, Ala. – A three-judge panel denied a request by Time, Inc., to reconsider its earlier ruling that *Sports Illustrated* reporter Don Yeager would not be protected from revealing his sources under an Alabama shield law.

The court's earlier ruling held that Yeager could rely on the First Amendment to refuse to disclose the name of a source until all other means were exhausted.

The suit stems from former Alabama football coach Mike Price's li-

bel claim, where he alleges that Yeager defamed him in an article about Price's drunken behavior at a Pensacola strip club.

### SHIELD LAWS

Price claims the article's statements that he had a sexual relationship with the strippers is untrue, and his lawsuit seeks to reveal the name of *Sports Illustrated's* source.

Gary Huckaby, an attorney for *Sports Illustrated's* parent company Time, Inc., has not said whether the magazine will appeal to the U.S. Supreme Court.

## Official faces Sunshine charge

OCOEE – The State Attorney's Office has charged an Ocoee city commissioner with violating the Public Records Law.

Commissioner Danny Howell faces one second-degree misdemeanor count and one noncriminal infraction count for discussing potential city business privately with another commissioner.

The charges stem from a 2004 phone call to fellow Commissioner Rusty Johnson, where the two allegedly discussed a proposed real estate transaction that was likely to come before the commission.

If convicted, Howell could face 60 days in jail and a \$500 fine for the misdemeanor charge.

Johnson was not charged.

## High Court takes speech, religion cases for docket

WASHINGTON – Chief Justice John Roberts will hear arguments in several First Amendment cases that appear on the U.S. Supreme Court's docket this fall.

Slated to come before the nine justices include cases involving compelled speech, government-funded speech and the Religious Freedom Restoration Act.

The First Amendment case likely to draw the most attention this fall is *Rumsfeld v. FAIR*, which comes on appeal from

the U.S. Court of Appeals for the 3rd Circuit.

There, the court ruled that a law requiring colleges and university receiving federal funds to offer military recruiters equal access to their campuses was unconstitutional. Doing so would require the schools to subsidize and send a message promoting discrimination, the court said.

Another case on this term's docket addresses the free-speech rights of

### COURTS

government employees. It stems from the punishment of a prosecuting attorney who revealed a flaw in the case to the opposing counsel.

The 9th Circuit analogized the attorney's conduct to that of a whistleblower, whose speech would be protected by the First Amendment.

At press time, the Supreme Court had not decided whether it would grant certiorari in *Hosty v. Carter*, a 7th Circuit ruling that deals with the press freedoms of college students.

## Terrorist attacks, hurricanes slow FOIA response

WASHINGTON – The federal government is taking longer to respond to Freedom of Information Act requests, according to a recent study by the Society for Environmental Journalists.

The report, based on interviews with 55 environmental reporters, concludes that the September 11th terrorist attacks, along with more recent events such as Hur-

ricane Katrina, have caused government compliance with the federal freedom of information law to plummet.

For example, reporter Mark Scheifstein waited more than a week for the Environmental Protection Agency to even acknowledge the request that he filed on behalf of *The Times-Picayune*.

Schleifstein, who is the newspaper's

top hurricane reporter, requested information about any chemical spills, accidents or fires reported to the EPA in the wake of Hurricane Katrina.

Among the worst FOIA offenders are the Labor and Defense departments, the Food and Drug Administration and the Mine Safety and Health Administration, according to the report.

## Graphic photos remain sealed in sex case involving teacher

TAMPA – Hillsborough Circuit Judge Wayne S. Timmerman ruled that the public will not be allowed to view graphic photographs of former middle school teacher Debra Lafave.

Lafave has been accused of having a sexual relationship with a 14-year-old student.

Attorneys for both the prosecution and defense appeared before Timmerman for argument on the issue of whether to release the pictures.

Hillsborough Assistant State Attorney Mike Sinacore told the judge that the police officers followed the law while taking pictures of Lafave's genitals as a part of their investigation.

Releasing the photographs, he said, "would make it much more difficult

for both the defense and the state to have a fair trial."

Only a few parties knew the photos existed before Lafave's attorney, John Fitzgibbons, filed a motion with the court to have them sealed.

Shortly after the motion was filed, two area television stations requested to view the photographs, which were taken after the

Temple Terrace police obtained a search warrant for Lafave's body.

Fitzgibbons contends that police officers overstepped their bounds, and said he was pleased with the judge's decision

"Obviously these photos were a tremendous invasion of privacy on Debbie, and we are just glad that the order was entered," he said.

### ACCESS COURTS

## 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.

### ACCESS MEETINGS

## Inquiry turns up no evidence of Open Meetings infraction

CRYSTAL RIVER – A local school board has been cleared of violating the state's Sunshine Law.

The State Attorney's Office investigated the Academy of Environmental Sciences' school board after a complaint was filed against several members.

The complaint, which was filed by former Academy Director Lisa Merritt, asserted that the school board violated the law's requirement that public busi-

ness be conducted in public when the board president sent e-mails to board members.

However, the inquiry found there was no evidence to indicate that a violation of the law had occurred.

Assistant State Attorney Mark Simpson reviewed several e-mails that discussed the departure of the school's director, but he found that the contents of the e-mails "do not on their face establish a clear violation of the Sunshine Law by any board member."

## COURTS CONT'D

### Court declines to hear media cases

WASHINGTON – The U.S. Supreme Court denied certiorari in numerous media cases this term.

Among the most notable was its decision not to hear a case involving a large libel verdict against the *Boston Globe* based on its refusal to reveal a confidential source. After the paper refused to name its informant, a judge granted a default judgment against the newspaper, which was upheld by the Massachusetts Supreme Court.

The other cases that the justices turned down include a copyright infringement case involving Smithsonian Institution Press and a libel suit against CBS Television for one of its late-night talk shows.

To be heard by the Supreme Court, four justices must vote to grant certiorari. The justices, as usual, did not give any reasons for their decision not to take the cases.

A denial of certiorari allows the lower court decision to stand.

# Bill would allow cameras in U.S. Supreme Court

WASHINGTON – Supreme Court TV could become a reality if Congress passes a bill introduced by Sen. Arlen Specter (R-Pa.), who is the chairman of the Senate Judiciary Committee.

Specter introduced the legislation in the Senate shortly after Judge John Roberts announced that he was unsure whether cameras should be allowed in the nation's highest court.

"Because the Supreme Court of the United States holds power to decide

cutting-edge questions on public policy, thereby effectively becoming a virtual 'super legislature,' the public has a right to know what the Supreme Court is doing," Specter said on the Senate floor. "And that right would be substantially enhanced by televising the oral arguments of the Court so that the public can see and hear the issues presented to the Court."

The legislation would allow cameras in the courtroom unless a majority of the

court believed the presence of cameras would violate due process.

The idea of televising Supreme Court arguments has not been well-received by all members of the bench. In 1996, Justice David Souter said, "I can tell you the day you see a camera come into our courtroom, it's going to roll over my dead body."

Five other members of the Judiciary Committee have also signed on as co-sponsors.

## SHIELD LAWS CONTINUED

### Court decides privilege lawsuit

WASHINGTON - The U.S. District Court allowed the publisher of an energy newsletter to rely on the reporter's privilege to fight a subpoena.

But, that privilege was overcome by the Commodity Futures Trading Commission's need to investigate an energy marketing company who the commission believes was attempting to affect natural gas prices by reporting false data to the newsletter.

The ruling noted that a decision to allow a federal agency to overcome the reporter's privilege must strike a balance between the test used in criminal cases and the one applied in civil cases.

### Miller leaves jail, appears before grand jury to offer testimony

WASHINGTON – *New York Times* reporter Judith Miller was released from federal jail after 85 days when she agreed to testify before a grand jury investigating the leak of undercover CIA operative Valerie Plame's identity.

Miller testified only after she and her attorneys had secured a voluntary and personal waiver from her source.

"My attorneys have also reached agreement with the Office of Special Counsel regarding the nature and scope of my testimony, which satisfies my

obligation as a reporter to keep faith with my sources," she said.

Miller remained in the Alexandria Detention Center until she was sure that I. Lewis "Scooter" Libby's decision to allow her to testify was of his own volition and had not been coerced.

Miller did not publish any articles on the subject, but she did testify about conversations she had with Libby, who is Vice President Dick Cheney's chief of staff.

Legislation aimed at establishing a federal shield law is before Congress.

## ACCESS MEETINGS CONTINUED

### Resident sues city officials for gathering at local dining spot

JACKSONVILLE – Five members of the Jacksonville City Council met in violation of the state's Open Meetings Law, according to a lawsuit filed by resident Donald Smitha.

The lawsuit claims that Suzanne Jenkins, Lake Ray, Pat Lockett-Felder, Reggie Fullwod and Mia Jones met May 25 at an Arlington restaurant to discuss the restaurant's petition for a zoning exemption that would allow it to serve alcohol until 2 a.m.

Smitha is a dentist and works across the street from Arielle's Fine Dining, the restaurant where the lawsuit claims the council members toured and dined.

Ray has said in an interview that the gathering was an inspection trip, even though a meeting notice posted at city hall said the visit was for "discussion," according to *The Florida Times-Union*.

After the members toured the facility, Ray said they talked about their families and running for the state Legislature.

Florida's Government-in-the-Sunshine Law requires that all meetings held to discuss topics likely to be voted upon be open to the public, properly noticed and have minutes taken.

Jacksonville Deputy General Counsel Tracey Arpen said that the city doesn't believe a violation occurred.

#### THE BRECHNER REPORT

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.brechner.org>  
e-mail: [brechnerreport@jou.ufl.edu](mailto:brechnerreport@jou.ufl.edu)

Sandra F. Chance, J.D., Exec. Director/Exec. Editor  
Amy Kristin Sanders, Editor  
Alana Kolfrath, Production Coordinator  
Anaklara Hering, Production Assistant  
Christina Locke, Production Assistant

*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.

---

# “War on Terror” ignites battle for access to court files

In a recent decision in a case brought by *The Tampa Tribune* and *The New York Times*, a federal appeals court in Richmond, Va., held the government’s interest in shielding details of an investigation into Muslim charities warranted a judge’s blanket decision to seal search warrant affidavits that are presumptively public record.

Concluding that the affidavits themselves demonstrated the need for secrecy, the court affirmed the judge’s decision even though she did not articulate any reasoning until well after she had agreed with the government’s request for complete secrecy.

The law of access to court records is built on a series of presumptions and burdens of proof – legal hurdles that judges require litigants to clear when seeking to close records to the public. Under the First Amendment, courts are supposed to ensure that closure only happens in a narrowly tailored fashion, after judges demand rigorous proof of need and articulate clear and specific reasons for their rulings.

Court rulings touching on the “War on Terror,” however – such as the recent decision in *Media General Operations and New York Times Co. v. Honorable Theresa Buchanan*, decided on Aug. 1 by the U.S. Court of Appeals for the 4th Circuit – have tested the limits of openness. In many of these cases, the courts have allowed closure where precedent suggests that, in other circumstances, they probably would have permitted at least limited access.

The case arose out of a March 2002 raid on a group of suburban Washington, D.C., Islamic think tanks, businesses and homes. In full view of the press, which had been tipped off about the raids, federal agents carted off dozens of boxes of records. No charges have ever been brought against any of the people involved.

Under federal law, once a search occurs, all documents associated with it are presumptively public record, open to public inspection at the clerk’s office. Just before this raid, however, Alexandria, Va., federal magistrate judge Theresa Buchanan agreed to seal the government affidavits based on the U.S. Attorney’s motion that simply said public access “might jeopardize ongoing investigations.”

The *Tribune* and the *Times*, after the clerk’s office would not let them see any part of the court file, filed a motion asking the magistrate to open the records. At a hearing two months after the raid, while she agreed that portions of the file had been improperly with-



Charles D. Tobin

held, the magistrate continued the seal on the affidavits, saying that it was “clear and apparent from the affidavits that any disclosure of the information there would hamper an investigation.”

Citing well-established precedent in which courts require parties seeking closure to clearly prove an imminent threat, and judges to articulate specific findings of need and tailor as narrow a closure as necessary, the newspapers appealed to the 4th Circuit. Neither the government’s request nor the judge’s after-the-fact pronouncement cleared the requisite First Amendment

hurdles for closure, the newspapers argued.

But the appeals court reviewed the affidavits and in an 18-page decision agreed with the magistrate. The appeals court acknowledged that “the press and public enjoy a qualified common law right of access” to search warrant documents filed with the clerk. The court held, however, that the magistrate need not have presented a full discussion of her reasons for sealing the document, and, instead, was entitled to rely on the government’s articulated need and her own review of the affidavits.

“Where, as here, the government’s explanations and the judicial officer’s reasons for sealing are patently apparent upon consideration of the documents at issue and when the record provides sufficient justification for appellate review, there is no separate requirement that a district court or magistrate judge prepare separate, detailed orders.”

The decision – and a separate part of the ruling that leaves undisturbed the Alexandria courthouse’s practice of keeping the search-warrant docket book underneath the counter, and noting sealed warrant papers with cryptic designations only – reflects that as with other civil liberties, courts are increasingly reluctant to challenge law enforcement decision-making that touches on the “War on Terror.”

Interestingly, the 4th Circuit’s decision does not mention that in October 2003, the magistrate decided to make most portions of the affidavits public, again deferring to the U.S. Attorney’s Office, which told her that complete secrecy no longer was warranted.

---

Charles D. Tobin is with the National Media Practice Team of Holland & Knight LLP and works in the firm’s Washington, D.C. office. Along with Gregg D. Thomas and Rachel E. Fugate of the firm’s Tampa office, he represented The Tampa Tribune and The New York Times in this case.