

THE BRECHNER REPORT

Volume 25, Number 4 ■ 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

April 2001

Bill would close autopsy photos

ORLANDO – *The Orlando Sentinel's* efforts to examine the autopsy photos of NASCAR driver Dale Earnhardt has sparked a legislative effort to exempt autopsy photographs from the state's Public Records Law.

Senate Majority Leader Jim King, R-Jacksonville, introduced legislation that would create a Public Records Law exemption for autopsy photos and make it a third-degree felony to publish an autopsy photo.

Another version of the Senate bill, which passed unanimously out of the Criminal Justice Committee, would make the exemption retroactive. It also would allow for the spouse, parent or child of the deceased, as well as state and federal agencies, to view or copy autopsy photos. The

courts could grant public could access autopsy photos, videos and audio recordings if the records' requester showed "good cause."

The House State Administration Committee approved an amended version of the bill by a 3-2 vote. The amendment is similar to the Senate committee version and additionally would allow a local agency to request the photos, and would allow a medical examiner to use the photos in training materials, to get another medical opinion, and to conduct medical or scientific research.

Some access advocates have proposed an alternative, which would preserve the public's right to inspect the autopsy photos but place a blanket ban on copying them without a judge's approval. (2/22/01 – 3/10/01)

Some media settle, but paper challenges seal

The Orlando Sentinel and five other media outlets reached an agreement with Teresa Earnhardt, the widow of NASCAR driver Dale Earnhardt, for an independent medical expert to examine her husband's autopsy photos. But the *Independent Florida Alligator* in Gainesville is continuing to fight against an effort to seal the photos.

Under Florida's Public Records Law, autopsy photos are public record. Mrs. Earnhardt went to court on Feb. 22 to have the photos sealed. Judge Joseph G. Will, 7th Judicial Circuit, granted a temporary injunction. The media and the family were ordered into mediation.

The *Sentinel* said it wants access to the photos to help settle questions

about the cause of Earnhardt's death.

Under the agreement, an "automotive biomechanics" expert will view the photos and a videotape of the autopsy, and issue a report. The photos then would be sealed. The agreement also involves *The Miami Herald*, *The Tampa Tribune*, *Los Angeles Times*, *Chicago Tribune* and WFLA-TV in Tampa.

Campus Communications Inc., the *Alligator's* publisher, said it would continue to fight for access to the photos. A hearing is set for April 6.

"There is something more at stake here," *Alligator* attorney Thomas Julin told the paper. "The rights of the people are going to be inhibited by decisions like these." (2/22/01 – 3/20/01)

ACCESS
RECORDS

ACCESS
MEETINGS

University presidents meeting in secret

TALLAHASSEE – A Feb. 20 meeting with Gov. Jeb Bush was public, but secret meetings together are more the norm for a new group established by Florida's 10 university presidents.

With the state's Board of Regents about to be demolished, the university presidents have formed the State University Presidents Association.

The presidents say the group is informal, and they have met three times in private since forming in November.

As the Council of Presidents, the same group met publicly for years and advised the Board of Regents. A spokesman for the university system said the meetings are not covered by the Sunshine Law because the presidents were acting as staff members, not acting on behalf of, or advising, the regents. (2/16/01 – 2/21/01)

Civil action filed against town councilman

GOLDEN BEACH – The Miami-Dade State Attorney's Office has filed a civil action against Golden Beach town councilman Adalberto Paruas for violating Florida's Open Meetings Law.

Paruas had resident Oded Meltzer ejected from a meeting where a town committee reviewed applications for the town manager and clerk positions.

Ed Kreiling, the town's attorney, later issued an opinion that the town violated the Sunshine Law.

Paruas said he didn't realize the meeting was public. He could face up to \$500 in fines. The town voted in December to pay Paruas' legal fees, expected to be about \$7,000. (*Brechner Report*, March 2001) (1/28/01)

Judge orders votes sorted by hand

JACKSONVILLE – Duval County Supervisor of Elections John Stafford was ordered to separate by hand the almost 5,000 undervote ballots from the 291,000 cast in the 2000 election.

The Miami Herald filed a public records lawsuit in order to see the undervotes, ballots that had no clean punches for president.

Elections officials had resisted conducting a machine sort because they were concerned a machine recount of the punch card ballots might dislodge more chads and alter the ballots.

Judge Lawrence Page Haddock, 4th Judicial Circuit, ruled on Feb. 27 that the county had three weeks to separate the ballots by hand and could charge the

newspaper a maximum of \$10,000 in staff fees.

Stafford originally estimated that it would cost \$75,600 to hand sort the ballots.

The review of the Duval ballots began on March 5.

Haddock also rejected an effort by *The New York Times* and *The Washington Post* to have Stafford separate out the 22,000 overvotes, which had more than one clear punch for president.

The Times and the *Post* asked to join the *Herald* lawsuit, but the judge ruled the papers should file their own records request rather than delay the *Herald's* count. (2/2/01 – 3/7/01)

Federal judges to consider electronic records

WASHINGTON – A federal judiciary committee is considering making records, now available for inspection in paper form, part of a Web-based electronic database.

The proposal would make the files available through the Public Access to Court Electronic Records (PACER) system. A Judicial Conference committee is studying the security and privacy implications of making the records more widely available.

Many federal courts already use PACER, but a user has to log onto a

PACER site for each court. The new system would also allow a user to search all courts from a single site.

The Judicial Conference, which makes policy for the federal judiciary, received approximately 240 responses to its request for public comment. Additional comments were gathered at a public hearing on March 16 from both privacy advocates and access advocates. The Court Administration and Case Management Committee may make suggestions to the Judicial Conference by September. (2/6/01 – 3/1/01)

Lawsuit claims agency violated Sunshine Law

FORT WALTON BEACH – Four plaintiffs filed a lawsuit against the Florida Department of Environmental Protection that claims the agency violated the Public Records Law.

The documents being sought involve a criminal probe into environmental

violations at the Garcon Point Bridge.

Charles Grande, Edward McKay, Roger Sharp and L. Kevin Stinnette sued to get a copy of the file. The suit claims the DEP failed to provide the documents and didn't specify in writing its reason for not releasing the records. (2/23/01)

Release of ballots delayed by lawsuit

HOLMES COUNTY – A contested sheriff's race in Holmes County delayed the release of ballots to the media.

County Court Judge Robert Brown, 14th Judicial Circuit, ruled in January that the ballots could not be unsealed for the media while a lawsuit regarding the sheriff's race was still pending. *The New York Times* appealed the decision. A circuit court judge reversed and allowed the newspapers access to the ballots. A review of the ballots began on March 12. (1/19/01 – 3/7/01)

Panel recommends limits on access

TAMPA – A Florida commission charged with reducing medical errors has suggested the state establish two new centers to track the mistakes and educate the public but wouldn't give the public access to information about which health care providers are making the errors.

The Commission on Excellence in Health Care recommended several ways to improve the way medical mistakes are reported to the state.

However, the names of hospitals and doctors that commit mistakes would not be public record under the committee's proposal.

Currently, consumers can get specific information about mistakes that happen in doctor's offices but not in hospitals. (1/24/01 – 2/3/01)

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, (352) 392-2273.

Tampa General ordered to release its records

TAMPA – Tampa General Hospital will have to make its records and meetings public after a state appeals court affirmed a lower court ruling.

A three-judge panel of the 2nd District Court of Appeal upheld a decision by Judge Edward Ward, 13th Judicial Circuit, that the private, non-profit hospital must operate in the open.

The Hillsborough County Hospital Authority handed over operating control of Tampa General to Florida Health Sciences Center in 1997. *The Tampa Tribune* and the *St. Petersburg Times*

sued in 1999 to get access to records that have been unavailable since the private company took over.

The hospital, which still operates on public land with a public lease, has been ordered to release the records and pay the newspapers' \$300,000 legal fees.

Tampa General in late February asked the appeals court to rehear the case. Gregg Thomas, an attorney with Holland & Knight, the law firm representing the *Tribune*, said it could take the court several months to rule on the rehearing. (2/3/01 – 2/23/01)

Charges against board dismissed as part of agreement

TAVARES – The State Attorney's Office has agreed to dismiss Sunshine Law civil charges against a school board member who refused to enter a plea agreement.

The State Attorney's Office offered to dismiss charges against Jimmy Conner, Phyllis Patten, Kyleen Fischer, Mary Fletcher and Gerald Smith if the

five attended a two-hour seminar on the Sunshine Law.

Conner refused to sign the plea agreement and insisted that the charges against him needed to be dropped because he had already voluntarily attended a Sunshine Law workshop. State Attorney Brad King agreed to dismiss the charges. Patten, Fischer, Fletcher

and Smith have expressed no problems with accepting the plea agreement.

The charges stemmed from an executive session that the board closed to discuss collective bargaining. During the closed session, the board also discussed issues that should have been discussed in an open session. (1/11/01 – 1/26/01)

City officials no longer face charges

ST. AUGUSTINE – The city's former mayor and its current mayor no longer face charges of violating the Sunshine Law after the Daytona Beach State Attorney's Office found the accusations were "totally without merit."

Leslie Garcia filed the original complaint, claiming that then-Mayor Len Weeks and then-City Commissioner Mark Alexander discussed city business outside a city commission meeting.

Garcia claimed the two officials had discussed a draft of a street performers ordinance at a Historic St. Augustine Area Council meeting held at Weeks' restaurant. Both men denied the allegations.

After conducting 20 interviews, investigators didn't find any witnesses to the alleged discussion, and organization records showed the men were never at the same council meeting. (1/27/01)

Online Sunshine collects user data

TALLAHASSEE – The Florida Legislature's home page, Online Sunshine, is keeping up with its users through technology that the U.S. government has almost completely banned from its Web sites.

"Cookies" – pieces of information that are stored on the user's computer that keep up with the use of a Web site – are not allowed on U.S. government sites unless a "compelling need" exists for the cookie technology. Neither the governor's myflorida.com nor many other state sites use the technology.

The cookies from Online Sunshine are programmed to stay on a computer until 2037. A spokeswoman for the House Speaker Tom Feeney said the state collects only aggregate data and doesn't profile individuals. (2/11/01)

PRIVACY

FIRST AMENDMENT

Prosecutors drop Web pornography case

BARTOW – Polk County prosecutors have dropped a criminal obscenity case in an Internet pornography case against a Lakeland couple.

Tammy and Herbert Robinson agreed to avoid "sexually connected" businesses in the 10th Judicial Circuit, which includes Polk, Hardee and Highlands counties, for the next four years and pay the sheriff's office \$2,000.

The couple also agreed to drop a federal civil rights lawsuit they had filed against the Polk County Sheriff's Office.

The suit claimed that their March 1999 arrest was unconstitutional.

Herbert Robinson took nude photographs of his wife and posted the photos on her Web site.

The site still operates, but the couple now lives in the Tampa Bay area.

The Robinsons' case was believed to be the first in the nation where prosecutors applied a community's decency standards to an Internet case, according to the Associated Press.

Most of the Internet prosecutions to date have involved child pornography. (2/7/01 – 2/17/01)

Commission won't pursue book policy

OCALA – Marion County commissioners decided against removing a controversial book from the public library following an opinion from the county attorney that taking it off the shelves would be unconstitutional.

"It's Perfectly Normal," a sex education book for children, prompted complaints from parents.

In response, the commissioners started to change their policy so the commission would have the final say in cases where residents challenge library

books.

The commission dropped its initiative after County Attorney Gordon Johnston wrote that removing books based on content would be censorship.

As part of the ongoing debate over "It's Perfectly Normal," another resident filed a complaint with the library against the Bible, saying it is filled with graphic descriptions of rape, murder, incest, cannibalism and sodomy. (1/17/01 – 2/2/01)

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.jou.ufl.edu/brechner/>
e-mail: brechnerreport@jou.ufl.edu

Sandra F. Chance, J.D., Director/Executive Editor
S. Camille Broadway, Editor
Jackie Thomas, Production Coordinator
Meghan McShane, 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. *The Brechner Report* thanks Gregg D. Thomas, Robert Rivas and Colleen Ahern for their contributions to this issue.

Online vote swapping deserves protection

The boondoggles of the 2000 presidential election were not limited to dimpled chads, standards of review, or Supreme Court justices making a mockery of federalism to further a political agenda or their own retirement plans. Nor was Florida Secretary of State Katherine Harris the only one in her position to

**The
Back Page**
By Marc J. Randazza

dramatically influence the election's outcome. The forgotten issue of the 2000

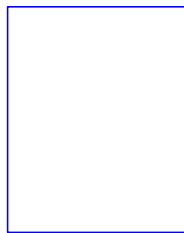
election, and the issue that stands to impact presidential politics in 2004, took place in cyberspace. The battle over online vote swapping has just begun.

As the 2000 campaign reached its climax, some renegade supporters of Green Party candidate Ralph Nader countered critics' charges that they were "handing the election to Bush" by creating Web sites encouraging vote swapping. In short, a Nader supporter in a hotly contested state would agree to vote for Al Gore if a Gore supporter in an uncontested state would vote for Ralph Nader. The object – help deliver 5 percent of the popular vote to the Green Party so that the Greens would receive federal matching funds for the 2004 presidential election, while simultaneously working to prevent a George W. Bush presidency.

With the election less than a week away, and the poll margins closer than any election in recent history, the Secretaries of State of Oregon and California acted to snuff out the online vote-swapping movement by writing letters that threatened vote-swap site operators with fines and/or imprisonment. Although nobody was certain whether vote swapping was constitutionally prohibitable, the chilling effect brought about by the letters may have tipped the scales in the 2000 campaign.

Freedom of speech is "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest" (*Terminiello v. Chicago*). Freedom of association is equally protected as "a fundamental element of personal liberty" (*Roberts v. United States Jaycees*).

In the waning days of the 2000 presidential election, the



Marc J. Randazza

Secretaries of State of Oregon and California set aside these fundamental notions, and set an example for Harris by interfering in the closest presidential race in recent history and quite possibly changing the result in the process.

Freedom of assembly and freedom of speech are necessary elements in a self-governing society. The argument could be made that the Framers intended to extend freedom of expression and association only to technologies existing in the 1700s, but even strict textualists urge that courts must apply constitutional values to new circumstances, especially when those circumstances arise due to changes in technology. Cyberspace is entitled to no less protection than other traditional public forums and media.

The one goal that these Secretaries of State considered illegitimate was the common goal of simultaneously electing Al Gore as president and helping the Green Party achieve 5 percent of the popular vote. As such, this was not a content-neutral regulation, but one that specifically targeted the political goals of the so-called "Nader traders." Inasmuch as they restricted websites that urged people to vote in a particular manner in a publicly held election, the actions of the Secretaries of State are presumably unconstitutional.

The vote-swap phenomenon was the result of thousands of people nationwide coming together in the new town square to associate for the furtherance of a common political goal. Had this happened in a traditional meeting room, few would question its legality. However, the Secretaries of State of California and Oregon acted out of unfamiliarity with the new technology. In doing so, California and Oregon imperiled the most fundamental of constitutional rights.

Although the Constitution demands that any government actor wishing to restrict the fundamental rights to free speech and assembly bear a heavy burden, the Secretaries of State barely lifted a constitutional feather. Vote swapping is legal, constitutionally protected, and should be recognized as such.

Marc J. Randazza is a graduate of Georgetown University Law Center and is a graduate student in the University of Florida's College of Journalism and Communications.