
THE BRECHNER REPORT

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Panel advises more electronic access

WASHINGTON – A federal judicial committee recommended making civil case files available electronically. However, the committee said criminal case files should not be available.

The Committee on Court Administration and Case Management examined privacy issues related to electronic file

access and solicited public comments. (*Brechner Report*, April 2001)

The committee is recommending to the U.S. Judicial Conference, which sets policy for the federal judicial system, that civil case files from all federal

courts be made available through the PACERNet system. However, the committee also suggested that social security numbers and other personal identifiers be removed from the files

before they are posted on the PACERNet system. The committee did not support giving electronic access to criminal case files, saying that

easy electronic access to the criminal files could be used to “intimidate, harass and possibly harm victims, defendants and their families.” (8/16/01 – 8/24/01; the committee report is available at <http://www.privacy.uscourts.gov/>)

**ACCESS
RECORDS**

Anti-leak bill introduced in Congress

WASHINGTON – Sen. Richard Shelby, R-Ala., once again is sponsoring an anti-leak bill, which would prosecute, fine and jail current and former government employees who release classified information.

The bill would cover any classified information, whether or not the information affects national security. Those convicted under the statute would

face up to \$10,000 in fines and up to three years in prison.

Former President Clinton vetoed a similar bill last year, but Shelby is hoping that a Bush White House will be more receptive. Bush has not stated his position on the legislation. A Sept. 5 hearing on the issue was postponed at the request of Attorney General John Ashcroft. (8/27/01 – 9/6/01)

Magazine plans to appeal ruling in favor of freelance photographer

ATLANTA – In the wake of a Supreme Court ruling concerning freelancers and copyrights, the National Geographic Society is planning to appeal a decision by 11th Circuit U.S. Court of Appeals, which ruled that

National Geographic infringed on the copyrights of freelance photographer Jerry Greenberg when it published back issues of the magazine on CD-ROM.

The appeals court issued its decision before the U.S. Supreme ruled in *New York Times v. Tasini*, a similar case in which the Court said that freelancers’ copyrights were violated when their work was republished in a database.

(*Brechner Report*, September 2001)

Like the Supreme Court, the appellate court had to decide whether National Geographic’s collection of back issues on CD-ROM was a new work, which would give freelancers control of the rights, or a reproduction of a collected work, which would give the magazine control of the rights.

While the CD-ROM contained exact digital copies of the original print issues, the appeals court ruled that it was a new work because it offered a search program and because the CD-ROM starts with an animated clip.

Attorneys for National Geographic

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FAMU trustees to hire in open

TALLAHASSEE – The Board of Trustees for Florida A&M rejected a proposal to begin its hunt for a new president at a private search firm, choosing to keep all parts of the search process in the open.

Current President Frederick Humphries suggested sending early applications to a private search firm in order to protect the applicants’ confidentiality. Applicants solicited by search firms may have several discussions with the firm doing the hiring before officially applying.

The official application is a public record, and filing the application often starts public scrutiny of the candidate.

The trustees, however, decided to have early applicants send material to the university’s Office of Equal Opportunity Programs, until a search firm is hired mid-September to handle the rest of the search process.

“I think we need to be as open as possible ... in the sunshine, plus the sunshine,” said board member Rev. R.B. Holmes. (8/17/01)

are hoping that language in the *Tasini* opinion that says the copyright law is “medium-neutral” will help them win an appeal based on an argument that the CD-ROM is a revision of the magazine, not a new work, because the articles, ads and photographs appears in the same order and in the same format on the CD-ROM as in the paper edition. In the *Tasini* case, the Supreme Court found that the freelance articles posted in electronic databases could not be considered a reproduction because they had been pulled out from their original context. (3/26/01 – 8/28/001; *Greenberg v. National Geographic Society*, 29 Media Law Reporter 1599, May 8, 2001)

Auditor: Access funds not used for original purpose

TALLAHASSEE – Florida Auditor General William O. Monroe suggested abolishing a state fund designed to improve public access to state records because the fund is being used by the Department of State for routine operational expenses.

The fund, which is earmarked for technology to improve access to public records, also was used by the Department of State for more than

\$900,000 in payments for rent, student assistants and repairs during the 1999-2000 fiscal year. Less than a third of the fund – \$494,000 – was spent on record systems during that same time period.

The Legislature first authorized the department to use the fund to pay for approximately \$1 million in operational expenses in 1992-1993 and formally re-approved using the fund for operational costs during the 2000 session.

Monroe suggested eliminating the fund since the money is used for purposes beyond its original authority.

The department disagreed with the audit's recommendations, saying in a letter to the auditor "this trust fund enables the department to fund technology issues from a dedicated funding source rather than fight for general revenue dollars each legislative session." (8/24/01)

Pharmaceutical company challenges Sunshine in Litigation Act

WEST PALM BEACH – Drug maker Novartis Pharmaceuticals Corp. is challenging the state's Sunshine in Litigation Act as part of its defense against a personal injury lawsuit.

A Fort Lauderdale couple filed a lawsuit against Novartis, formerly Sandoz Pharmaceuticals Corp., over the drug Parlodel, which the couple claims caused the wife to have a stroke.

Florida's Sunshine in Litigation Act requires judges to reveal public hazards discovered during product liability lawsuits.

If Parlodel is ruled a public hazard, the public will have complete access to documents and testimony about the drug's development, testing and marketing. If the courts determine that Parlodel is not a public hazard, the information about the drug is available only to the suing couple and their attorney.

A Novartis constitutional challenge to the Sunshine in Litigation Act was rejected by a three-judge panel of Florida's 4th District Court of Appeal, which said "[W]e ... decline to entertain

the broad range of constitutional challenges to the trial court's order and the Sunshine Act... We find those challenges to be premature at best."

The appeals panel ruled instead on a procedural matter in the case, saying the trial judge should not have sent the public hazard hearing to a special master without the consent of Novartis.

The U.S. Chamber of Commerce and the national Product Liability Advisory Council filed friend-of-the-court briefs on behalf of Novartis, which plans to file an appeal for a rehearing. (8/16/01)

Two papers challenge autopsy photo law

MIAMI – *The Orlando Sentinel* and the *South Florida Sun-Sentinel* filed a challenge to the state law that closed access to autopsy photos.

The papers are asking a judge to declare the statute unconstitutional, arguing that the statute is overly broad and fails to accomplish its stated purpose. The two papers filed requests to see several autopsy photographs in Broward County but were denied access under the statute. (8/30/01)

Judge refuses to unseal records before trial

GAINESVILLE – A judge refused to unseal records in the case of prison officers accused of murdering an inmate.

Lawyers for several papers, including the *St. Petersburg Times*, the *Gainesville Sun* and the *South Florida Sun-Sentinel*, argued that releasing the records would not affect the officers' ability to receive a fair trial.

Attorney Penelope Bryan argued that the judge could prevent the jury pool

from being tainted without keeping the records sealed.

Judge Larry G. Turner, 8th Judicial Circuit, refused to unseal the documents, saying that releasing the documents would create publicity that would threaten the officers' rights to a fair trial.

The eight officers are being tried in the 1999 death of inmate Frank Valdes. Four of them are scheduled to go on trial October 12. (8/17/01)

Lease agreement not public record, judge rules

TAMPA – A lease-arrangement agreement between an airport developer and mall developers is not a public record, a circuit court judge ruled.

The *Weekly Planet* sued to get a copy of the lease-arrangement agreement for an upscale mall being built on a portion of property owned by the Tampa International Airport.

Tampa businessman Richard A. Corbett signed a lease with the aviation authority to develop the property and then signed a lease agreement with mall developers to build the International Plaza mall.

The paper wants a copy of Corbett's agreement with mall developers to see how much Corbett is making from the mall compared to how much he is paying the aviation authority for the land.

Judge Sam D. Pendino, 13th Judicial Circuit, ruled that Corbett's lease-arrangement agreement with the mall developers is between two private groups and not subject to Florida's Public Records Law.

Weekly Planet officials say the newspaper will appeal the decision. (7/25/01)

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, P.O. Box 118400, University of Florida, Gainesville, FL 32611-8400, (352) 392-2273.

Judge OKs Miami airport contract

MIAMI – A judge upheld Miami-Dade County’s awarding of a baggage-wrapping contract at Miami International Airport, rejecting arguments that the county commission violated the state’s Open Meetings Law in making the contract decision.

Quick Packing, which placed fourth among the bidders, filed a lawsuit that

claimed the commission met in private to discuss bid proposals, and a judge issued an injunction to prevent Miami-Dade from executing a contract with Secure Wrap. (*Brechner Report*, May 2001) Judge Thomas S. Wilson, 11th Judicial Circuit, ruled against Quick Packing and allowed the county to sign the contract with Secure Wrap. (8/8/01)

Carnival contract not Sunshine violation

TAMPA – State investigators found that former Florida Agriculture Commissioner Bob Crawford did not violate the Sunshine Law in awarding contracts for the state fair.

Ed Gregory, who is a friend of Crawford’s and a campaign contributor, was given a three-year extension on the state fair management contract shortly

before Crawford left the agriculture post for a job as the executive director of the Florida Citrus Commission. (*Brechner Report*, May 2001) “We found no evidence of any criminal conduct and no evidence of a violation of the Sunshine Law,” said Jerry Bryan, a law enforcement captain in the office of the Inspector General. (8/3/01)

Judge orders school board to allow taping

LARGO – The public has a right to videotape public meetings, a circuit court judge ruled.

Suncam Inc. sued the Pinellas County School Board because the board refused to let Suncam tape a selection committee meeting where construction manager candidates were being interviewed.

The board said that the candidates would not perform well in front of a camera and that the videotaping process would be disruptive. School board attorney John Bowen argued that the

public has a right to attend meetings but does not have the right to videotape.

Judge James R. Case, 6th Judicial Circuit, ruled that the school board cannot prohibit the public from videotaping a meeting. If the school board wants to claim an exemption and bar videotaping, it must schedule a hearing, he ruled.

Case also ordered the school board to pay Suncam’s court costs and attorneys’ fees. (8/22/01; Decisions on file, *Suncam Inc. v. Pinellas County School Board*, July 30, 2001)

FIRST AMENDMENT

Court rules mushroom ads are unconstitutional

WASHINGTON – The U.S. Supreme Court ruled that a mandatory advertising campaign to promote mushrooms violated the First Amendment’s free speech protections.

United Foods Inc., a Tennessee-based mushroom producer, argued that the mushroom industry’s campaign forced the company to pay for promoting its rivals. Producers pay into a common fund, which is used by the Mushroom Council to generate generic advertising.

The Supreme Court in a 6-3 ruling upheld an appeals court decision in favor of United Foods.

“Just as the First Amendment may prevent the government from prohibiting

speech, the Amendment may prevent the government from compelling individuals to express certain views or from compelling certain individuals to pay subsidies for speech to which they object,” according to the Court’s opinion.

The Supreme Court ruled earlier that joint advertisements are constitutional in more heavily regulated industries such as fruit production. The Court said that the mushroom industry ads, unlike those of the fruit growers, were not part of a much wider marketing scheme. Additionally, the Court found that the mushroom market is less regulated than the fruit market. (6/26/01 – 7/2/01)

REPORTER’S PRIVILEGE

Reporter’s phone records subpoenaed

WASHINGTON – The Justice Department subpoenaed the home telephone records of an Associated Press reporter from northern Virginia, looking for the identity of a confidential source.

The source provided AP reporter John Solomon with information about an investigation of Sen. Robert Torricelli, D-New Jersey. Justice officials want to identify the source of the leak.

Critics claim that the Justice Department is not following internal guidelines that say subpoenas should only be issued for reporters’ information when the information being sought is essential to a criminal investigation. The guidelines, which are not legally binding, also require the government to pursue all other reasonable investigative routes first and to notify the journalist whose records are being sought.

The subpoena, which was approved by newly confirmed FBI Director Robert S. Mueller, asks MCI Worldcom to turn over the records of all of Solomon’s incoming and outgoing home phone calls. (8/27/01 – 8/31/01)

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Terror should not triumph over nation's freedoms

The terrors on Sept. 11 were so calamitous that they threaten to shake us loose from our constitutional mooring. A civil liberties catastrophe looms as citizens surrender to fear, fury and frustration and as lawmakers throw money and shards of the Bill of Rights at the specter of terrorism.

Some of our elected leaders predict a gloomy future

The Back Page

By Paul McMasters

Democratic Minority Leader Richard A. Gephardt, D-Mo. "We're not going to have all the openness and freedom we have had." Senate Minority Leader Trent Lott, R-Miss., repeated the warning: "When you're in this type of conflict, when you're at war, civil liberties are treated differently." Even staunch First Amendment advocates, haunted by the devastation in New York City, near Washington, D.C., and the Pennsylvania countryside, are tempted to temporize in the face of insistent calls to suspend or re-examine our commitment to civil liberties.

The First Amendment fallout commenced within hours of the airplanes crashing into their targets. FBI agents fanned out to persuade Internet firms and service providers to hook up e-mail sniffing software to monitor private citizens' e-mail. While the desire to marshal all resources is understandable, there are serious consequences for private speech and public discourse when ordinary citizens fear that law enforcement officials with broad powers to investigate and detain are listening in.

Government officials and policymakers immediately called for measures that would chill public discourse, disrupt reporting by the press, and interrupt the flow of information to the public. They want an expansion of law enforcement powers to spy on telephone and Internet traffic, to restrict the use of Internet encryption products that thwart online monitoring of private e-mail, to slow down and divert funds from the declassification of secrets, and to force public libraries to reveal information about patrons' use of their computers.

In Congress, prospects brightened for several troubling measures, including: The Cyber Security Information Act, which among other things would blow a gaping hole in the Freedom of Information Act. Anti-leaks legislation, dubbed the "official

secrets acts" by those who are deeply concerned about its impact on speech and the press and the flow of critical information to the public. The Flag Desecration Act, which would for the first time in the history of our nation amend the First Amendment to prohibit burning the flag as a form of political dissent. It would be foolish to dismiss such developments as mere nibbling at the edges of our rights. In fact, each nibble

diminishes our commitment to freedom and the principles that distinguish our way of life from all others.

In such an atmosphere, voices of dissent grow silent, probing questions by the press are viewed as unpatriotic and subversive, and whistleblowers inside government with vital information are quieted. In such an atmosphere, propaganda, rumor and paranoia fester and infect. In such an atmosphere, citizens are denied their place as full partners in their own governance.

By suspending some of our most precious principles, the risk becomes not just terrorists whose hearts have grown rancid with hate but also a citizenry whose hearts are filled with fear.

There are things we can and should be doing rather than joining the stampede to ditch our rights. As columnist Thomas Friedman put it: "We have to fight the terrorists as if there were no rules and preserve our open society as if there were no terrorists." As much as we wish to be safe forever from the horrors of last week, we simply cannot protect freedom by forsaking freedom. As much as we want relief from this time of national duress, we simply cannot make ourselves more secure by making fundamental freedoms less secure.

What an affront to the courage and heroism shown by those who gave their lives in rescue efforts or in forcing hijackers into a crash if we give in easily to fear or panic.

Fire from the skies and hatred from afar caused human carnage and suffering at an unthinkable level. They dealt terrifying blows to our financial institutions, our transportation and communications systems, our political and military nerve centers, and to a nation's sense of self and security.

Do we really want to add constitutional freedoms to that sorrowful list of casualties?

Paul McMasters is the First Amendment Ombudsman with The Freedom Forum foundation. A lengthier version of his column is available at <http://www.freedomforum.org>.