
THE BRECHNER REPORT

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Identity theft report urges access curbs

TALLAHASSEE – A statewide grand jury convened to investigate identity theft crimes in Florida has issued a controversial report that is highly critical of the state’s public records law. The report suggests, among other things, tighter restrictions on personal information available from the government.

“We do not suggest that government should withhold information that its citizens need to ensure that government carries out its role in a fair and efficient manner. However, there is a vast difference between information documenting what the government is doing on one hand, and private and personal information that government has collected from its citizens for a specific and limited purpose on the other,” the report states.

According to the Office of Statewide Prosecution, identity theft “involves the use of personal information by criminals to assume the identity of law-abiding citizens and use of it for a variety of fraudulent

purposes, including the securing of driver licenses, credit cards, bank accounts, automobile loans and insurance and government benefits.” The report states that both government and businesses take in more information than is absolutely necessary, which can lead to the information falling into the wrong hands. The crimes totaled \$2.5 billion nationwide in 2001.

Tom Sadaka, a special counsel for the Office of Statewide Prosecution, believes that the Legislature will probably act on most of the grand jury’s recommendations. “From history, the statewide grand jury reports generally get acted on.”

The grand jury resulted in charges against 33 individuals, for crimes including criminal use of personal identifying information, racketeering, organized fraud, grand theft and money laundering. (1/18/02 – 1/22/02)

ACCESS RECORDS

Media mounts challenge to Earnhardt law

FORT LAUDERDALE – Saying that the Earnhardt law, which restricts access to autopsy photos, is interfering with the ability of medical examiners and law enforcement officers to do their jobs, seven Florida newspapers and one television station have filed a challenge in Broward County.

The challenge includes a statement from Stephen J. Nelson, chairman of the Florida Medical Examiners Commission, affirming the law has “an extremely detrimental effect” on Florida medical examiners because it means they can no longer give lectures at national conferences. According to Nelson, the law will inhibit the professional advancement of Florida’s medical examiners, and could ultimately impede the advancement of medical

scientific theory.

The challenge also points out that autopsy photos have at various times been important tools in criminal investigations. In the Frank Valdes murder case, for example, autopsy photos showing boot marks on Valdes’ body indicated a different cause of death than the one suggested by the guards’ accounts. The guards were recently acquitted of causing Valdes’ death.

The seven newspapers bringing the challenge are the *Orlando Sentinel*, the *South Florida Sun-Sentinel*, the *Gainesville Sun*, the *Ledger of Lakeland*, the *Sarasota Herald-Tribune*, the *Ocala Star-Banner* of Ocala and the *Tampa Tribune*, along with WFLA-TV. (1/10/02)

Judge bars cameras from Moussaoui trial

WASHINGTON – A federal judge barred television broadcast of the trial of Zacarias Moussaoui, the only person charged to date in the September 11 terrorist attacks.

Court TV sought a ruling that the ban on cameras in federal courts was unconstitutional. A number of news organizations, including the Reporters Committee

for Freedom of the Press, the Radio-Television News Directors Association, CNN, NBC, CBS and ABC, filed *amici curiae* in support of Court TV.

Federal District Judge Leonie Brinkema said that the ban was not unconstitutional. In addition, the decision underscored the security concerns involved in the upcoming trial.

According to Brinkema, “any societal benefits from photographing and broadcasting these proceedings are heavily outweighed by the significant dangers worldwide broadcasting of this trial would pose to the orderly and secure administration of justice.”

Rather than appeal the decision, Court TV Chairman and CEO Henry Schlieff said he would actively support legislation currently before the U.S. Senate that would give individual federal trial and appeals court judges the right to allow photography, electronic recording, broadcasting and televising of court proceedings if they choose. The bill includes a provision that would allow the law to lapse three years after it is initiated.

Even if the bill is ultimately signed into law before the trial begins, however, Brinkema has already signaled her intention to bar cameras from the court in this case. (1/18/02 – 1/24/02)

COURTS

Editors hire lobbyist to make case for public records

TALLAHASSEE – After years of watching the legislature nibble away at the state’s vaunted Sunshine Law, the Florida Society of Newspaper Editors has taken the unusual step of hiring a lobbyist to beat the drum for openness in government.

FSNE hired Curt Kiser, a lobbyist and lawyer for Holland and Knight, to represent the cause of access during the

upcoming legislative session. Kiser is a former member of the Florida state House of Representatives and the state Senate. He will reportedly be paid \$35,000 for the session.

Kiser indicated that his most important assignment will be to push the so-called “newspaper amendment” to the Earnhardt bill, which would give members of the media the right to view

autopsy photographs without reproducing them. Media organizations often use independent analysis of autopsy photos to verify cause of death in controversial cases.

Neil Brown, managing editor of the *St. Petersburg Times* and a board member of FSNE, said the organization “wants to make sure the case for public access and open government is made.” (1/15/02)

JQC fights judge’s attempt to make complaints public

TAMPA – The Florida Judicial Qualifications Commission is trying to keep the details of an official complaint secret, even though the judge charged in the complaint has waived any right to confidentiality, and asked that the records be released to the press.

Hillsborough County Circuit Judge Gregory Holder was charged with giving a false or misleading answer on his application to become a federal judge. Holder answered “no” to a question that asked if he had been disciplined or cited for an ethics breach, or been the subject of a complaint. Holder said he did not realize that there had been official complaints lodged against him.

Although Holder asked the JQC to release all information about the complaints and the subsequent charges, the JQC has instead hired Barry Richard, who represented President George W. Bush during the Florida election cases, to fight the release. Holder has also filed a motion to keep the JQC from hearing his case, since high ranking members will be witnesses against him. (2/5/02)

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.

Pentagon orders press to withhold photos

WASHINGTON – Claiming they might violate prisoner rights under the terms of the Geneva Convention, the Pentagon ordered photojournalists not to send images of al-Qaeda and Taliban prisoners being loaded onto

planes for the trip to Guantanamo Bay, Cuba from Kandahar, Afghanistan. The Pentagon had originally given permission for journalists and camera crews to cover the departure of the C-17 cargo plane. However, after the plane left, officials told journalists that they could not send the images.

The pictures showed prisoners, chained and masked, being led onto the plane. Pentagon officials said that the Red Cross had questioned whether or

not the photos violated the Geneva Convention. However, the Red Cross denies that they contacted the Pentagon about the photos.

The Bush administration had originally said that the Geneva Convention did not apply to either the Taliban or al-Qaeda detainees. Later, White House spokesman Ari Fleisher said that the Geneva Convention would be applied to Taliban detainees, since Afghanistan is a party to the Geneva Convention, but not to the “al-Qaeda international terrorists.” The Bush administration has denied all detainees prisoner-of-war status, which means they can be tried for crimes outside of the conflict in Afghanistan, including the Sept. 11 attacks. (1/15/02; 2/8/02)

Airport to install face-scanning software

ST. PETERSBURG – St. Petersburg/Clearwater International Airport will be among the first in the country to install software designed to match faces with a database of known terrorists and other wanted criminals.

Departing passengers will be asked to look into a camera at security checkpoints. If the system returns a match, sheriff’s deputies will question the passenger. Ultimately, Sheriff Everett Rice plans to use the system to

scan the faces of incoming international passengers, but that would require the permission of the United States Customs Service.

Installing the system in the airport required less than \$100,000 of a \$3.5 million federal grant that was earmarked to overhaul the county jail’s booking database, obtained prior to Sept. 11. A similar system installed in Ybor City has thus far yielded no arrests, and was reportedly inoperative for four months beginning Aug. 11. (1/23/02)

Improperly stated position is not defamation

OCALA – An article in the *Ocala Star-Banner* that incorrectly summarized mayoral candidate Marguerite Jill Cantine’s position on growth along State Road 200 does not constitute libel, according to a Marion County judge. Cantine’s complaint alleged libel due to an Oct. 1999 article that misreported the number of the road on which she favored

growth. The ruling says that such an inaccuracy does not rise to the level of defamation, since the position, as it was stated, would not be ridiculous. The order to dismiss points out that cases are routinely dismissed as a matter of law “where statements have falsely attributed political positions or affiliations of the plaintiff.” (30 Media Law Reporter 1127, Jan. 2, 2002)

FIRST AMENDMENT

PRIVACY

LIBEL

Newspapers challenge trustees' telephone meetings

ORLANDO – Florida Board of Education Chairman Phil Handy has been speaking privately with the chairs of the boards of trustees of the state's public universities via conference calls. The private meetings have raised questions about possible Sunshine Law violations, leading four Florida newspapers, *The Gainesville Sun*, the *Orlando Sentinel*, the *South Florida*

Sun-Sentinel and *The Tampa Tribune*, to send a letter asking that the meetings be opened. Handy told reporters that he had not read the letter.

A Board of Education spokesperson said that because the chairs were all appointed to different boards, the meetings do not constitute a board or commission meeting, and the Sunshine laws do not apply. University presidents

have met in the past, but their meetings are normally open to the public.

Handy told reporters that the informal meetings were to discuss policy options, and he acknowledged that the chairs conferred on upcoming legislative issues, including the state budget and proposed tuition increases. However, he said that policy making is left to the individual boards of trustees. (1/10/02 – 2/6/02)

Citizens groups win right to input on development issues

CHARLOTTE COUNTY – Local environmental groups and government watchdog associations have won the right to have a say in future real estate development plans in Charlotte County. The 2nd District Court of Appeals ruled that the county's Development Review Committee, which has the power to approve real estate developments such as apartment complexes and marinas, is a public body, subject to Florida's Sunshine Law.

A local environmental group, EverGreen, filed suit to stop the development of an apartment complex that included the cutting of more than two dozen old-growth trees. A lower court ruled that the trees could be cut down under county law, and agreed that the DRC was not subject to the Sunshine Law. Charlotte County had referred to the DRC meetings as "staff meetings." The public was allowed to attend, but not make comments. But in overturning a lower court decision, the three-judge panel said that the lower court had mistakenly ruled that the DRC members were nothing more than "glorified plans examiners."

The ruling also said that the lower court decision was wrong in assuming that the public had enough opportunity for input when the county did its long range developmental planning.

Officials in Charlotte County said that the development review process has already been under review for some time, in an attempt to incorporate more citizen input into final decisions. The ruling may force changes in the way other counties within the state incorporate public input into the land development process. (1/20/02)

Commissioner sues over open meetings violation

CHIEFLAND – City Commissioner Sunshine Baynard has filed a civil suit against the Chiefland City Commission, saying that an "emergency meeting" violated Florida's Sunshine Law.

At a regularly scheduled commission meeting on Jan. 14, Commissioner John Hart suggested that rather than fill the Chiefland Police Department's chief of police vacancy, the city should downgrade the position, or eliminate it entirely and hire Sheriff Johnny Smith to

handle local law enforcement. At that meeting, the commission decided to continue the search for a chief of police, but also to give further consideration to Hart's alternative proposals.

Mayor Betty Walker called the Jan. 17 meeting on Jan. 16, with minimal public notice, after speaking privately with Smith. *The Chiefland Citizen*, a local newspaper, received notification of the 10 a.m. meeting by fax at 5:33 p.m., the evening before the meeting.

Baynard, who was unable to attend that meeting due to a scheduling conflict, claims in her suit that the mayor had the city manager call her to find out her opinion on the matter, and that the decision to halt the search for a police chief was actually made in advance of the emergency meeting "by virtue of liaison communication" between members of the city commission. (1/24/02)

Butterworth issues opinion on school advisory committees

TALLAHASSEE – In a letter to Collier County School Board Attorney John Clapper III, Florida Attorney General Robert Butterworth said members of school advisory councils are subject to criminal penalties for knowing violations of the Sunshine Law. Clapper had requested the opinion on behalf of the board.

The school advisory councils are established pursuant to Florida statute, which states that the councils' duties include preparing and evaluating schools' improvement plans. The boards have the power to make recommendations to a public agency, but those recommendations are not binding. However, because the councils receive state funding, and have been found to constitute a "board or commission" under the provisions of the Sunshine Law.

Accordingly, Butterworth noted that any school advisory board members "who knowingly attend a meeting of the council not held in accordance with [the Sunshine Law]" would be subject to criminal penalties. (AGO 2001-84, 12/13/01)

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When judges act as editors, public loses out

Trial judges, we're too frequently reminded, make lousy newspaper editors. Three recent decisions merit — and perhaps even require — special attention. In South Lake Tahoe, Calif., a trial judge, hearing a murder case, initially barred the *Tahoe Daily Tribune* and other newspapers from publishing color photographs of the defendants. The unusual ruling followed a defense request that the defendants be

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By Douglas Lee

allowed to appear in court in street clothes, rather than their orange jail jumpsuits. The jumpsuits, defense counsel argued, could lead



Douglas Lee

potential jurors to presume the defendants are guilty.

At the first hearing on the issue, Judge Jerald Lasarow denied the motion but threw the defense a bone — the newspapers, he said, could not run color photos of the defendants or any photo of a defendant showing “jail-type insignia.” These restrictions, the judge believed, would preserve an untainted jury pool.

After considering the issue again, Lasarow changed his mind and said the defendants could appear in street clothes. Then he threw the media a bone — the newspapers, he said, would be allowed to publish color photos of the defendants, as long as the defendants wore street clothes.

At best, Lasarow's rulings are uninformed. At worst, they're ludicrous. If potential jurors presume the defendants guilty, it will not be because of what the defendants are wearing. Rather, it will be because they have been arrested, charged with the crime and are in custody, facts the newspapers are free to report.

Moreover, the rulings are wholly ineffective. Banning color photos and “jail-type insignia” never would have fooled anyone. Even the densest potential juror would not have confused a black-and-white photo of a jail jumpsuit with the latest in courtroom fashion. Lasarow's second ruling is no better, as it apparently bars the newspapers from publishing photos taken earlier in the case and unnecessarily infringes on the newspapers' right to choose how they will cover the proceedings.

While it's difficult to imagine a ruling more flagrantly unconstitutional than Lasarow's, the decision of Tennessee Circuit Judge Allen Wallace comes close. In this case, a criminal child abuse prosecution of Tennessee state Sen. Doug Jackson, Wallace sealed the plea bargain. After the secrecy of the deal predictably resulted in a firestorm of criticism, both Jackson and the prosecutor asked Wallace to release the terms of the agreement. Amazingly, Wallace refused.

“I feel like we're here this morning for the benefit of the news media and not for the benefit of this child,” Wallace said in denying the joint

request to unseal the plea bargain, “and that kind of bothers me.”

It should bother the public, however, that Wallace, while perhaps well-intentioned, failed to recognize the vitally important surrogate role the news media play for the public, especially when covering the criminal justice system. The public, more than the news media, benefits when plea bargains involving elected officials are open to scrutiny. And in this case, in which prosecutors reportedly agreed to dismiss the charges that Jackson abused his 16-year-old daughter if

Jackson and his family sought counseling, the public is entitled to ask whether justice was done.

An uninformed public was also the goal in Camden, N.J., when Superior Court Judge Linda Baxter charged four *Philadelphia Inquirer* reporters with contempt for publishing the name of the jury forewoman in the trial of Rabbi Fred Neulander, who was accused of arranging for his wife's murder in 1994. Baxter initially barred the media from identifying or contacting jurors during the trial and then renewed the order after the jurors' inability to reach a verdict resulted in a mistrial.

The *Inquirer* challenged the order after the trial, but the state appellate court affirmed Baxter's ruling, saying that history showed a “strong likelihood that continued publicity predictably will impair the defendant's right to a fair trial.” Baxter's order, however, doesn't limit publicity before the next trial. Instead, it prohibits coverage of jurors, coverage unpopular with some jurors and almost all judges.

When did jurors earn the right to be unaccountable for their decisions? Does anyone really believe that jurors in a capital murder case will be influenced by whether reporters will be allowed to contact them? And, if so, how can we possibly place the life of an individual in the hands of persons so worried about their own personal inconvenience?

The *Inquirer's* publication of the forewoman's name was intentional and included in an article with four bylines, which suggests the paper is prepared to fight for its right to publish the name — which was revealed in open court and public records — as long and as hard as necessary. Let's hope the *Inquirer* ultimately is successful and that some court somewhere finally rejects the notion that a juror's desire for privacy trumps the public's right to know.

And, while we're at it, let's also hope that in the future, judges are content to leave editing to editors.

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