THE BRECHNER REPORT

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Appeals court reviews access to the FCAT

TALLAHASSEE – The state Department of Education has asked the 1st District Court of Appeal to review a lower court ruling that allows parents access to test questions and answers of the Florida Comprehensive Assessment Test.

ACCESS RECORDS

Last year, Steven Cooper, parent of a high school student who failed the FCAT, sued the Department of Education after it refused to release his son's questions and answers from the test. Leon County Circuit Judge Janet Ferris ruled that questions and answers should be released.

"Providing parents or guardians reasonable access to such materials, especially where their child has 'failed' the test, does no violence to the integrity of the testing process," wrote Ferris.

The state has asked a three-judge panel to overturn Ferris' ruling. A lawyer for the DOE, Daniel Woodring, argued that the Legislature never intended to let test questions and answers become public, noting that the law makes it a crime for teachers or administrators to release such information.

Woodring noted that releasing the information would cause a number of problems for the state. The state would have to review the test every year, forcing the costs up, he said.

Mark Herdman, the lawyer representing Cooper, said that without seeing the FCAT questions and the student's responses, it is extremely difficult to evaluate the learning process.

"The score is meaningless without the underlying data," Herdman told the court. (9/19/03)

Government can exempt private calls

TALLAHASSEE – A ruling that government workers can determine which telephone records are private, even if the calls are made in public places using government phones, was allowed to stand after the Florida Supreme Court refused to hear the case.

ACCESS RECORDS

The lower court decision came after three Florida newspapers attempted to obtain cellular phone records for five staff members in the office of former House Speaker Tom Feeney. Feeney's office responded to the records request by providing phone logs in which all five employees blacked out phone calls they considered to be private.

Feeney's attorney, Barry Richard, argued that while calls concerning government business are always public, private calls can be exempt. The lower court agreed, ruling that personal calls fall outside the current definition of public records.

The three newspapers, the *Orlando Sentinel*, *The Tampa Tribune* and *The Palm Beach Post* asked the Florida Supreme Court to review the decision.

"This basically creates a license for government officials to edit public records, and that has never been state law," said David Bralow, attorney for the *Orlando Sentinel*. (9/16/03)

Earnhardt case goes to Supreme Court

GAINESVILLE – A student-run newspaper has petitioned the U.S. Supreme Court to overturn a lower court decision that restricts access to autopsy photos.

In its petition to the Court, the *Independent Florida Alligator* argues that the law barring public access to autopsy photos passed after the death of race car driver Dale Earnhardt is unconstitutional.

ACCESS RECORDS

In March 2001, the 5th District Court of Appeals ruled that the viewing of any autopsy photos violates the privacy rights of families. The newspaper then took the case to the Florida Supreme Court, which declined to review the case without explanation, allowing the appellate court's decision to stand.

The *Alligator* and other papers requested the autopsy photos of Earnhardt after questions arose over how he died and if better safety equipment might have prevented the death. Earnhardt's widow, Teresa, fought to keep the photos private and lobbied to pass a law restricting access to autopsy photos. Under the 2001 law, those who view or copy autopsy photos without authorization can be fined $5,000.

"The *Alligator* was trying to get the records to find out if NASCAR was telling the truth. The trial court said that was not a good enough reason," said Tom Julin, attorney for the paper.

Jon Mills, attorney for Teresa Earnhardt, said he expected the newspaper's publisher, Campus Communications, to go to the U.S. Supreme Court, but believes the Court will back the Florida court rulings.

"The state of Florida and the Florida courts have always been generous on open records and the First Amendment," but they agree that autopsy photos should remain private, he said. (9/30/03)

ACLU sues prison

WEST PALM BEACH – The American Civil Liberties Union has filed a public records lawsuit against a maximum-security prison for girls.

The lawsuit charges the Florida Institute for Girls juvenile prison in suburban West Palm Beach with "illegal, malicious and willful" evasion of the Public Records Law. The institute is run by a private company, Premier Behavioral Solutions.

The attorney who filed the suit, Frank Kreidler, requested a variety of records from the prison after hearing inmates' complaints about their treatment. Premier Behavioral Solutions released some of the records, but would not provide information including its profit margins, records of internal staff investigations, information about its school curriculum and the names of its teachers.

Since the request of the records, staff members of the prison have been accused of sexual misconduct and breaking the arms of two inmates while restraining them.

Kreidler says the public has the right to know more about the private company's finances. He wants to review the records to make sure the company is following a rule that prohibits it from using its contract earnings for political lobbying.

"They need to be produced for the benefit of the taxpayers of Florida," he said.

Premier Behavioral Solutions won a $5.2 million annual contract from the state in 2000 to open Florida's only maximum-security prison for girls. The contract was renewed this year. (9/20/03)

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.

Newspaper challenges Sunshine Law exemption in appeals court

TALLAHASSEE – The *Baker County Press* has asked the 1st District Court of Appeals in Tallahassee to review a 1998 statute that exempts meetings and business records of certain community hospitals from the Sunshine Law.

The state statute in question allows not-for-profit, public hospitals to operate behind closed doors, and was cited by the Indian River Memorial Hospital as exempting its leaders from Sunshine violations. If the *Baker County Press* succeeds in the appeals court, the ruling could have legal weight elsewhere in the state where not-for-profit corporations want to run publicly owned and funded hospitals out of the public eye.

Those who support the exemption for not-for-profit public hospitals say that doing business in the public puts those hospitals at a competitive disadvantage with private for-profit hospitals.

But *Baker County Press* attorney Robert Dees said corporations running hospitals built and owned by the public also have inherent advantages.

A Daytona Beach attorney argued the exemption was unconstitutional in a 2002 Volusia County case. The hospital lost in circuit court, but declined to appeal.

County employees cleared of violation

TALLAHASSEE – The state attorney's office has determined that three Escambia County employees did not violate the state Open Meetings Law during the Development Review Committee process.

ACCESS MEETINGS

A complaint was filed with the state attorney's office in mid-August by local developer Dan Gilmore. The complaint alleged that Keith Wilkins, Taylor Kirschenfeld and Brent Wipf broke the Open Meetings Law when they met to discuss development review matters with the developers.

After an investigation, state attorney office investigator Allen Cotton said the procedures used by the Development Review Committee did not violate the Sunshine Law.

Conversations with staff have never been subject to Sunshine Laws, said County Attorney Janet Lander.

Despite the findings, the county plans to "carefully rework" the committee's process with the help of staff input, Landers said. (9/6/03)

Security officer sues Sears for privacy

PALM BEACH – A former Sears employee has filed a lawsuit against the store, claiming Sears violated his right to privacy by taping him without his consent and for firing him after he complained about it.

PRIVACY

Carl McMahan, a former part-time security officer at a Sears store, found a hidden video camera on top of a filing cabinet in a corner of the security office. According to the suit, the problem wasn't the camera taping McMahan, it was the camera's audio recording. It is illegal to record someone without his or her consent in the state of Florida, according to the suit.

The camera was placed in a box with a small hole cut out of a corner with a bag placed on top of the box to conceal it.

McMahan confronted his supervisor about the camera, who admitted to installing the camera. McMahan then reported the incident to police and filed an internal Sears incident report.

Subsequently, McMahan was placed on probation and fired a month later.

Steven Grover, McMahan's attorney, said Sears should have known better.

"Employers videotape employees all the time, but you just can't record people's conversations without telling them," Grover said. "It's unfortunate that when an employee speaks out about their rights, they can fall victim to something like this." (9/16/03)

FIRST AMENDMENT

Group may pursue constitutional claim

TAMPA – A federal appeals court has ruled that a federal judge in Tampa erred when he threw out a case brought by a conservative Christian group against a public transit authority that refused to display advertisements at bus shelters for an anti-homosexuality conference.

The three-judge panel of the 11th U.S. Circuit Court of Appeals said that the Focus on the Family group may pursue its claim that the Pinellas Suncoast Transit Authority violated the group's First Amendment rights by not posting ads about the 2000 "Love Won Out" convention. The ads discussed homosexuality and the theory that it can be prevented.

The transit authority contracted Eller Media, who owns and manages 500 bus shelters. The authority, however, retains final say on shelter advertisements.

The question in this case is whether a government entity working though a private company can reject ads they don't want, even if the agency feels the ads may be offensive. The group's lawsuit claimed that the government can not limit advertisements regardless of whether they believe they will offend some.

Focus on the Family was refunded nearly $5,000 that was paid to install the advertisements in the shelters before the conference.

"What the case really says is the government can't hide behind a private company when it violated the Constitution," said Erik Stanley, the attorney representing Focus on Family. (9/15/03)

Judge orders do-not-call list be enforced

WASHINGTON – A three-judge panel of the 10th U.S. Circuit Court of Appeals has blocked a lower court's decision that ordered the Federal Trade Commission to stop operating the national do-not-call list.

The judges' decision will allow the FTC to begin enforcing the list of more than 50 million telephone numbers of people who do not want to receive calls from telemarketers.

The telemarketing industry had scored legal victories in two lower federal courts before the appellate court's decision. First, a federal District Court judge in Oklahoma City ruled that the FTC lacked authority to enforce the list. As a result, Congress passed legislation that was signed into law explicitly granting the agency the authority.

A U.S. District judge ruling in Denver followed. That judge determined the do-not-call list was unconstitutional because it blocked commercial telemarketing calls, but allowed calls from charities.

The three-judge appeals panel stayed the lower court's ruling, saying that the FTC was likely to be successful in having it overturned. (10/9/03–10/11/03)

BROADCASTING

Appeals court issues stay on FCC rules

PHILADELPHIA – A federal appeals court has issued an emergency stay delaying the new Federal Communications Commission media ownership rules from going into effect.

The petition to stay the new rules was brought by a coalition of media access groups called the Prometheus Radio Project, a group that advocates community radio stations.

The new rules would have allowed a single company to own newspapers and broadcast outlets in the same city as well as allowing a broadcast network to own a group of stations reaching 45 percent of the national audience, up from 35 percent.

The stay preserves the current rules while the 3rd U.S. Circuit Court of Appeals conducts a review on the new rules.

In granting the stay, the three-judge panel wrote: "The harm to petitioners absent a stay would be the likely loss of an adequate remedy should the new ownership rules be declared invalid in whole or in part. In contrast to this irreparable harm, there is little indication that a stay pending appeal will result in substantial harm to the Commission or other interested parties." (9/4/03)

COPYRIGHT

RIAA sues for file-sharing

WASHINGTON – The Recording Industry Association of America has filed 261 lawsuits across the country against people who share music over the Internet, charging them with copyright infringement.

Called the heaviest crackdown on illegal song swapping, the lawsuits are expected to be followed by thousands more in an attempt to discourage people from downloading copyrighted material from the Internet.

The lawsuits were aimed at what the RIAA described as "major offenders" who illegally distribute on average more than 1,000 copyrighted music files each. The trade group used a search technique that allows anyone using file-sharing services to view what files users made available to others.

A sampling of people using file-sharing services such as Kazaa, Imesh, Blubster, Grokster and Gnutella were named in the lawsuits. The RIAA obtained the names and addresses of the users because of a court decision that ruled Verizon had to turn over the names and addresses of its customers whom the trade group wanted to subpoena.

U.S. copyright laws allow for damages of $750 to $150,000 for each song offered illegally. The group has already settled with a few song-sharers, with most settlements in the $3,000 range. (9/9/03)

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Publishing the name of an undercover deputy

The Back Page

By Skip Perez

Skip Perez

The Ledger of Lakeland ended a year-long tussle with the Polk County sheriff over publishing the name of an undercover deputy. The 2nd District Court of Appeal rejected the sheriff's lawyers' arguments favoring an unconstitutional attempt at censorship.

I have received numerous phone calls and letters about the topic, most of them critical. I have written to those who have called, explaining *The Ledger's* position. Following is an edited version of the letter:

Dear Mr. Smith,

Thank you for your letter concerning *The Ledger's* decision to print the undercover deputy's name. It was my decision, as executive editor. Permit me to explain my thinking.

First, it is my strong belief that the role of the press is to hold all levels of government — including law enforcement — accountable for actions that have a serious impact on its citizens. The shooting and killing of a drug suspect by an undercover drug agent falls into that category.

The Ledger knew the name of the undercover deputy for several weeks before we published his name. I paid the Sheriff's Office the unusual courtesy of notifying them, well in advance, of our intent to publish, so they could take whatever measures they felt might be necessary, including transferring the deputy out of undercover work.

As this is written, the Sheriff's Office has chosen not to do that. (The deputy was moved to an agriculture unit a year later.) One might conclude, then, that our publishing the name did not pose the immediate serious threat, as first claimed. If it did, why not transfer the deputy to a less perilous job?

Initially, we were told by the Sheriff's Office that there were credible threats against the deputy's life. But during a court hearing on the situation, the deputy's supervisor said under oath that the threats were unsubstantiated, and could neither be proved nor disproved.

In a personal meeting with the undercover deputy and his supervisor before we published the name, I was told by the deputy several times that one reason he opposed publication of his name was because he had worked hard to get assigned to the undercover job, enjoyed that form of work and was proud to work for this elite unit. He did also claim there were threats against him, but I found it revealing that he stressed his opposition to a transfer because he worked hard to get this job.

I think I understand why law enforcement sometimes argues so strongly for secrecy, and in some rare cases the arguments may be legitimate. But government agents acting secretly and killing people secretly without a trial (even when justified) is not what America is all about. There are plenty of examples of other societies in our history where government agents had or still have unbridled and unaccountable power, and the citizenry was abused as a result. Fortunately, in their wisdom, our founding fathers saw the dangers of that, and courts since then have repeatedly reaffirmed why an open society is the best society.

The press has an important and historical role — and an obligation — to uphold these principles. And one of the ways we do this is by printing names of people, including police, who shoot or kill other people. Police should understand the public nature of their work and its perils. (Even undercover agents must testify in open trials using their true names).

A point of curiosity for me is that many or most people understand the press's role — and may even respect the press's role — when it comes to scrutinizing major government actions. But when that government is law enforcement, a different standard is sometimes applied. And, what I find curious, is not only that some people hold law enforcement to a lower standard of exposure, they automatically accept law enforcement's arguments as being sound and valid — as if law enforcement is exempt from questioning, or being required to defend or prove its arguments for secrecy.

Our system of government has a forum for testing those arguments — the courts. As you know, *The Ledger's* arguments were tested in the courts and we prevailed. In my view, the law-enforcement arguments were not sound on any level. So we published the name and will continue to when we deem it relevant.

Skip Perez is executive editor of The Ledger of Lakeland. The complete story ran in The Ledger Sunday, Sept. 28, 2003.