
THE BRECHNER REPORT

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Sunshine survey shows no problems

TALLAHASSEE—The Council for Education Policy, Research and Improvement conducted a survey to assess the effects of the Sunshine Law on how education officials run their institutions. The survey was e-mailed to school board members, superintendents, and college trustee chairs and presidents throughout the state.

The survey asked educators if the state's Sunshine Law had a positive, negative or neutral effect on their work. Those who cited a negative effect were asked to make suggestions to change the law.

Executive Director of the council Bill Proctor said the group wanted to see if there was an exemption that would significantly increase schools' productivity.

"If there was a slight change you could make and say that would improve the way we do business, maybe it would be worth exploring," Proctor said.

The survey had a low-response rate — 50 of the state's 67 school districts did not respond and only six members of university boards responded — showing the Sunshine Law does not seem to be inhibiting education officials from conducting business, Proctor said.

Proctor said that based on the results of the survey, the council likely will not recommend an exemption because educators did not cite a common area or request that strained their staff. (10/8/03)

Judges rule FCAT exams are not public

TALLAHASSEE—The 1st District Court of Appeal ruled that copies of the Florida Comprehensive Assessment Test are not public records and parents do not have a right to review them.

The appeal court decision overturns a lower court decision that would have allowed parents to see both the FCAT booklets and the answer sheets.

The state appealed the lower court decision, arguing that if the tests were made public, they would have to be changed every year, costing the state

millions of dollars.

The three-judge panel ruled unanimously on the matter, after hearing arguments from a parent's attorney that it would be meaningless to release test scores but not the test sheets that produced the

scores.

Judge Paul Hawkes wrote in the decision that the plain language of the statute makes it clear that a student's public records refer to standardized test scores, not the exams themselves.

(11/6/03)

**ACCESS
RECORDS**

Former employee sues county over access to pre-termination meeting

PALMBEACH COUNTY—A former Palm Beach County employee is appealing a circuit judge's decision that a pre-termination conference panel that upheld the employee's firing is not subject to the Open Meetings Law.

Former Department of Community Services senior secretary Lee Ellen Dascott exercised her right to appeal to a pre-termination panel after she was fired. The panel upheld her firing, which was based on Dascott's act of bringing a tape recorder to a meeting with her supervisor.

Dascott's attorney, Frederick W. Ford, argues that the closed panel meeting violated the Open Meetings Law and that the termination must be rescinded, according to the brief.

Palm Beach Circuit Judge Arthur Wroble rejected Dascott's lawsuit in March, ruling that pre-termination hearings are not open to the public. Ford is appealing the decision in the 4th

District Court of Appeal, backed by an amicus curiae brief from the First Amendment Foundation.

"We weren't privy to the discussion, to their assessment of the evidence and the law, which hampers us in any attempt to appeal in the administrative procedure," said Ford. "For all we know, they could have come up with some other reason that's unstated in the record for why they did it."

Assistant County Attorney Paul F. King argued that meetings of personnel committees are executive matters not covered by the Sunshine Law. King said if Dascott wins her appeal, the county administrator would be unable to talk to anyone on his staff about personnel matters outside of an advertised public meeting. Also, county employees fired since 1999 involving pre-termination conferences could sue the county due to the four-year statute of limitations for Sunshine Act lawsuits. (10/9/03)

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SPECIAL REPORT

The Brechner Center's Annual Freedom of Information Report is included in this issue, p. 1B-4B.

Judge bars private panel meeting

BROOKSVILLE—A circuit judge issued a temporary injunction at the request of the *St. Petersburg Times*, barring a Hernando County school district committee from meeting to review a novel in private.

The *Times* challenged the district's assertion that the committee is not subject to the Open Meeting Law, contending the panel's review should be open to the public because the group's recommendation would affect public policy to be settled by the School Board.

The matter arose after the mother of a fourth-grader at Spring Hill Elementary School, Jerri Trammel, complained about passages inappropriate for children that talk frankly about masturbation in the Judy Blume novel *Deenie*. A review committee at the school made no decision and passed the matter to the district level.

"I think that should be a public meeting," Trammel said. "That's something I think parents should at least get to listen to, if not have a voice."

After Circuit Judge Jack Springstead issued the temporary injunction, two School Board members said school officials are planning to let the public attend the meeting.

"We'd rather have it a public meeting due to the nature" of the subject matter, said board member Robert Wiggins.

The Hernando County district last reviewed a book challenged during the 2000-01 school year after a parent demanded the removal of *Freaky Friday*. The School Board made the decision not to remove the book. (10/14/03-10/28/03)

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.

Council members not indicted on charges of Sunshine Law violation

CAPE CORAL—Two Cape Coral council members will not be indicted on allegations of violating the state's Open Meetings Law after a Lee County grand jury released a sealed report, according to the state attorney's office.

Mayor Arnold Kempe and Councilmember Dick Stevens were accused of violating the Open Meetings Law after they were caught on videotape talking during a break following a vote on removing a proposed skate park from the city's strategic plan. Normally, the recording equipment is turned off during breaks, but the camera and audio came back on as the two spoke.

The state attorney's office began an investigation of the matter after Councilmember A. J. Boyd asked for the tape to be reviewed. The office later

brought the issue before the grand jury after questioning Kempe, Stevens and a number of city staffers.

Kempe and Stevens argued that the conversation did not violate the Open Meetings Law because the vote for the skate park had already taken place and because there was no prohibited discussion of any kind.

According to state law, the grand jury findings will remain sealed for at least 15 days, allowing Kempe and Stevens time to review the documents.

"In this instance, the grand jury has not come back with an indictment or a true bill," said Attorney Michael Hornug. According to Florida Statute 905.28, grand jury reports "not accompanied by a true bill or indictment" are confidential until future order of the court. (10/10/03)

Company sues appraiser for photos

COLLIER COUNTY—An Orlando-based real estate information provider is suing a Collier County property appraiser, claiming the appraiser violated the state Public Records Law.

MicroDecisions Inc. is suing Property Appraiser Abe Skinner over the property appraiser's Internet Geographic Information System, or GIS. Attorneys for Skinner assert that disks containing the GIS pictures requested by MicroDecisions are copyrighted items, and, therefore, the company would be required to purchase a \$2,000 commercial license from the property appraiser that gives them permission to use the GIS maps.

Attorneys for MicroDecisions argue that anything produced by the appraiser's office is a public record and no limits can be imposed on records created by using public tax dollars.

Earlier this year, Collier County Judge Ted Brousseau issued a summary judgment on the issue in favor of Skinner. MicroDecisions is

appealing the judgment to the 2nd District Court of Appeal in Tampa. Attorneys for the company acknowledge they have been given the GIS disks, but the appeal insists the disks cannot be used for commercial purposes unless the company pays for the license.

Earlier in the year, Palm Beach officials asked Attorney General Charlie Crist if the county could

legally obtain copyright protection and require license agreements for GIS maps. Crist responded saying any restriction on the maps

would violate the Florida Public Records Law.

"It is clear that maps and related data produced by Palm Beach County for purposes of county business are public records," Crist said in an official opinion (AGO 2003-42). "I am not aware of, nor have you brought to my attention, any statute that would generally allow counties or county agencies to secure copyrights for or license material produced by the county for official purposes."

ACCESS RECORDS

THE BRECHNER CENTER

ANNUAL FREEDOM OF INFORMATION REPORT

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2003

Legislature approves five new public access law exemptions

The Florida Legislature passed five new public records exemptions during the regular 2003 legislative session and in a special May session.

During the main legislative session, the Legislature passed a public records exemption for all information contained in the putative father registry maintained by the Office of Vital Statistics. It provides that these databases are confidential and exempt from public disclosure.

The Legislature also passed an exemption that makes any visual images of a sexual offense victim confidential.

Beginning June 17 of this year, such information is confidential and exempt regardless of whether or not the victim is identified.

The three other public records exemptions that passed during the regular

legislative session included:

- An exemption for all personal identifying information contained in records relating to an individual's health held by local governments for the purpose of determining eligibility for paratransit services under Title II of the Americans with Disabilities Act.

- An exemption for information deemed confidential under federal law when provided to the Department of Agriculture and Consumer Services for purposes of food safety investigations, federal-state contracts and partnership activities, and regulatory reviews.

- An exemption for credit scoring methodologies and related data and information that is a trade secret and filed with the Office of Insurance Regulation.

Voters approve two-thirds vote amendment to state constitution

Florida voters approved an amendment to the state constitution that requires a two-thirds vote in the legislature in order to pass a new Public Records or Open Meetings exemption.

During the 2002 legislative session,

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Florida lawmakers passed the bill that placed the constitutional amendment on the ballot for Florida voters. Approximately 76 percent of Florida voters approved the amendment.

Previously, an exemption only had to win a simple majority of the votes.

Although a higher number of votes

now is needed to pass an exemption, it may make little practical difference in the number of new exemptions.

Attorney General Charlie Crist clarified his position on the two-thirds vote requirement and its application to reenactment of exemptions under Florida's Open Government Sunset Review Act (OGSR).

According to Pat Gleason, General Counsel for the Attorney General's Office, General Crist clearly and unequivocally stated that he believes that the two-thirds vote requirement applies to all proposed open government exemptions, including reenactment of current exemptions under the OGSR Act.

U.S. Supreme Court rejects Alligator appeal

The U.S. Supreme Court rejected an appeal from *The Independent Florida Alligator* for access to autopsy photos of race car driver Dale Earnhardt, ending the newspaper's two-year legal battle.

The *Alligator* requested access to the photos as questions were raised about the cause of Earnhardt's death and whether better safety equipment would have saved his life.

The Earnhardt Family Protection Act, which passed in 2001, exempts public release of autopsy photos without a court order and prevented the newspaper from obtaining Earnhardt's records. Before the law, autopsy photographs were public information in Florida.

The first lawsuit brought by the *Alligator* challenged the law and its constitutionality. It resulted in 7th Judicial Circuit Judge Joseph G. Will ruling the law was "valid and constitutional" and the retroactive provision was constitutional.

The *Alligator* then appealed the ruling to a three-judge panel of the 5th District Court of Appeal, and the lower court ruling was upheld. The newspaper then petitioned the Florida Supreme Court, which declined to review the case, without explanation.

Its final petition was to the U.S. Supreme Court to overturn the lower court's decision.

The *Orlando Sentinel* and *The South Florida Sun-Sentinel* also challenged the law, with a lawsuit pending in Broward County filed in the 4th District Court of Appeal.

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State Attorney General tackles public record issues

Autopsy photographs or videotapes may be shown for training purposes to non-public agencies or associations when a court has made the finding of good cause, according to Florida Attorney General Charlie Crist. However, the family of the deceased must be notified and have the opportunity to attend and be heard at any hearing on the matter.

Access to sensitive information was the subject of several official access opinions issued by Crist during 2002 and 2003. These access opinions included:

■ **Criminal history records** (AGO 02-68) - Law enforcement agencies that have been ordered to expunge criminal history records should physically destroy or obliterate information consisting of identifiable descriptions and notations of formal criminal charges. However, criminal intelligence information and criminal investigative information do not fall within the scope of section 943.0585, Florida Statutes, in which a judge orders a criminal history record sealed.

■ **Closed meeting records** (AGO 03-09) - There are no specific restrictions on the dissemination of information discussed at closed labor negotiation meetings, other than work product developed in preparation for and during negotiations. There are, however, other Florida laws prohibiting the disclosure of such information, under certain circumstances.

■ **Domestic Violence records** (AGO 02-50) - Law enforcement agencies must remove information revealing the home or employment address, telephone number or personal assets of a person who has been the victim of domestic violence.

■ **Court records** (AGO 02-69) - Clerk of the courts are not authorized to permanently remove social security, bank account, debit, charge or credit card numbers from original court documents, following a written request.

■ **Social Security Number records** (AGO 03-23) - The "legitimate business purpose" exception does not authorize towns to release the social security numbers of its water and sewer system customers to a private company that intends to enter the social security numbers into a computer database.

Other notable access-related opinions

■ **Board voting requirements** (AGO 02-40) - Advisory board members who are appointed by a Board of County Commissioners and responsible for making recommendations on county issues are subject to voting requirements for state, county and municipal bodies.

■ **Meeting minutes** (AGO 02-51) - Cities cannot adopt a rule of procedure that approves minutes of prior meetings without requiring that these minutes be read or signed at a subsequent meeting. Rather, a vote on the concurrence and revisions of the members should be taken at an open meeting with the minutes and any changes or revisions also discussed during an open meeting at the time the board adopts the minutes.

■ **Not-for-profit corporation records** (AGO 02-53) - Not-for-profit corporations are subject to the requirements of Florida's Government in the Sunshine and Public Records Laws when they lease property from a county to establish and operate a business.

■ **Petition card records** (AGO 02-67) - The use of a petition card to indicate an elector's change of address does not make the petition card a voter registration record subject to restrictions on inspection and copying, under the Florida Election Code.

■ **County records** (AGO 02-73) - Confidential and exempt information must be deleted from county equal opportunity records prior to its release.

■ **Competitive bidding** (AGO 02-74) - A governmental entity may disclose and distribute documents in order to comply with requirements for competitive negotiation or bidding. However, the entities or persons receiving the information shall maintain the exempt status of the information.

■ **Board meeting quorum** (AGO 02-82) - Physically-disabled members of city

committees may participate and vote on board matters by electronic means if they are unable to attend a public meeting, so long as a quorum of the members of the board is physically present at the meeting site.

■ **Re-adoptions of exemptions** (AGO 03-18) - The two-thirds majority vote applies to any attempt by the Legislature to restrict the public's access to executive branch governmental records and meetings, whether through the initial creation of an exemption or the re-adoption of such an exemption.

■ **Voting Systems records** (AGO 03-26) - Custodian of records of the Department of State are required to make maintenance manuals supplied to the Bureau of Voting Systems Certification available for examination and inspection. State law must yield to the federal law on the subject of reproducing, copying and distributing copies of these manuals. The Department of State should advise individuals of the limitations of the federal copyright law and the consequences of violating its provisions; such notice may take the form of a posted notice. It is advisable for the custodian to refrain from copying such records himself or herself.

■ **Hospital meetings** (AGO 03-33) - The trial court's holding in *Florida Health Sciences Centers, Inc. v. Tribune Company* is not controlling law in the 19th Judicial Circuit.

Schools:

■ **School Board records** (AGO 02-37) - District School Boards are not authorized to use a private company to produce and copy public records. The district may contract with private companies to provide information also obtainable through the district. But, it may not give up its duty to produce such records and, thus, require those seeking public records to do so only through the company at whatever fee it establishes.

■ **Community College councils** (AGO 03-28) - Communities college councils are subject to the Government in the Sunshine Law, and must allow open meetings to the public at all times.

ATTORNEY GENERAL OPINIONS

Escambia County Commissionerspends time in jail

Former Escambia County Commissioner W.D. Childers was found guilty on one count of violating the state's Open Meetings Law and sentenced to 60 days in jail. Childers is the first elected official to be jailed for violating the open meetings provision of the law.

On a second count, Judge T. Patterson Maney also ordered Childers to pay a \$500 fine along with \$376 for court costs and \$3,227.85 for the cost of the state's investigation and prosecution.

Childers stands accused of discussing public business with fellow commissioners in private on four separate occasions, and conferring with fellow commissioners about redistricting.

Former Escambia Commissioner Mike Bass was also sentenced for two

sunshine offenses, but avoided jail time and ordered to pay \$4,143.69 in total costs.

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After serving all but two weeks of his 60-day sentence, Childers was released on an appeals bond. Maney granted Childers the \$10,000 appeal bond a day after Circuit Judge Jere Tolton granted another \$10,000 appeal bond for a separate and unrelated bribery conviction that sentenced Childers to a three-and-a-half year prison term.

Other Officials Charged:

■ Welaka Mayor Gordon Sands pleaded no contest and paid a \$500 fine after being charged with violating the Sunshine Law last year. The charge stemmed from a discussion that Sands

reportedly had with another town council member about nominations at a public meeting. The county judge withheld adjudication, meaning that Sands will not have a criminal record.

■ Kissimmee city commissioners Wendell McKinnon and Bob Makinson were charged with violating Florida's Open Meetings Law. Both pleaded guilty to civil violations and faced a \$50 fine and court costs. The charges stemmed from a private meeting between the two men to discuss plans for a future meeting.

■ In Deland, Oak Hill City Commissioner Bob Jackson pleaded no contest to charges that he violated the Open Meetings Law when meeting with former Commissioner Ron Mercer to discuss several issues scheduled to come before the commission.

Employees can protect personal phone calls and e-mails

In two separate rulings, state courts answered the question of whether government e-mails and phone calls deemed private or personal are exempt from the state's Open Records Law.

In September of this year, the Florida Supreme Court upheld a lower court decision that personal e-mails contained in city computers fall outside the definition of public records because they are not connected to official city business.

The Times Publishing Company sued the City of Clearwater after requesting all e-mails either sent or received by two city employees over the city's computer

network during certain dates. The city allowed employees to determine which e-mails were "public" and which were "private," releasing the "public" ones. Times Publishing Company sought a temporary injunction and an order to make every e-mail available.

A trial court denied the company injunctive relief. The 2nd District Court of Appeals upheld the trial court's decision, stating that "personal" or "private" e-mails are not considered public records. The state Supreme Court agreed with the District Court.

In a separate case, the Florida

Supreme Court refused to hear a case challenging a decision that ruled government employees can determine which telephone records are private.

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. The court ruled that personal calls fall outside the current definition of public records.

Florida Senate committee holds closed-door meeting

For the first time in 30 years, a Senate committee met in a closed-door session authorized under a new Sunshine Law exemption. The committee is responsible for funding the state's counterterrorism effort and met in a closed meeting to review plans to expand Florida's homeland security technology.

The Home Defense, Public Security and Ports Committee

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closed the meeting with unanimous support from members, invoking its post Sept. 11 rule for such a meeting.

Discussed at the meeting was the "threat net" program, which is an intelligence system that takes tips and leads to see if there is reasonable suspicion to include that information in the intelligence base. The Florida

Department of Law Enforcement requested \$1.6 million to expand the program.

"The meeting was closed so that information that was provided in the meeting could not become available to those who could harm us by having some of that information," said Sen. Paula Dockery, R-Lakeland, the committee chair. "...security and safety are paramount."

Series on access to FBI records wins 2003 Brechner Award

A freedom of information series by the *San Francisco Chronicle* has been named the 2003 winner of the Joseph L. Brechner Center for Freedom of Information Award.

The eight-page piece, titled "The Campus Files: Reagan, Hoover and the UC Red Scare," is the work of journalist Seth Rosenfeld who challenged the FBI after it refused his freedom of information requests. After a 15-year struggle and \$1

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million in expenses, the bureau was ordered by a federal appeals court

to turn over more than 200,000 document pages to Rosenfeld.

The series reveals how the FBI engaged in unlawful intelligence activities at the University of California at Berkeley and tried to cover them up for 17 years.

His research uncovered how the FBI conspired with the head of the CIA and a member of the University's Board of Regents to harass liberal faculty, students

and fellow regents; campaigned to destroy the career of UC President Clark Kerr; forged a close relationship with Ronald Reagan, who turns out to be an even more active FBI informer than previously disclosed; and sought to unlawfully withhold public records by making unfounded claims of national security.

"His series documents how government corruption, when unchecked, can wreak havoc on citizens," said Sandra F. Chance, executive director of the Brechner Center. "It demonstrates that freedom of information is fundamental to government accountability and an informed citizenry, particularly in times of crisis."

In reviewing some of the FBI documents, the 9th Circuit Court of Appeals found "these documents all support a conclusion that these reports were compiled with no national nexus to a plausible law enforcement purpose – that any purpose for compiling these documents was pretextual."

"The later documents all strongly support the suspicion that the FBI was

investigating Kerr to have him removed from the UC administration, because the FBI officials disagreed with his politics or his handling of administrative matters," the court said.

Rosenfeld's series, which he spent 22 years working on, is being recognized nationally as an important case study for the protection of freedom of information laws.

The New York Times said: "The documents should be required reading for the Bush administration and Congress as they consider how to reconfigure domestic intelligence. These accounts of the FBI's malfeasance are a powerful reminder of how easily intelligence organizations deployed to protect freedom can become its worst enemy."

The annual award was established by the late Joseph L. Brechner, an Orlando broadcaster. Previous winners include: *The Washington Post*, the *St. Petersburg Times*, *The Dallas Morning News*, the *South Florida Sun-Sentinel* and the *Houston Chronicle*.

Brechner Citizen Access Project rates state access laws

The Marion Brechner Citizen Access Project produced a number of research reports rating the open meetings and public records laws of the 50 United States and the District of Columbia during 2003.

"The goal of the Citizen Access Project is to allow citizens and public officials to better understand public access to local government information in all 50 states," according to CAP Director Bill Chamberlin. The project, in the College of Journalism and Communications at the University of Florida, focuses on open-government legislation across the United States.

In its study on security and safety, the researchers discovered that following Sept. 11, 2001, state lawmakers across the nation blocked access to government records dealing with everything from security response plans to criminal investigations.

According to their report, states limited access to government-held information about building plans, evacuation

procedures, medical supplies and other issues related to security.

"A lot of us worry about how much information is now being kept from state citizens," Chamberlin said. "It's one thing to keep sensitive information out of the hands of terrorists, but quite another to use terrorism as an excuse to shield government officials from being accountable for their actions."

The researchers also discovered that several state governments have inadequate rules on official e-mail that may limit public access to those records. According to their study, 45 out of 51 laws in states and the District of Columbia do not specifically mention e-mail in their public records laws.

"This large number of laws that do not directly deal with e-mail often hurt the public's right to know in an era when technology makes discussions between public officials easier in cyberspace than at the town hall," according to Chamberlin.

In its most recent study, the CAP studied the availability of several

categories of education records in the 50 states, including personnel records, public records, as well as documents held by school boards, school administrative offices and school libraries.

Chamberlin said he plans to release a ranking of states that provide the most and the least access to educational records soon.

The Citizen Access Project will eventually rate all the provisions of laws governing access to information in each of the 50 states through the use of a board of access experts. They are rating each law on a seven-point scale, from those with complete openness to those that are totally closed.

The project is funded by Marion Brechner, an Orlando broadcast executive. The Knight Foundation also provided important early funding, Chamberlin said.

Details about the various research findings, as well as links to other valuable and informative resources are available on the CAP Web site, at: <http://www.citizenaccess.org>.

Group sues county for Sunshine claim

FRANKLIN COUNTY – A Tallahassee attorney has filed a complaint on behalf of an activist group alleging Franklin County commissioners have violated the state’s Open Meetings Law when they unanimously enacted a new redistricting plan.

Concerned Citizens of Franklin County, Inc., a not-for-profit group of civic activists, is attempting to block judicial approval of the new redistricting plan by arguing the plan should be nullified because commissioners failed to provide advance public notice that

redistricting would be taken up at a meeting. The complaint also argues that commissioners communicated about the plan before the meeting.

Attorney Robert Rivas wrote in his motion that the “[commissioners] did not have a lawful prerogative to formulate a redistricting plan during the closed meeting in order to present said plan for perfunctory ratification at a subsequent public meeting.”

Rivas is seeking nullification of the plan as well as attorney’s costs and fees. (11/20/03)

Florida “gag law” statute questioned

KEY WEST – A federal magistrate determined that a state statute that resulted in the arrest of a Key West journalist who published columns criticizing local police in 2001 was unconstitutional.

Magistrate John J. O’Sullivan wrote that the First Amendment rights of journalist Dennis Reeves Cooper were violated by the city of Key West when Cooper was arrested. According to state statute 112.533, it is a criminal misdemeanor for anyone involved in an active internal police probe, including the person who filed the complaint, to publicize information about the investigation.

Cooper filed a complaint in May 2001

with the Florida Department of Law Enforcement about the police department’s handling of an investigation about a traffic officer, who Cooper claimed had falsified information. Cooper wrote about the complaint in his column and was arrested.

Criminal charges against Cooper were dropped, but the American Civil Liberties Union filed a civil lawsuit to compensate Cooper and ask that the statute to be struck down.

A federal judge declared the statute unconstitutional in 1990, writing that it “chills free speech and chills the expression of truthful information,” but the Florida Legislature changed the language slightly, creating the new statute. (11/14/03)

FIRST AMENDMENT

Citrus department appeals advertising tax decision

VERO BEACH – The Florida Department of Citrus is challenging a lower court decision that ruled government-mandated citrus ‘box’ tax paid by growers violates their First Amendment rights.

FIRST AMENDMENT Citrus growers filed the original lawsuit last year, claiming the mandated tax violates their free speech rights because the tax money pays for generic advertising on oranges and grapefruits they didn’t necessarily produce.

Riverfront Groves President Dan Richey, a member of the Florida Citrus Commission, maintains that generic citrus advertising funded by the tax is important.

“In light of the fact we have a record crop and a no-carb diet craze that prohibits orange juice, we’ve got to keep advertising,” Richey said. “You don’t cut advertising when you have a record crop and declining movement.”

Richey said he believes the judge missed a few arguments on behalf of the Department of Citrus and anticipates a ruling that will uphold the tax.

The appeal was filed in the 2nd District Court of Appeal in Lakeland. (11/7/03)

COPYRIGHT

Newsletter publisher wins judgment

NORTH PALM BEACH – A North Palm Beach-based stock market newsletter publisher won a \$20-million judgment after suing financial giant Legg Mason for copyright infringement.

Lowry’s Reports Inc., which publishes the *Technical Market Advisory*, sued Legg Mason after the company ignored a cease-and-desist order to stop distributing copies of their newsletter to brokers throughout the country. The newsletter is sold as an e-mail subscription for an annual fee of \$700.

According to Thomas Kirby, the attorney representing Lowry’s, Legg Mason officials claimed they were not

responsible for the electronic distribution of the newsletter to its 1,000 employees, saying they had no policy requiring the distribution among employees.

“Rather than acknowledge corporate responsibility, Legg Mason persisted in representing it as a simple mistake by lower-level employees,” Kirby said.

Harry Baisden, publications director for the Newsletter & Electronic Publishers Association in Arlington, Va., said Lowry’s is unique because a jury decided the case. Similar cases are usually settled out of court or decided by a judge, Baisden said. Legg Mason is considering an appeal. (10/23/03)

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Winning series uncovers FBI secrets using the FOIA

I was a journalism student at the University of California at Berkeley in 1981 when I sent off a Freedom of Information Act request for FBI records concerning the university. I knew that in the fifties and sixties UC had been involved in some of the nation's biggest protests over academic freedom, free speech

The Back Page

By Seth Rosenfeld

and the Vietnam War. I was curious about what the FBI had been up to behind the scenes. But I had no idea that I was embarking on what would become a two decade fight to get the FBI files; that I would bring three lawsuits under the FOIA that would reach the U.S. Supreme Court; and that ultimately the FBI - which had denied snooping on campus - would release more than 200,000 pages showing J. Edgar Hoover's bureau had conspired with the head of the CIA to harrass students and faculty, contributed to the 1966 defeat of Democratic Governor Edmund Brown, provided secret political support to his successor, Governor Ronald Reagan, and waged a covert campaign to get UC President Clark Kerr fired.

I figured I would get the files within a year or so; after all, the FOIA is the main federal law requiring timely public access to executive branch records. Months passed with no reply from the FBI. Finally the bureau sent me a letter saying processing the papers would cost about \$35,000, and it would gladly start as soon as I put 25 percent down. I asked the FBI to waive fees, which agencies must do if releasing the documents would benefit the public. But in the bureau's editorial opinion, there was no public interest. I was stonewalled. But in 1984, a pro-bono lawyer took my case and I sued for a fee waiver. A federal judge ordered the bureau to waive all fees.

The FBI finally released a small batch of files, but they were so heavily censored I had to wonder if the bureau was the nation's largest consumer of Magic Markers. The FBI claimed the deleted information had to be withheld to protect national security, law enforcement operations and the privacy of people named in the papers.

Based on my own research, I believed those claims were greatly exaggerated. I sued again to challenge the deletions. In 1988, a federal magistrate ordered most of the information



Seth Rosenfeld

released, but the FBI appealed. In 1991, a federal judge affirmed the ruling, saying the records should be disclosed because they go to "the very essence of what the government was up to during a turbulent, historic period." I filed a third lawsuit challenging the FBI's delays in releasing the records.

But the FBI still refused to release the files, and appealed to the U.S. Court of Appeals. In 1995, that court concluded the documents must be released because they concerned not legitimate law enforcement, but unlawful campus spying. The court said the records showed, among other things, that "the FBI waged a concerted effort in the late 1950s and 1960s to have Kerr fired ... because officials disagreed with his politics or his handling of administrative matters."

By now, five federal judges had ordered the bureau to fork over the files. But in 1996, the FBI asked the U.S. Supreme Court to review the case. Before the high court decided whether to hear the matter, the FBI agreed to settle by releasing more than 200,000 pages and paying my lawyer's fees of more than \$680,000. All told, the court record shows the FBI spent more than 15 years and \$1 million in trying to suppress public records documenting its abuse of power.

Dr. Kerr, who passed away this month at 92, was one of the nation's most respected educators. He was fired in 1967, but there was never any evidence of misconduct by him. He was shocked when I showed him memos detailing the FBI's campaign against him.

Senator Dianne Feinstein opened a formal inquiry into the FBI's actions, telling FBI Director Robert Mueller that "as we have seen from this *Chronicle* article, FOIA is often the only way the American people can be assured of government accountability."

Once again America finds itself in a turbulent, historic time. Once again the FBI and other intelligence agencies have been granted great secrecy and power. The Bush Administration has weakened the FOIA. I hope it won't take another two decades to find out what the government is up to behind the scenes.

Seth Rosenfeld is an investigative reporter for the San Francisco Chronicle and received the 18th annual Brechner Center FOI award for his work. To see the complete story and the FBI documents, visit www.sfgate.com/campus.