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# THE BRECHNER REPORT

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## Judge allows prosecutors to review records

PALM BEACH—A Palm Beach Circuit Court judge ruled that prosecutors can review radio commentator Rush Limbaugh's medical records to determine whether he illegally obtained prescriptions from a series of doctors to support his addiction to painkillers.

### ACCESS RECORDS

arguing that releasing the documents would violate Limbaugh's right to privacy. Judge Jeffrey A. Winikoff disagreed, ruling that the state's interest in determining whether Limbaugh broke the law surpassed his privacy concerns. Prosecutors, however, may not make the records public. Roy Black, Limbaugh's attorney, filed a notice of appeal after the ruling and, in a separate motion, asked the court to stay its order until the appeals court had reviewed the case.

The ruling was just the latest outcome of the criminal investigation of Limbaugh, who spent five weeks in a drug rehabilitation facility last year for an addiction to prescription painkillers.

Florida officials began investigating Limbaugh after learning that he had received thousands of painkillers prescribed by several doctors. Officials seized Limbaugh's medical charts and files, but this information had been under seal. Prosecutors argued that they needed to review the documents to gauge what Limbaugh's doctors knew about his prescriptions for painkillers.

Palm Beach County State Attorney Barry Krischer stated that the office had "scrupulously protected Mr. Limbaugh's rights," and added that Winikoff found that the state had "acted in good faith." (12/24/03)

## U.S. Supreme Court to hear Cheney case

WASHINGTON—The U.S. Supreme Court has agreed to hear Vice President Dick Cheney's arguments for keeping his energy task force papers a secret.

The Court said Cheney's Justice Department lawyers could present a detailed explanation of why he should not have to comply with a federal judge's order to produce details of White House contracts with the energy industry.

In 2001, the environmentalist Sierra Club and Judicial Watch government watchdog group sued to find out the names and positions of members of the vice president's energy task force that year.

Cheney developed a 2001 energy task force that included a policy paper calling for more oil and gas drilling, as well as a revived nuclear power program.

The two plaintiff groups allege that Cheney drafted these energy policies by consulting industry executives like Enron Corporation's Ken Lay, and made them members of his task force while leaving environmentalists out.

While Cheney acknowledged meeting with Lay, his lawyers said that the task force was comprised of government

officials, not corporate representatives.

Over a year ago, U.S. District Court Judge Emmet Sullivan ordered the White House to produce documents about the energy task force. The alternative action was to provide a detailed list of the

documents it was withholding, and why.

The Bush administration appealed the order, although the case was not completed in the lower court, and the

U.S. Court of Appeals refused to step in. It said that Cheney did not have legal standing to refuse the judge's order.

The Energy Department, the Environmental Protection Agency and other agencies have turned over documents in the case, but none have come from the White House.

Justice Department lawyers claim that Cheney is immune to the court order on constitutional, separation-of-powers grounds. They also argued that judicial power cannot extend to ordering the executive branch to disclose details about the way the president gets advice, like on energy policy.

The Supreme Court will hear arguments on the case in the spring, with a decision due by the end of June.

(12/15/03)

### ACCESS RECORDS

## City Commission opposes Patriot Act

SARASOTA—The Sarasota City Commission voted 3-2 to pass a resolution formally opposing portions of the counterterrorism USA Patriot Act.

Sarasota became the third community in Florida to oppose the Patriot Act, along with Alachua and Broward counties and more than 180 other communities around the country.

The resolution opposes the act's provision that allows the FBI to access records from library and bookstore customers, as well as individual medical, financial and education files.

The measure asks Florida legislators to "work to repeal certain provisions of the USA Patriot Act and to oppose the adoption of any new laws which may limit or violate fundamental rights and liberties."

Commissioners Mary Anne Servian, Fredd Atkins and Danny Bilyeu voted in favor of the resolution. Mayor Lou Ann Palmer and Vice Mayor Richard Martin voted against it.

"I just feel this is something that does not belong at this table," Martin said.

(10/21/03)

## Panel votes to continue violating Records Law

PALM BEACH – A county panel in Palm Beach overwhelmingly recommended that the county continue charging more for certain public property information than the law currently allows.

The decision was made despite the Florida attorney general's opinion that Palm Beach County is violating the state Public Records Law.

The Geographic Information Systems Policy Committee decided that the county should continue to charge people for more than copying costs if they want to use copyright-specific technical information for commercial purposes.

Attorney General Charlie Crist wrote in an opinion that such a policy "would conflict with Florida's Public Records Law." Crist said the law only allows the county to charge for the cost of copying the information.

The panel voted to recommend that the County Commission reduce the fees, but to a price that is still more than copying costs.

Linda Culbertson, chief deputy clerk in charge of legal records for Clerk of the Circuit Court Dorothy Wilken, was the only member of the 12-person committee to oppose the extra fees.

"We are simply the custodians and we have the responsibility to provide access," Culbertson said.

She said her vote was "consistent with the way we do business and our interpretation of the public records laws."

The County Commission has yet to make a final decision on the issue. (10/31/03)

## 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.*

## County Attorney's office grants clerk access to exempt county documents

COLLIER COUNTY – The County Attorney's office reversed a decision that denied the Collier County Clerk of Courts access to certain documents related to the widening of Immokalee Road.

Elected Clerk of Courts Dwight Brock made a public records request in November 2003 to obtain research, legal strategy and other documentation that supported the county's claim that it had a right to approve millions of dollars in change orders for the project. The county refused to hand over the documents, claiming they were exempt.

Officials with the County Attorney's office originally concluded that the documents were exempt from release under the Public Records Law because they dealt with privileged communications.

The decision was reversed after Brock, who is responsible for paying the bills of county government and making sure that all expenditures are legal, said the public records were needed to perform an audit.

Florida Statute 119.07(6) says the designated auditor of a governmental body cannot be denied access to public records of that government body while conducting an audit.

Assistant County Attorney Michael Pettit said that the county wasn't aware until then that Brock was requesting the documents to do an audit. He also agreed that \$1,300 for staff time and copying fees incurred while complying with Brock's records request will be waived.

The county is widening a 8.1-mile segment of Immokalee Road that was initially bid to be increased from two to four lanes. After the original bid, county officials decided to widen the road to six lanes and approved change orders of more than \$3.8 million.

Brock believes that the additional lanes and costs mean the project will have to be bid on again. Officials with the County Attorney's office disagree, and the issue is expected to end up in court. (12/24/03)

## Women file complaint to force release of University of Florida documents

GAINESVILLE – Two women filed a complaint against the University of Florida (UF), to compel university officials to release documents concerning UF's hazardous waste policies.

Gay Webster and Catherine Good Duncan claim that a university-run landfill caused their potentially fatal illnesses.

They also allege that they have continually asked for specific documents and received no response from the university.

"Previous responses to our public records requests have been under-inclusive and the university has provided nothing for over a month in response to our most recent public records request," said Jim Alves, attorney for Webster and Duncan.

University officials say that the request for the information requires the production of tens of thousands of documents.

"The university was not able to respond to your request earlier given the massive amount of documents you have

requested," UF associate general counsel David Klan wrote to Alves.

Klan also added that the original documents were available for inspection at "any mutually convenient time."

Last year, the two women told state environment officials that they planned to sue UF unless appropriate enforcement action was taken.

One month later, UF and the Florida Department of Environmental Protection finalized a consent order that required the university to submit a site assessment plan that determined the degree and extent of any contamination.

In the mid-1970s, the two women lived near the former landfill that is now partially covered by the Southwest 34<sup>th</sup> Street commuter parking lot.

Webster has a rare recurring tumor and Duncan has been diagnosed with breast, thyroid and cervical cancers.

They continue to investigate the extent of contamination they may have been exposed to while living near the landfill.

(12/19/03)

## Federal appeals court protects privacy and information of Internet file sharers

WASHINGTON – A federal appeals court ruled that the recording industry cannot force Internet companies to disclose the names of people who are trading music online by using legal shortcuts.

The ruling overturned a U.S. District Court decision that allowed the music industry to force disclosure of individuals by submitting subpoenas to a court clerk without winning a judge’s approval.

Verizon Communications had brought suit against the Recording Industry Association of America to protect the identities of its Internet customers.

“It’s [the ruling] a huge victory for all

Internet users,” said Sarah Deutsch, vice president and associate general counsel for Verizon Communications. “The court today has knocked down a very dangerous procedure that threatens Americans’ traditional legal guarantees and violates their constitutional rights.”

The ruling is a major setback to record companies in their efforts to eliminate the online sharing of copyrighted songs.

Cary Sherman, president of the recording association, said the case “is inconsistent with both the views of Congress and the findings of the district court,” and that his organization will continue to sue those who violate copyrights. (12/20/03)

## The Ledger files lawsuit alleging violation

LAKELAND – *The Ledger* filed a lawsuit against the Florida Department of Citrus, claiming the department violated the state’s Sunshine Law.

The newspaper claimed that a reporter was barred from attending a meeting where the preliminary findings of a study

evaluation on the department’s orange juice advertising were under review.

The lawsuit addresses the issue of whether the meeting of a peer committee of economists, most connected with the state’s citrus industry, was subject to the Sunshine Law.

The committee was formed by the Advertising Review Committee, created

by the Citrus Commission, to supervise the advertising study.

*The Ledger* filed a lawsuit last year against the Citrus Department after its reporter was barred from a meeting in January 2003.

Judge Harvey Kornstein, who heard and ruled on the case, ordered the committee to meet again with a court reporter present to transcribe the proceedings.

Hank Campbell, the commission’s attorney, defended the recent meeting, arguing that the peer committee is not a public body subject to the Sunshine Law because it has no decision-making power. He added that the committee is a fact-finding body only. (10/1/03)

## ACCESS MEETINGS

## Officers sue station, reporter over series

TAMPA – Three Tampa police officers filed lawsuits claiming that the WFTS-TV series “Bad Cop, Big Promotions” held them in false light and invaded their privacy.

They are suing both the station and reporter Mike Mason over the May 2003 series, which suggested that many officers were promoted out of friendships, not performance.

The report mentioned that police officers Mary O’Connor, Paul Luszczynski and Keith O’Connor had past disciplinary actions taken against them.

And, that despite their respective incidents, each of the three officers had

been promoted.

In their lawsuit, the officers state that they are not corrupt and do not lack integrity.

In addition, the lawsuit refers to a follow-up story that implied the three officers weren’t recently promoted because of the “Bad Cops, Big Promotions” series.

The officers claim they have not been promoted because of their failure to complete minimum stay in their recent assignments.

Channel 28 News Director Bill Berra said the station stands by its reporting and the lawsuit allegations are unfounded. (12/10/03)

## PRIVACY

## Proposed bill would ban eight offensive words from airwaves

WASHINGTON – Rep. Doug Ose (R-Calif.) introduced the Clean Airwaves Act in reaction to U2 lead singer Bono’s use of profanity during the 2003 Golden Globe Awards show.

The Parents Television Council filed a complaint with the Federal Communications Commission (FCC) after Bono made the vulgar comment while receiving a Golden Globe Award.

The FCC ruled that the word he used, in the context that it was used, was not indecent.

It claimed it would not take action just because certain words, “even expletives or other four-letter words,” were used.

“C’mon, give me a break,” Ose replied to the decision. “I don’t think there’s a parent in the country who wants to hear this stuff come out of their TV.”

The bill would bar eight offensive words from the airwaves and amend the U.S. Code relating to indecency. If passed, it would force the FCC to examine the words and phrases by themselves, regardless of the content.

Currently, FCC rules prohibit indecent broadcasts at times when children are likely to be watching or listening.

Ose’s bill would ban the use of the words “with each other or with other words or phrases, and other grammatical forms of such words and phrases.”

(1/8/04)

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# Audit exposes how policy discourages FOIA disclosures

*This is the first in a series of articles concerning the results of the federal Freedom of Information Act audits conducted by the National Security Archive.*



Meredith Fuchs

agencies (15 %) indicated significant changes in regulations, guidance and training materials and another 8 federal agencies (24 %) also disseminated the guidance and incorporated it into FOIA regulations or procedures.

These findings were confirmed several months later when the General Accounting Office (GAO) released the results of its survey concerning the impact of the Ashcroft guidance on federal agencies.

GAO reported in "Agency Views on Changes Resulting from New Administration Policy" (September 2003) that one-third of the FOIA officers surveyed reported a decreased likelihood of their making discretionary disclosures. Seventy-five percent of these cited the Ashcroft guidance as the reason for changing their practices and withholding more records from the public.

What is the result of the Ashcroft guidance? More secrecy in government. And the blame for the increased secrecy cannot all be attributed to terrorism concerns.

The change in FOIA practice can also be seen in the increased use of specific exemptions. In 2003, the Reporters Committee for Freedom of the Press found dramatic increases in use of FOIA's personal privacy exemption (b)(6). The same increases were not found with respect to FOIA's national security exemption (b)(1).

It is not hard to find vocal proponents of secrecy to protect commercial interests, privacy and the government's privilege to make decisions behind closed doors. It is much harder to overcome public complacency at government efforts to control information during a time of national insecurity.

On close examination, however, the link between many secrecy initiatives and national security can rarely be found.

We must look hard and ask questions when we see the door to the government slamming shut and find ways to demonstrate to the public that an open government protects our safety and security.

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*Meredith Fuchs is the General Counsel of the National Security Archive, a non profit research institute in international affairs and a public interest law firm defending and expanding public access to government information through the FOIA. A full copy of Phase One of the FOIA audit can be found on its Web site at [www.nsarchive.org](http://www.nsarchive.org).*

What have they got to hide?

Although the events of Sept. 11 are blamed for the culture of secrecy, many new restrictions on the flow of

## The Back Page

By Meredith Fuchs

government information in the last two years have nothing to do with such concerns.

Take for example

Attorney General John Ashcroft's 2001 guidance concerning the administration of the Freedom of Information Act (FOIA) by federal agencies. The Attorney General's memorandum reversed a policy of maximum disclosure that had been put in place by his predecessor, Attorney General Janet Reno.

Under the Reno guidance, agencies were *required* to release information that fell within their discretion to withhold, unless they could identify a foreseeable harm that would be caused by the release.

In contrast, the Ashcroft guidance highlights the importance of Exemption (b)(5) of the FOIA, which permits information to be withheld to protect the deliberative process privilege, and counsels that any discretionary decision to release information under FOIA should fully consider the *institutional, commercial and personal privacy interests* that could be implicated by disclosure of the information.

In Phase One of a multiphase audit conducted in 2003, the National Security Archive sought to test whether the Attorney General's guidance had changed the way the federal bureaucracy handles FOIA requests.

Specifically, the Archive asked 35 federal departments and agencies that handle over 97% of the FOIA requests filed each year about the implementation of Attorney General Ashcroft's guidance.

Although told in advance by senior FOIA officials that the Ashcroft guidance had "a soft landing," the Archive found that 39% of agencies incorporated the more restrictive policy into their FOIA programs.

Specifically, the Archive found that 5 of 33 responding federal