THE
# BRECHNER REPORT

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## Judge upholds Earnhardt Act in Broward challenge

BROWARD COUNTY – Despite sharp questioning of government attorneys at a hearing in March, Judge Larry Moe, 17th Judicial Circuit, in July ruled for the state of Florida and upheld the public records' exemption for autopsy photographs.

ACCESS RECORDS

The *Orlando Sentinel* and the South Florida Sun-Sentinel challenged the Earnhardt Act in a lawsuit separate from *The Independent Florida Alligator's* lawsuit. The two papers requested access to photographs of "John Doe" corpses in Broward County and were denied access.

Moe during a March hearing had asked the state solicitor general: "What can you do to convince me to save this legislation?" Moe had also commented at one point during the hearing: "I'm not sure the Constitution protects hurt feelings." (*Brechner Report*, July 2002)

However, Moe upheld the act and based much of his ruling on the opinion of Judge Joseph G. Will, 7th Judicial Circuit, who denied the *Alligator* access to racer Dale Earnhardt's autopsy photographs.

"The right to privacy, the right to freedom of press and speech, the right of the people to have access to public records and the right to be left alone are important rights to all who live in this country," Moe wrote. "They are not absolute rights, however, and they frequently clash, as they did in this case. The legislature has indeed applied a proper balancing of these rights in enacting this legislation." (7/4/02)

## *Alligator* loses Earnhardt appeal

DAYTONA BEACH – A three-judge panel of the 5th District Court of Appeal upheld a lower court ruling and declared the public records exemption for autopsy photographs constitutional.

The Earnhardt Act, named after late race car driver Dale Earnhardt, exempts from public release autopsy photographs without a court order. The law applies retroactively to all autopsy photos. *The Independent Florida Alligator*, a student-run newspaper, sued to get access to Earnhardt's autopsy photographs, but Judge Joseph G. Will, 7th Judicial Circuit, ruled against it.

The appeals court upheld Will's ruling and said the Earnhardt Act "serves an identifiable public purpose, is no broader than necessary to meet that public purpose, and was enacted in accordance with the constitutional and legislative requirements." The appeals panel also ruled that the retroactive provision of the law was constitutional.

Tom Julin, an attorney for the *Alligator*, said he plans to appeal the ruling to the state Supreme Court. (7/13/02; *Campus Communication Inc. v. Teresa Earnhardt et al.,* case no. 5D01-2419)

## Commissioners found guilty of Sunshine Law violations

ESCAMBIA COUNTY – Escambia County Commissioner W.D. Childers was found guilty of one count of violating the state Open Meetings law.

ACCESS MEETINGS

Childers, 68, is a former state senator. He was accused of breaking the state's Sunshine Law by discussing public business with fellow commissioners in private on four separate occasions. The jury found him guilty of breaking the law by discussing redistricting with fellow commissioner Terry Smith on a speaker phone call with Supervisor of Elections Bonnie Jones.

He was declared not guilty on two other Open Meetings counts, including a charge that he discussed a county landfill contract over a meal at a Whataburger restaurant. The jury was unable to reach a verdict on a fourth count.

Childers, Smith and commissioners Mike Bass and Willie Junior were indicted for misdemeanor violations of the Open Meetings law, which surfaced as part of a larger investigation into several land deals. Childers, Bass and Junior were indicted on additional felony charges, including money laundering and bribery, in connection with the land deals. As part of a plea bargain with prosecutors, Junior agreed to plead guilty to racketeering, extortion and bribery charges and testify for the state. Bass is scheduled to go to trial at the end of September. Smith faces trial in mid-July. Childers' retrial on the fourth Sunshine Law charge is scheduled for late August.

In sentencing Childers, County Judge T. Patterson Maney, 1st Judicial Circuit, could impose a maximum $500 fine and order Childers to spend up to 60 days in jail. Childers also could lose his state pension and his seat on the Escambia County Commission.

County Commissioner Terry Smith was also found guilty on two counts of violating the Sunshine Law, including his Whataburger meeting with Childers. Assistant State Attorney Bobby Elmore said the difference between Childers' acquittal and Smith's conviction in the Whataburger case was that Smith did all the talking. (6/19/02 – 7/21/02)

# Aisenberg family files suit to obtain records

TAMPA – Lawyers for Steve and Marlene Aisenberg filed a public records lawsuit against the Hillsborough County state attorney. The Aisenbergs' 5-month-old daughter, Sabrina, disappeared in 1997 and has not been found. While the Aisenbergs have never been charged with Sabrina's disappearance, the two were charged in federal court with conspiracy and making false claims. Those charges were dismissed last year and a federal judge in the case criticized the handling of the case by the Hillsborough County Sheriff's Office.

The Aisenbergs are preparing to file a lawsuit against the Sheriff's Office and have requested records from the investigation into the disappearance.

Last year, State Attorney Mark Ober refused the records request, saying that the case was an ongoing investigation and not subject to the state's open records law. Ober wrote a letter later that said that another state attorney, who investigated the Hillsborough detectives involved in Aisenberg case, has the records. (6/06/02)

## E-mail question may head to Supreme Court

LAKELAND – The 2nd District Court of Appeal modified its order in the *Times Publishing Co. v. City of Clearwater* case to certify a question to the state Supreme Court. In May, the appeals court ruled two Clearwater employees could decide whether or not e-mails sent between them were public records. The *St. Petersburg Times* had requested the e-mails, which were stored on city computers. (*Brechner Report*, June 2002)

The appeals court rejected the idea that e-mail stored on a city computer automatically becomes a public record.

In July, the court modified its ruling to certify to the state Supreme Court as a matter of great public importance the question of whether e-mails received by government employees at government-owned computers are automatically public records.

Alison Steele, an attorney representing the *St. Petersburg Times*, said the case revealed a "big hole" in the state's public records act. (7/4/02; *Times Publishing Co. v. City of Clearwater*, case no. 2D01-3055)

## 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.*

## Arts organization requests ruling

ORLANDO – The executive committee of United Arts of Central Florida decided to ask a judge to decide whether or not the art group is a public agency and subject to the state's Sunshine Laws.

The group authorized a $10,000 expenditure to file an action for declaratory judgment. Until now, United Arts has operated as a private, nonprofit foundation.

However, Bruce McMenemy, who serves on United Arts' standards and allocations committee and whose wife may bring a wrongful-dismissal suit against the group, threatened to take United Arts to court based on the state's Open Meeting and Public Records laws. The group hopes to find a way to keep operating as a private entity in order to protect the anonymity of its donors.

Until the court case is resolved, the organization will hold its meetings in public but continue to withhold many of its records. (7/9/02)

# FIRST AMENDMENT

## Students suspended for "hate list"

LAND O'LAKES – Two Land O'Lakes High School freshman were suspended when they admitted they were the creators of an Internet site that listed students and teachers they hated. The list included more than 60 students and five or six teachers, according to the school's principal, Max Ramos.

The principal suspended the two girls until the administration could determine whether or not the site posed a danger to students and faculty.

The girls later removed their Web site, and issued an online apology. "We want to apologize for frightening anyone with The List or The Website," they said. "This was not our intention. We're sorry to the parents of the students on the list if they thought they're [sic] children were going to be harmed."

"The List was made to vent our anger. We are constantly picked on at school and this was a way to express how we feel about it," the students explained.

American Civil Liberties Union attorney Bruce Howie said without a threat to do harm, the students' rights to free speech should protect the Web site. However, he also noted that schools are governed by posted rules of conduct. Pasco County rules specifically prohibit "harassment of school staff or students, including actions, verbal comments or written materials." (5/9/02 – 5/10/02)

## Commentator wins defamation suit

WEST PALM BEACH – A jury ruled for talk show host Dick Farrel, rejecting claims that he defamed retired teacher Larry Ferrara.

Ferrara sued the WPBR-AM 1340 talk show host for allegedly calling him a homosexual and a pedophile during Farrel's weekday morning show. Farrel, who said he never used Ferrara's full name on the radio, denied that he said anything to damage Ferrara's reputation.

Circuit Judge Thomas Barkdull ruled that Ferrara, once a candidate for the school board, was a limited public figure, forcing Ferrara to prove that Farrel's allegedly defamatory remarks were made with either a reckless disregard of the truth or with knowing falsity.

The jury took 25-minutes to decide the case and rule for Farrel, who represented himself throughout the second half of the trial. (5/24/02 – 5/31/02)

# Orlando toughens open meetings requirements

ORLANDO – Orlando Mayor Glenda Hood has released tough new guidelines for city government officials who wish to discuss government business. The new guidelines end the practice of meeting at restaurants and private clubs to discuss public business.

Hood issued the guidelines after an *Orlando Sentinel* investigation found that the mayor and city council members had met 208 times since 1996 at private or semi-private locations. The investigation also found that notice for these meetings often was minimal, and written summaries of the meetings required by the Open Meetings Law were not filed in a quarter of the cases.

The new rules require that members of the City Council and advisory boards meet only in public buildings. Public notice of meetings must be posted at City Hall and on the city Web site at least 48 hours in advance of meetings. In addition, council members must now file complete summaries of discussions within 5 days of meeting.

"I think it's important that there is never any doubt in the public's mind that we are operating in the sunshine," Hood said. (6/4/02)

# Citizen sues Port Richey mayor

PORT RICHEY – A citizen who accused Mayor Eloise Taylor of Port Richey of stifling public participation at council meetings has filed a lawsuit claiming Sunshine Law violations.

In his lawsuit filed in Pasco-Pinellas Circuit Court, John Ward King asked a judge to stop Taylor from cutting off public comment at meetings and asked the judge to void a decision the city council made regarding an investigation into the building department.

When the council tackled the building department probe – which was not on the agenda – they debated the issue and voted to hire an outside investigator without taking public comments and then moved to the next agenda item.

King prepared the lawsuit himself, calling the failure to allow public comment "illegal behavior." (6/30/02 – 7/2/02)

# Flagler commissioners fined

BUNNELL – Two Flagler County commissioners, Jim Darby and Pat McGuire, were charged with violating the state's Open Meeting Law. It is the first time that a Flagler County official has been charged with a Sunshine Law violation.

The pair was charged with a civil infraction for discussing their votes on a noise ordinance during a lunch break. (*Brechner Report*, July 2002). The prosecutors recommended the highest possible civil fine, $500. A criminal charge could have resulted in a sentence of up to 60 days in jail. State Attorney John Tanner said, "The evidence reveals a clear violation of the law. But the violation was spontaneous and careless, rather than planned or contrived. The commissioners did not receive any money or other benefit."

Both Darby and McGuire chose not to contest the charges, and each paid a fine of $500. (6/7/02-6/15/02)

# COPYRIGHT

## Businesses sue state over Web site

TALLAHASSEE – Florida's government Web site is facing two lawsuits from private computer businesses. GroupThink, a Tallahassee company, filed an intellectual property lawsuit in Leon County Circuit Court that accused government officials of stealing the company's idea for a user-friendly online state budget. The state began releasing its budget in electronic form in January 2000 on www.flgov.com.

Anna Mattson and Sherri Taylor of GroupThink said their concept, keystrokes, and program features for a phonebook-sized state budget on the Internet were stolen during meetings they had with government officials beginning in 1998.

Brent Gregory, a Winter Springs computer consultant, filed a lawsuit asking for the shutdown of the state's MyFlorida.com site and repayment of lost income. Gregory accused the state of stealing information, page design and the overall concept for MyFlorida.com from his privately held StateofFlorida.com Web site, which he began developing in 1998. Gregory also claims that MyFlorida.com prevented visitors from returning to his Web site by using software programming called "mousetrapping." (6/3/02 – 7/15/02)

# Citizens group challenges closed DRC meetings

HERNANDO COUNTY – Opponents of a Wal-Mart Supercenter filed a lawsuit to stop construction on the store, claiming the Development Review Committee violated the Open Meetings Law. The Coalition for Anti-Urban Sprawl and the Environment (CAUSE) opposes the building in Spring Hill on U.S. 19. The lawsuit, filed in Hernando County Circuit Court, claims that the permit issued to Wal-Mart was discussed by the review committee during a closed meeting in violation of the state's Sunshine Laws.

Kent Weissinger, assistant county attorney for Hernando County, said the committee meetings are not open because the committee only gathers information for the county staff and does not make any decisions. (7/6/02)

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Brechner Center for Freedom of Information
3208 Weimer Hall, P.O. Box 118400
College of Journalism and Communications
University of Florida, Gainesville, FL 32611-8400
http://www.jou.ufl.edu/brechner/
e-mail: brechnerreport@jou.ufl.edu



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# Too many secrets

The Back Page

**By Mark S. Zaid**

*Mark. S. Zaid*

The late U.S. Supreme Court Justice Potter Stewart once wrote, "when everything is classified, then nothing is classified."

His statement has been interpreted to mean that secrecy has its place, but when taken to excess, it trivializes what truly needs to remain secret. Most importantly, as the 1997 Congressional Report of the Commission on Protecting and Reducing Government Secrecy declared, "[e]xcessive secrecy has significant consequences for the national interest when, as a result, policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate."

President Bush has done more than simply declare a war against terror. He has launched a systematic attack against government openness. In fairness, it should be noted that historically, Republican administrations have generally been more conservative toward openness than their Democratic counterparts. Still, this administration has taken so many steps against openness in such a short period of time that, at this pace, it's likely to break records for closed-government initiatives. The Bush administration appears inclined to reverse many of the trends initiated by the Clinton administration.

Consider just a few of its recent steps:

- The White House refused to disclose records relating to Vice President Cheney's energy task force, including discussions involving meetings with Enron officials. Public interest organizations as well as Congress were denied access. Two federal courts have ordered records to be released, and the General Accounting Office, Congress' investigative arm, has taken the unprecedented step of suing the White House.
- President Bush invoked executive privilege in December 2001 to protect the confidentiality of prosecution documents concerning the FBI's handling of mob informants in Boston in the 1960s.
- President Bush issued an executive order in November 2001 limiting the disclosure of past presidential records just as information concerning President Reagan and Vice President George H.W. Bush was to be made public.
- The president awarded the Secretary of the Department of Health and Human Services classification authority for the first time in the agency's history. Prior efforts sought to reduce the number of officials with classification authority.
- Attorney General John Ashcroft issued an agencywide memorandum on Oct. 12, 2001, essentially advising federal agencies to lean toward withholding information whenever possible, reversing Attorney General Janet Reno's openness policy issued in 1993.

Many have questioned the extent to which the tragic events of Sept. 11 have driven the Bush administration's disclosure policies. Actually, the genesis for these policies can be found long before Sept. 11. Last April, President Bush told the American Society of Newspaper Editors that things were going to be different during his watch.

Of course, no thoughtful advocate for open government would challenge, for example, a president's need to hold private, national security conversations in the Oval Office. However, the tone the president has set for himself and his cabinet officers has been one of ever-expanding concentric circles of secrecy.

Sept. 11 did have a justifiable impact on some disclosure-policy decisions. Certain potentially sensitive documents, particularly dealing with infrastructure vulnerability assessments, have been removed, at least temporarily, from government Web sites. Some steps, regrettably, appear as no more than efforts to keep the public in the dark concerning certain governmental decisions.

Moreover, further assaults on government openness are forthcoming. For example, President Bush will soon announce a proposal for a new executive order governing classification. The existing Executive Order 12,958 was issued in April 1995 by President Clinton and resulted in the declassification of more than 800 million pages of documents.

Two specific provisions that are in danger of repeal are the prohibition against reclassifying previously declassified information and the automatic declassification of records 25 years or older.

It will take time to assess fully the damage the Bush administration has caused in the realm of open government. Although we live in perilous times, we must remain vigilant that national defense is not achieved at a price that sacrifices citizens' rights to live in an open society.

*Mark S. Zaid is the executive director of The James Madison Project,* www.jamesmadisonproject.org*, a Washington, D.C., nonprofit organization that seeks to reduce secrecy in government and promote government accountability.* 