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# THE BRECHNER REPORT

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## Release of Aisenberg records delayed

TAMPA – A federal judge has delayed the release of grand jury transcripts in the Aisenberg case after prosecutors filed a motion in U.S. District Court to delay release, allowing time for an appeals court to review the case.

The Aisenberg's daughter Sabrina disappeared in 1997. Hillsborough County sheriff's investigators suspected the couple and got a judge's permission to use listening devices in the Aisenberg's home. Prosecutors later charged the couple with lying to investigators, but the wiretaps which allegedly incriminated the couple were thrown out as evidence when the judge found them to be inaudible.

The U.S. District Judge Steven D. Merryday originally ordered the grand jury transcripts to be unsealed, saying the public has the right to know how prosecutors and detectives erred in the investigation of Steve and Marlene Aisenberg. Merryday later ruled that the transcripts not be made public until at least May 6.

The Aisenberg's attorney argued the couple deserves to see the secret grand jury records. But prosecutors argued that keeping the records shut would not hurt the Aisenbergs and that "the public interest in grand jury secrecy outweighs any interest in immediate disclosure."

"We're obviously concerned about the grand jury material being released," said Steve Cole, U.S. Attorney's Office spokesman. "Obviously, there is an ongoing investigation. It's very clear that it is ongoing."(3/13/03 – 4/5/03)

## Supreme Court justice bans media coverage of award event

CLEVELAND – Supreme Court Justice Antonin Scalia banned the media from attending a speech he gave after accepting an award for supporting free speech.

Scalia was awarded with the City Club's Citadel of Free Speech Award. The City Club usually tapes speakers for broadcast on public television, but the justice insisted that television and radio coverage be banned.

Television reporters were permitted to see Justice Scalia accept the award before he gave his speech. Scalia did not take any questions from reporters.

The ban "begs disbelief and seems to be in conflict with the award itself," C-SPAN vice president and executive producer Terry Murphy wrote in a letter last week to the City Club. "How free is

speech if there are limits to its distribution?"

The club chose Justice Scalia because he has "consistently, across the board, had opinions or led the charge in support of free speech," said James Foster, the

club's executive director. The award applauded Scalia for protecting free speech in several Supreme Court cases, including a

vote to strike down a Texas flag-burning ban.

Scalia also prohibited cameras that same week from a lecture he gave at John Carroll University, where he spoke about the constitutional protection of religion and how the government has room to scale back individual rights during wartime without violating the Constitution. (3/19/03)

## FIRST AMENDMENT

## Former club chairman pleads no contest to sunshine violation

MIAMI – Former chairman of the Country Club of Miami Community Council, Gus Exposito, has pleaded no contest to violating the Sunshine Law for questioning another council member after a controversial vote.

The plea ended an eight-month probe into Exposito's questionable behavior when he asked another member after a meeting to reconsider his vote for a housing project planned for a vacant 73-acre area. Exposito confronted council member Stuart Argüello after the meeting, insisting Argüello, who was the swing vote against the project launched by Exposito, had misunderstood the issue.

Two weeks after the meeting, Exposito

asked Argüello to write a letter to the county asking if the council could reconsider that application.

Exposito claimed he wanted to make sure there was no misunderstanding about the vote.

"All I was asking was a legal question. If I had thought it was in violation of the Sunshine Law, why would I have been speaking to him so openly in front of everyone?" Exposito said at the time.

Exposito was sentenced to six months' probation which will be served concurrently with the 12-month probation sentence he received for pleading guilty to perjury in a separate case. (3/29/03)

## ACCESS RECORDS

## ACCESS MEETINGS

## Circuit judge rules records are exempt

LEON COUNTY – A circuit judge denied The New York Times Company access to records held by the Department of Juvenile Justice, ruling the requested records fell under an exemption to the Public Records Law.

The New York Times Company made a written public request for the department's records regarding Lionel Tate, who was convicted of murdering his six-year-old playmate in January 2001 and sentenced as an adult to life in prison. The department refused to release the requested records, claiming they were exempt from public inspection under Section 985.04, Florida Statutes, providing that "records in the custody of the Department of Juvenile Justice regarding children are not open to inspection by the public."

The company argued that the exemption did not apply because the statute under which Tate was sentenced provides that when a child of any age is indicted by a grand jury and found to have committed a crime punishable by death or life imprisonment, such child shall thereafter be handled "in every respect as if an adult," and records regarding him are not records regarding "a child" within the meaning of the exemption.

Circuit Judge Janet E. Ferris ruled that Tate is a child under the definition provided in section 985.03(6), and the Department of Juvenile Justice records regarding him are exempt. (3/20/03)

## 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.

## DCF releases list of found children

LEON COUNTY – The Department of Children and Families released a list of missing children who have been found since fall in response to a lawsuit brought by the *South Florida Sun-Sentinel*.

Leon Circuit Judge Nikki Clark ordered the DCF to release the 26-page document which disclosed information showing the condition of the children, where they had been and where they were placed after they were found. In many cases, however, the list provides few details about the children. Some of the names appear without any information and some appear only with the word "closed" under the name.

The DCF has been criticized for losing children since April of last year when a 5-year-old named Rilya Wilson disappeared. After *Sun-Sentinel* reporters were able to locate nine of the children the DCF had been unable to find, Gov. Jeb Bush created a task force

to find the missing children and ordered the DCF to get permission to bypass confidentiality laws and release the names and photos of the lost youths. Once the children were found, the DCF claimed that confidentiality reapplied and could not release information about the children. The *Sun-Sentinel* sued for the records in November.

Although the records were released, the newspaper's general counsel claims they are vague and contain errors, lacking important information such as the health conditions of the children.

"If a missing child is found pregnant, malnourished and on drugs, that is precisely the type of information that the court envisioned would be released," wrote David Bralow, the newspaper's general counsel, in a letter to the DCF. He called it incredible that "these few pieces of paper represent the only public records" that the agency has on the children. (3/1/03)

## Welaka mayor pleads no contest to Sunshine Law violation

WELAKA – Welaka Mayor Gordon Sands pleaded no contest and paid a \$500 fine after being charged last year with violating the Sunshine Law.

The charge stems from a discussion Sands reportedly held with another town council member to discuss nominating council member Curtis Williams as

council president at a public meeting.

Prosecutors and defense attorney James McCune both asked County Judge Peter Miller to withhold adjudication, which means Sands will not have a criminal record.

Miller equated Sand's civil infraction to "a speeding ticket," and did not find him guilty. (2/22/03)

## ACCESS MEETINGS

## Judge rules group must be recorded

BARTOW – A judge ruled that all communications of a Florida Department of Citrus peer review group must be documented by a court reporter in case they fall under the Sunshine Law.

Judge Harvey Kornstein of the 10<sup>th</sup> Judicial Circuit Court, issued the ruling after *The Ledger* of Lakeland filed a lawsuit against the department for not releasing records and closing meetings of a peer review group concerning a study of the Citrus Department's generic advertising program being conducted by a Texas research firm.

The attorney representing the Florida Citrus Commission claims the requested records do not fall under the Sunshine Law because the peer review group does not have decision-making power.

Attorney Susan Bunch, representing *The Ledger*, asked the judge for a temporary injunction allowing the newspaper to attend the closed meetings and have access to records due to the timely nature of Sunshine Law protection.

While he did not grant the injunction, Kornstein did order a court reporter to be allowed into the meetings to record the peer review group's activities until he could make a final ruling on the matter. Kornstein said he needed time to examine both sides to make a proper decision on whether or not the meetings fall under the Sunshine Law.

"This is very difficult to get a grasp on," Kornstein said. "It's like Jello – the tighter you squeeze, the more it slips through your fingers." (3/15/03)

## Circuit Court upholds suspension for students

GAINESVILLE—A three-judge panel of the 11<sup>th</sup> U.S. Circuit Court of Appeals upheld the suspensions of two Santa Fe High School students for displaying a Confederate flag on school premises after previously being told not to.

The students, Franklin Jay Scott, Jr. and Nicholas Thomas, filed a lawsuit against the School Board of Alachua County claiming the discipline imposed by the principal violated their First Amendment right to symbolic speech. The District Court granted the school

board's motion for summary judgment and sent the case to the Court of Appeals.

The appeals panel wrote in its decision that the district court properly dismissed the case against the school board.

An unwritten ban on the Confederate flag by the Santa Fe High School principal was not an unconstitutional restriction on the student's free-speech rights, Judge Gerald Tjoflat wrote. The decision also noted how school officials

presented evidence of racial tensions and racially based fights at the school in the months leading up to the suspensions.

"This First Amendment freedom of expression case stands against the unique backdrop of a public school," Tjoflat said. "Short of a constitutional violation based on a school administrator's unsubstantiated infringement on a student's speech or other expressions, this court will not interfere with the administration of a school." (3/20/03–3/22/02).

## PRIVACY

### Appeals Court strikes down "Scarlet Letter" law

WEST PALM BEACH – A state appellate court struck down Florida's "Scarlet Letter" adoption law, ruling it violated birth-mothers' right to privacy by requiring them to list personal information in newspapers.

The law has been blamed for a decrease in adoptions throughout the state. The law's constitutionality was challenged at a February hearing before the 4<sup>th</sup> District Court of Appeal, but the Florida Attorney General's Office refused to appear.

The law was passed by lawmakers in October 2001, and makes no exception for

rape victims or minors. All mothers who wished to give up their child for adoption had to run an ad once a week for four weeks in a newspaper posting their name, age and description, along with descriptions of any men who could have been the father.

The appellate court ruled that the law violated a "fundamental right to privacy" by identifying the mother and her child in "such a personal, intimate and intrusive manner."

The attorneys for the four birth mothers challenging the law said they were not surprised by the decision.

"It's a good decision because the law was inhibiting birth parents who feel the need to give a child up for adoption," said Lynn Waxman, one of the women's attorneys. "This helps children because it helps facilitate adoptions. It also helps prospective adoptive parents because it's going to make the adoption more readily accessible. The law really had a chilling effect."

Sen. Walter "Skip" Campbell, D-Tamarac, who sponsored the notification requirement, said he anticipates a bill repealing it will be passed soon. (4/24/03)

## Four college students sued for copyright infringement

The Recording Industry Association of America has sued four college students at three universities for running file-sharing Internet sites allowing students to infringe on copyrights.

The suits ask three U.S. district courts for permanent injunctions to shut down the file-sharing systems on the networks at Princeton University, Rensselaer Polytechnic Institute in Troy, N.Y., and Michigan Technological University in Houghton, Mich. The suits also seek the highest damages allowable by law, which could be up to \$150,000 per copyright infringement.

The music industry blames the free file sharing for its current depression in sales. The industry says it must fight to shutdown sites that make file sharing

possible, saying the sites are in violation of copyright and fair-use laws and take money away from artists and record companies.

"We want this infringement stopped for good," said Matthew J. Oppenheim, the industry's senior vice president for business and legal affairs. He added the lawsuits would not be dropped if the systems were shut down. "Frankly, we are hopeful this round of lawsuits will send a message to others that they should immediately cease and desist."

The industry has sued Web sites and individuals in the past for file sharing, but this is the first time the organization has commenced such a strong legal attack on students using college networks. (4/4/03)

## COPYRIGHT

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# New report tracks increase in government secrecy

In the days immediately following September 11, the U.S. government embarked on an unprecedented path of secrecy. The atmosphere of terror induced public officials to abandon this country's culture of openness and opt for secrecy as a way of ensuring safety and security.

## The Back Page

By *Lucy Dalglish*

The administration of President George W. Bush announced a variety of actions designed to restrict information from reaching the public, including:

- A directive to agency heads by Attorney General John Ashcroft that changes the interpretation of the federal Freedom of Information Act to allow the agencies to deny access more often to public records if a claim of invasion of privacy or a claim of breach of national security can be alleged.

- Secret imprisonment of more than 1,100 non-American citizens on alleged claims of immigration violations or as material witnesses.

- Disregard of a 1992 agreement between the media and the Pentagon that provided for pooled and open coverage of military actions.

No one has demonstrated that an ignorant society is a safe society. Citizens are better able to protect themselves and take action when they know the dangers they face.

In the months since September 11, there has been some progress. More information became available from some government agencies. The Pentagon created an elaborate "embedding" system to place more than 500 journalists with U.S. military units during an Iraqi invasion. Courts have been aggressively protecting the public's right to know who is being detained by the government, and it appears that the U.S. Supreme Court will decide whether immigration cases will be conducted in secret.

Perhaps most importantly, American citizens seem less frightened and more determined to maintain the rights and liberties they have worked so hard to achieve. They have started to object to the secret imprisonment of witnesses and immigrants. They are asking hard questions about airline security. They want to know whether Afghan civilians have been killed by American



*Lucy Dalglish*

air attacks.

The Reporters Committee's Homefront Confidential "White Paper" was first published in March 2002 and a second edition was published on the first anniversary of September 11. We believe the public's right to know is severely threatened in the areas of changes to freedom of information laws and access to terrorism and immigration proceedings. This report describes in detail why the public should be concerned about the information it is not getting.

As with the second edition, this third edition incorporates a threat assessment to the public's right to know based on the color-coded scheme used by the Department of Homeland Security. Just as the government assesses threats to the nation's security, this report assesses how government actions have affected the media's ability to provide information to the public.

Careful observers will note that Pentagon efforts to "embed" reporters with military units poised for invasion of Iraq induced us to downgrade the threat posed by the military to the public's right to know. It moved from "Code Red," to "Code Orange." But recent news reports about Justice Department plans to introduce a dangerously restrictive "USA PATRIOT Act II," caused us to move the threat posed by the domestic legislation from "Code Blue" to "Code Yellow."

The report begins with a chronology of events related to government secrecy since September 11. Major secrecy initiatives are discussed in depth later in the report, which concludes with a summary of parallel secrecy actions taken by state governments. For daily updates on threats to the public's right to know, log on to [www.rcfp.org/behindthehomefront](http://www.rcfp.org/behindthehomefront).

We live in a nation built on the concept of balance. When the government, with the best of intentions, goes too far in its efforts to shield information from the public, it is up to the public and the media to push back. Through a vibrant, information-based democratic process in our legislatures and through an independent judiciary, we as a society will come to a balance that hopefully will protect our liberties for generations to come.

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*Lucy Dalglish is Executive Director of the Reporters Committee for Freedom of the Press in Arlington, Va.*