THE
BRECHNER REPORT

Volume 30, Number 9 ■ A monthly report of mass media law in Florida
Published by The Brechner Center for Freedom of Information ■ College of Journalism and Communications ■ University of Florida

September 2006

Court orders more study of online records access

COURTS

TALLAHASSEE – Florida's moratorium on electronic access to court records will remain in effect while unresolved issues are studied further, according to an order by the Florida Supreme Court. In the meantime, Manatee County will be home to a one-year pilot project that could become a statewide model.

The moratorium was imposed in 2003 and is set for review in July 2007. It allows online access to dockets, calendars and certain records, such as those related to cases of "significant public interest" or cases in which a state agency is a party.

Among other things, the justices are still concerned with privacy, identity theft, fees for access and which Public Records Law exemptions to apply to court records.

The Committee on Privacy and Court Records submitted its final report and recommendations to the court in August 2005. The Court has ordered that a new committee, the Committee on Access to Court Records, be formed to implement and further study several of the first panel's recommendations.

Media General wins hearing before sealing of documents

TAMPA – Media General Inc., parent company of *The Tampa Tribune* and WFLA-TV, successfully challenged a judge's sealing of pre-trial information without a public hearing.

The information was gathered in preparation for the murder trial of David Lee Onstott. Onstott is accused of killing Sarah Michelle Lunde, 13, in April 2005.

Circuit Judge Ronald N. Ficarrotta sealed the pre-trial information and the request filed by Onstott.

While the ruling does not mean the documents will be released to the public, it does allow Media General the opportunity to argue that they should be released.

The 2nd District Court of Appeals suggested the trial court direct Onstott to file a motion that states the basis for keeping particular information secret without revealing the information he wants exempt from pre-trial disclosure.

Media General would then be allowed to participate in a hearing on the matter, and the trial court could decide whether to release the information.

FEMA reverses park restrictions

BATON ROUGE, La. – The Federal Emergency Management Agency (FEMA) reversed a policy restricting media access to its trailer parks.

Louisiana FEMA official James Stark told members of the Baton Rouge press that in response to criticism, a new policy "will allow media full access to the group site trailer parks" without a FEMA escort.

Journalists who wish to enter the FEMA-funded trailer parks and interview residents must first present "valid media credentials."

"I hope this is the first of many policy reversals from FEMA regarding its relationship with the public," said U.S. Rep. Charles W. Boustany, R-Lafayette.

Flagler Beach eases public comment regulations

FIRST AMENDMENT

FLAGLER BEACH – The city commission has adopted new rules that will allow the public to comment more frequently at commission meetings.

Flagler Beach residents have traditionally been allowed a one-time, three-minute limit to comment on non-agenda items, and a similar restriction for each issue on the agenda.

The commission voted to allow residents to speak for three minutes on each issue they choose to bring up during the "comments not on the agenda" portion of the meeting. The new rules will also allow three-minute comments on each general business item.

"I believe that if people come to the meeting they should be allowed to speak," said Commission Vice Chair John Feind.

"We're not trying to stifle people, we're not trying to cut off the debate and we're not trying to go home early," Feind said.

Chairman Ron Vath, the only commissioner who voted against the less-restrictive policy, said there were already checks and balances in place to prevent stifling speech.

Commissioners in the nearby town of Ormond Beach recently enacted a policy restricting public comments, allowing each citizen the opportunity to make the same remarks at no more than two meetings.

FREEDOM OF INFORMATION

Archive challenges CIA fees

WASHINGTON, D.C. – The National Security Archive filed suit against the Central Intelligence Agency, challenging the agency's fee practices for records requests.

The Archive, a non-governmental research institute located at George Washington University, has been considered a "representative of the news media" by the CIA since a 1990 court decision. Under the Freedom of Information Act, journalists pursuing news are charged only copying fees.

In 2005, the CIA began charging the Archive additional fees and determining whether it was a news media representative based on individual requests. The CIA applied criteria for favorable fee treatment that it promulgated in 1997, according the Archive's complaint.

The new test required the requests concern current events, interest the general public, and "enhance the public understanding of the operations or activities of the U.S. government."

For the past 15 years, the CIA had a policy of presumptively waiving additional fees for news media representatives, rather than evaluating requests individually.

The CIA charged additional fees for 42 of the 45 requests submitted by the Archive between August 2005 and March 2006. For example, it did not consider requests for biographical information about certain Taliban members "current events."

Resolution condemns media

WASHINGTON, D.C. – The U.S. House of Representatives passed a resolution condemning the media for revealing a covert government program to track terrorist financing, saying the reports "placed the lives of Americans in danger." No media outlets were named in the resolution, which passed 227-183.

But *The New York Times* and other publications had previously reported on the Terrorist Finance Tracking Program.

"Now the terrorists are well-informed of the details of our methods and will find other ways to move money outside of the formal financial system," said Rep. Michael Oxley, R-Ohio.

The Times defended its reporting. "We have on many occasions withheld information when lives were at stake," said Bill Keller, executive editor. "However, the administration did not make a convincing case that describing our efforts to monitor international banking presented such a danger."

Study planned on terrorism and FOIA

SAN ANTONIO – The Department of Defense is funding a $1 million study of possible changes to the Freedom of Information Act that would prevent terrorists from accessing sensitive infrastructure information.

The yearlong project will examine federal and state access laws passed since the Sept. 11, 2001 terrorist attacks. In particular, the project will study laws aimed at keeping information from terrorists.

"The mission is to balance increase in security with civil liberties, which are precious," said Jeffrey Addicott, head of the Center for Terrorism Law at St. Mary's University School of Law.

The law school will carry out the study, with an end goal of producing a model statute for Congress and state legislatures to consider.

Addicott, a former legal adviser in the Army Special Forces, said he did not know of any instances where open government laws were utilized by terrorists to gain infrastructure information. But he said he believes it is inevitable terrorists will do so.

FIRST AMENDMENT CONTINUED

Candidate barred from city, contacting officials

ALACHUA – A University of Florida doctoral student and instructor who is also a candidate for the Florida House has been banned from entering the city of Alachua or contacting the city's elected officials or employees. Charles Grapski will only be allowed to go to his home there, according to *The Gainesville Sun*.

Grapski was arrested in May after he went to the Alachua City Hall for public records related to the city's April election. City Manager Clovis Watson accused Grapski of recording him without his knowledge. Grapski denied the allegation. He was released on his own recognizance, but a complaint of disorderly conduct at a city meeting prompted prosecutors to seek a revocation of that release. Circuit Judge Peter K. Sieg imposed the geographical and contact restrictions at a hearing on the revocation issue.

Resident seeks injunction against free newspaper

LONGBOAT KEY – A Longboat Key resident is seeking an injunction against a free weekly newspaper to stop it from delivering the paper to his house. Lee Pokoik said he called and e-mailed the *Longboat Key News* in an effort to stop delivery, but that didn't work.

Pokoik said a pile of newspapers on his driveway could invite thieves when he is away from home, according to the *Sarasota Herald-Tribune*. After three phone calls and several e-mails to the paper, Pokoik e-mailed its editor and publisher in November 2005. He told publisher Steve Reid that it would cost $15 each to remove each paper. When the paper was delivered five more times over the next few months, Pokoik filed a small claims action against the newspaper for $60. Pokoik is now seeking an injunction.

The town gets few complaints on the issue, according to Longboat Key Town Attorney David Persson. A town can't require the newspaper to get permission to deliver, because that would be an unconstitutional ban on freedom of expression, according to Mr. Persson.

FDLE launches inquiry in Yankeetown dispute

YANKEETOWN – Gov. Jeb Bush declared a state of emergency in Yankeetown, where a dispute over development has virtually shut down the town government.

Three of the five town council members, as well as other key town workers, have resigned.

Prompted by residents concerned with actions by town officials, the Florida Department of Law Enforcement has launched an investigation into possible wrongdoing.

Residents claim the town mayor and others threw away public documents in a recycling trash bin outside town hall.

Those documents, some shredded, were turned over to the FDLE. The FDLE has also removed computers from the town hall.

The FDLE will not determine whether criminal activity occurred, but will turn evidence over to the State Attorney's Office to make that decision.

The controversy in Yankeetown stems from a proposal by developers to build a resort hotel on the Withlacoochee River.

City pays for commissioner's legal defense

DEERFIELD BEACH – City commissioners voted to pay the legal fees of a fellow commissioner who Deerfield Beach residents are trying to remove from office.

Steve Gonot is facing a second recall attempt by residents who allege the commissioner violated the Sunshine Law by meeting privately with another commissioner about a fire pension board appointment.

Gonot denies the allegation, and the State Attorney's Office did not find any evidence to support the claim.

Gonot spent $7,000 in legal fees defending himself against the first recall effort. That effort failed after organizers gathered 1,329 petition signatures but missed a filing deadline.

THE BRECHNER REPORT

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.brechner.org
e-mail: brechnerreport@jou.ufl.edu

Sandra F. Chance, J.D., Exec. Director/Exec. Editor
Christina Locke, Editor
Alana Kolifrath, Production Coordinator

The Brechner Report is published 12 times a year under the auspices of the University of Florida Foundation. *The Brechner Report* is a joint effort of The Brechner Center for Freedom of Information, the University of Florida College of Journalism and Communications, the Florida Press Association, the Florida Association of Broadcasters, the Florida Society of Newspaper Editors and the Joseph L. Brechner Endowment.

No wrongdoing found in Monroe

MONROE COUNTY – A four-month investigation into alleged Sunshine Law violations by Monroe County commissioners resulted in no evidence of wrongdoing, according to a State Attorney's Office report.

The firing of the county attorney at a February meeting prompted the investigation. Richard Collins was fired at the meeting after the action was added to the agenda at the last minute.

Commissioner George Neugent accused three commissioners of discussing the matter before the meeting. Those commissioners denied that allegation.

The investigation involved interviews with the five commissioners and other county employees. E-mails, cell phone records and other communications were also subpoenaed.

The State Attorney's Office also ran paid advertisements in local newspapers asking for any information related to potential Sunshine Law violations by the commissioners.

Council members appeal ruling

BARTOW – Members of the Polk County Opportunity Council (PCOC) have appealed a county judge's ruling that they were guilty of violating the Sunshine Law.

Judge Anne Kaylor ordered each board member to pay $250 for the civil infraction and $28.60 in court costs.

The charges stemmed from a September 2005 closed meeting where the council members discussed the former PCOC executive director's acceptance of a controversial training trip to Las Vegas. The closed meeting took place during a recess of the regular meeting. Council members returned to the regular meeting and voted to give the former director a letter of admonishment.

On appeal, the members maintain that neither they nor the PCOC are subject to the Sunshine Law. The appeal brief describes the PCOC as an "independent contractor" for the Florida Department of Community Affairs, according to *The Ledger* (Lakeland).

The PCOC is a nonprofit agency that aims to help the area's poor with its $13 million annual budget.

Five accused of Sunshine offense

ORCHID – Five current and former town council members are accused of violating the Sunshine Law by allegedly excluding town employees from public meetings.

The non-criminal offenses carry fines of up to $500 each. They stem from a 2004 budget workshop during which the then-town manager was asked to leave while his salary was discussed. In December 2005, the current town manager left while council members discussed her salary.

Former Mayor C. Warren Crandall said he was surprised at the charges, and called the Sunshine requirements confusing, according to the *Vero Beach Press-Journal*.

Current Orchid Mayor Richard C. Dunlop and former council members Walter J. Sackville, John Brehmer and Barbara Greenbaum Deputron are accused of the violation.

THE
BRECHNER
REPORT
University of Florida
Brechner Center for Freedom of Information
3208 Weimer Hall • Gainesville, FL 32611

September 2006

Leak investigations waste time, hinder journalism

The Back Page

By Bruce W. Sanford and Bruce D. Brown

Almost three years to the day after he published his now-infamous "Mission to Niger" column in which he described Valerie Plame as a CIA "operative," Robert D. Novak revealed what he had told special prosecutor Patrick Fitzgerald about the sourcing for his article. By supplying corroboration of what has long been suspected — that Fitzgerald knew almost immediately and on his own who Novak's three sources were — Novak has further confirmed another truth about leak investigations: They are a huge, dangerous waste of time.

It took three years of numbing legal process, including bruising battles in the federal courts that have left the relationships between journalists and their sources more vulnerable, to get us here. And where exactly are we?

The criminal investigation into who in the government disclosed Plame's identity has essentially rendered the mission to uncover the "Mission to Niger" a mission to nowhere. A reporter was jailed for almost 90 days, but Novak's principal source, whose identity he still protects under the terms of their agreement, has not and will not be indicted under the federal law criminalizing the purposeful disclosure of truly covert agents, because the stringent requirements of that statute could not possibly be met.

Bruce W. Sanford

Bruce D. Brown

But there's more futility — and fatigue — to come. The futility will be evident in the acquittal next year of Vice President Cheney's former chief of staff, Lewis "Scooter" Libby, on charges of perjury and obstruction of justice. The acquittal will be yet another symbol of the misuse of prosecutorial time that is the big problem with leak investigations.

Libby is charged with providing false statements to a grand jury when he testified that his contacts about Plame with Judith Miller of The New York Times and Matthew Cooper of Time consisted only of repeating a rumor about her identity that he had heard from NBC's Tim Russert. Russert, however, testified that he never spoke with Libby about Plame. Prosecutors allege that Libby learned who Plame was from Cheney and other government officials. The suggestion is that Libby sought to protect his administration colleagues by throwing investigators off the scent.

To win a perjury case, however, a prosecutor has to prove that a defendant willfully made false statements. Libby's attorneys will argue that his misstatement was an innocent mix-up by a top executive branch official who dealt daily with waves of reporters and a constant crush of domestic and international issues. It will be virtually impossible for the government to prove otherwise — beyond a reasonable doubt — when such a plausible defense exists and no conclusive evidence has emerged showing that his recollections of his contacts with journalists were intentionally false.

Ask any federal prosecutor, current or former, whether leak investigations are worth the effort and she'll say they are a monumental waste of time and resources. "The only reason to do them is to do them," one former prosecutor says. "Maybe they have a deterrent effect on loose lips."

But the certain cost of this elusive benefit, if any, is too high, since there are plenty of polygraphs and other devices for the government to ferret out any compromisers of its true secrets. Worse, leak inquiries end up harming the very relationships between government officials and journalists that must exist in confidence for the public to stay informed. By giving us headlines now, they all but ensure that we'll receive less real news later.

Even a conviction of Libby would not justify an investigation that has led many of Washington's finest journalists to ponder how to dumb down their files and remove traces of their contacts with sources as if they worked in the capital not of a great democracy but of Franz Kafka's or George Orwell's worst nightmare of a police state.

Bruce W. Sanford and Bruce D. Brown are partners at Baker Hostetler, practicing media law. This article originally appeared in The Washington Post *and is reprinted with permission of the authors.*