
THE BRECHNER CENTER

2005 FREEDOM OF INFORMATION REPORT

Published by The Brechner Center for Freedom of Information ■ College of Journalism and Communications ■ University of Florida

Investigation into pardons wins annual award

The *Argus Leader* in Sioux Falls, S.D., was named the 2005 Brechner Award winner for investigative reports that uncovered a veil of secrecy in the South Dakota governor's office.

The *Argus Leader's* reports of sealed gubernatorial pardons kicked off a 17-month legal battle that led to a South Dakota Supreme Court ruling to release 218 previously sealed pardons.

At the center of the controversy was former South Dakota Gov. Bill Janklow, who held the office during two periods for a total of 16 years, the longest gubernatorial service in U.S. history. He was later elected to the U.S. House of Representatives. In 2004, he resigned from Congress and was sentenced to 100 days in jail on an unrelated vehicular manslaughter charge.

As governor, Janklow pardoned crimes and reduced sentences in cases that ranged from murder and child molestation to driving while intoxicated and fishing without a license. Recipients of the pardons included his son-in-law,

state business leaders, and former state employees and their families.

The pardons were sealed under a 22-year-old South Dakota law passed during

BRECHNER AWARD 2005

Janklow's first term as governor that required gubernatorial pardons be sealed and held by the secretary of state.

The *Argus Leader* first became interested in the governor's clemency records after American Indian Movement leader Russell Means revealed to one of the paper's reporters that he had been pardoned during the last days of Janklow's administration.

The newspaper requested the clemency record, but the pardon was sealed. A legal battle ensued. A judge ruled in favor of plaintiffs who had received pardons and wanted an injunction to keep them sealed.

The state's attorney general, Larry Long, joined by the *Argus Leader* and 15 other state and national media organizations, appealed the ruling.

The South Dakota Supreme Court overturned the decision in 2004 and ruled that Janklow had improperly sealed dozens of pardons during his four terms in office

when he bypassed the state's Board of Pardons and Paroles. Chief Justice David Gilbertson, said that while the governor has broad authority to pardon criminals, there is no right to secrecy.

The South Dakota 2003 Legislature did not wait for the judicial decision. Shortly after the news broke of the sealed pardons, it passed a law that requires pardons to remain open for at least five years.

Patrick Lalley, assistant managing editor, accepted the award on behalf of the newspaper.

-Anaklara Hering

ABOUT THE BRECHNER AWARD

The Joseph L. Brechner Freedom of Information Award recognizes journalists whose investigative reporting uncovers stories related to freedom of information or access to government meetings and records.

This year's celebration marks the 20th anniversary. Previous winners include The Washington Post, the Houston Chronicle, the St. Petersburg Times and the Sun-Sentinel.

Miller spends time in jail, resigns from paper

NEW YORK – *New York Times* reporter Judith Miller parted ways with the newspaper in early November, just a little over a month after she was released from the Alexandria Detention Center in late September.

Miller spent 85 days in the federal jail after U.S. District Judge Thomas Hogan ordered her jailed after she refused to disclose the name of a confidential source to a federal prosecutor who was investigating the outing of CIA operative Valerie Plame.

Miller, who remained in jail more

than twice as long as any other American journalist, agreed to testify before the grand jury after she received word that

REPORTER'S PRIVILEGE

her source, I. Lewis "Scooter" Libby, Jr., had released her from her promise.

After Miller testified as to Libby's identity, journalists around the nation began to criticize her actions.

Former colleague Maureen Dowd made reference to Miller as a "Woman of Mass Destruction" in a column while *Times* Public Editor Barney Calame wrote that "new information that suggested the journalistic

practices of Ms. Miller and *Times* editors were more flawed than I had feared."

Pulitzer Prize-winning journalist and former *Times* reporter David Halberstam had been critical of the *Times'* handling of the Miller situation. He said her departure marked a "very sad end of a very sad and incalculably damaging story."

Miller hasn't gone quietly. She has appeared on television and radio, as well as published letters attacking her antagonists.

In the aftermath of Miller's testimony, Libby was indicted for providing false testimony. He pleaded not guilty.

-Amy Kristin Sanders

Attorney General advises about access issues

TALLAHASSEE – Attorney General Charlie Crist’s office issued numerous opinions in 2005 that address freedom of information issues.

The opinions are detailed below:

Child Abuse Death Review Committee Records (AGO 05-03) – Federal law prohibits the release of identifying information received by the State Child Abuse Death Review Committee when carrying out its responsibilities under the Child Abuse and Neglect Prevention and Treatment Act. State law, however, requires the disclosure of non-identifying information. Because the repeal of Section 383.410 of the Florida Statutes has created problems for the committee, the Attorney General recommended that the committee work with legislators to readdress the release of information.

Advisory Groups to Law Enforcement (AGO 05-05) – An advisory group created by a chief of police to make recommendations regarding the issues affecting the police department is subject to the Government-in-the-Sunshine Law. The fact that an advisory group is created by a single official rather than a collegial body does not affect the applicability of the Sunshine Law.

Access to Municipal E-mail Correspondence (AGO 05-12) – Florida’s Public Records Law prohibits a municipality from requiring use of a code in order for citizens to access e-mail correspondence between the city’s police department and its human resources department. While the city may delay producing the records in order to delete information that may be confidential or exempt under a provision of the Public Records Law, no automatic delay may be imposed and the city may not use a code in order to frustrate the public’s access to its records.

Identification Requirement for Meeting Attendance (AGO 05-13) – A municipality may not require persons desiring to attend the public meetings of its boards to present identification prior to their admission. The requirement that persons present identification could have a chilling effect on the public’s willingness to attend. In addition, board discussion of issues pertaining to security matters may be closed to the public if the issues fall within a specific exemption to the Sun-

shine Law. Therefore, the need to discuss such matters does not justify the presentation of identification to permit attendance.

Applicability to Advisory Council on Condominiums (AGO 05-18) – Florida’s Open Meetings Law does apply to meetings between a voting member of the Advisory Committee on Condominiums and the Director of the Division of Florida

Land Sales, who serves as an ex officio, non-voting member of the council. Because of this,

all of the law’s requirements, including notice and written minutes, apply to any meeting where two or more members of the council discuss matters on which the board will likely take action.

Applicability of Sunshine Law to Community College DSOs (AGO 05-27) – Direct Support Organizations that fund community colleges in Florida are subject to the state’s Government-in-the-Sunshine Law. Because the Sunshine Law should be construed liberally to give effect to its public purpose, DSOs come under its coverage. In most cases, the DSO may be permitted to use property and facilities

of the community college and are composed of members who have been appointed by directors of the community college. The goal of the DSO is to operate in the best interest of the state with the goals of the community college in mind.

Monetary Deposits for Access to Records (AGO 05-28) – A records custodian is authorized to retain monetary deposits collected in connection with the actual costs incurred in making copies to comply with a public records request if the requesting party subsequently advises the municipality that copies are no longer needed. Additionally, the custodian would be authorized to bill the requester for any shortfall between the deposit and the actual cost of copying in such a case.

Confidentiality of Social Security Numbers in Records (AGO 05-37) – A clerk, when presented with a document that is required by law to contain a Social Security number, must record the number in the Official Record upon payment of the recording fee. However, it is the responsibility of the clerk to ensure that the Social Security numbers contained in the records remain confidential and are not released to the public.

-Amy Kristin Sanders

ATTORNEY GENERAL OPINIONS

Panel endorses online records

TALLAHASSEE — The state panel formed two years ago to develop guidelines for Internet access to court records offered its final report in August, endorsing online access as long as privacy safeguards are implemented.

The committee’s report is currently pending before the Florida Supreme Court, which is in charge of determining what records will be available online, according to court spokesman Craig Waters.

The Committee on Privacy and Court Records, comprised of lawyers, judges, academics and court officials, voted 11-4 in favor of electronic access.

The committee was formed by the Florida Supreme Court in November 2003 when a moratorium was placed on the electronic release of certain types of court records. Privacy concerns prompted the moratorium, which is not likely to end soon. Until privacy safeguards are established, a proposed interim policy would restrict the elec-

tronic release of court records primarily to cases designated as having “significant public interest,” cases in which a public agency is a party and based on individual record requests.

In addition to its recommendation that electronic access be a goal for the judicial system, the committee also concluded that the Florida Legislature has the opportunity to have a greater impact on privacy issues by enacting privacy reform laws.

Specific privacy safeguards recommended by the committee included large-scale screening and redaction processes to prevent identity theft; user fees for online access; and a burden on filers to notify clerks of any documents containing confidential information or face the possibility of court sanctions.

The committee also recommended that most family, juvenile and probate records be excluded from those made available electronically.

-Christina Locke

ACCESS RECORDS

Studies reveal trends in access to information

Major reports released in 2005 on access issues include:

• **Report on Privacy of Trial Court Records:** The Committee on Privacy and Court Records issued a report to the Florida Supreme Court on the status of privacy in court documents. The committee reached five conclusions, ranging from judicial responsibility over individual privacy to implementation of access policies in the digital age.

The report is available at: www.floridasupremecourt.org/pub_info/index.shtml

• **Coalition of Journalists for Open Government:** The odds are stacked against those who appeal FOIA denials or sue to get withheld records, according to a report by CJOG. The Coalition has developed two new reports on FOIA. The first provides a detailed look at how well the federal government has handled FOIA requests. The other is a statistical review of FOIA litigation over the past six years. The performance report shows FOIA requests topped 4 million in the 2004 fiscal year, and that departments and agencies fell even further behind

in responding to the requests. It also includes each agency's record in granting requests and meeting statutory deadlines.

The report is available at: www.cjog.net/documents/Updated_Combined_Reports.pdf

• **Homefront Confidential:** The Reporters Committee for Freedom of the Press found that in the three years since Sept. 11, the U.S. government has cinched access to government information at an alarming rate. The report rates the risk to a free press in issues ranging from covering the War on Terror to state openness.

The report of its comprehensive study on government secrecy is available at: www.rcfp.org/homefrontconfidential/

• **Environmental Journalists See FOIA as "A Flawed Tool":** The Society of Environmental Journalists compiled a new study of the Freedom of Information Act. Its reporters experienced increased difficulties when they attempted to acquire government information, much of which was routine. Some experienced delays of up to a year, witnessed heavy-handed redaction of data, and

experienced challenges to the waiver of fees as required by law.

The report is available at http://www.sej.org/foia/SEJ_FOIA_Report2005.pdf.

• **2005 Secrecy Report Card: Government Secrecy Still Growing with Few Controls:** A study by OpenTheGovernment.org, Americans for Less Secrecy, More Democracy, found that government agencies are expanding secrecy in many areas. For example, the study found that the executive branch is using the "state secrecy" privilege 33 times more often than during the height of the Cold War.

The report is available at: <http://openthegovernment.org>

• **Sunshine Week Survey:** The poll, conducted for Sunshine Week and sponsored by the First Amendment Foundation and The American Society of Newspaper Editors, found nearly 7 in 10 Americans cited access to government information as 'crucial.' It also found that more than half of Americans believe government should provide more access to its records.

The report is available at: www.sunshineweek.org/files/2005sunshinepoll.pdf

-Anaklara Hering

ACCESS REPORTS

FEDERAL COURT CASES

Federal courts hear numerous media law cases

In 2005, numerous cases regarding freedom of information, access, and reporter's privilege went before the federal courts. The following summary includes some of the most significant cases.

The U.S. Supreme Court declined to hear several FOI cases. In January, the U.S. Supreme Court refused without comment to consider an appeal in which the plaintiffs wanted the Court to release grand jury transcripts in a case where they were wrongly prosecuted. The plaintiffs said the release of the transcripts would expose the misconduct of local authorities and federal prosecutors.

In March, the Supreme Court refused to hear a lawsuit regarding anti-abortion license plates. The Supreme Court declined to consider whether state license plates with anti-abortion messages were constitutional. The decision left lower courts in nearly a dozen states, including Florida, divided about whether the plates violate the First Amendment rights of pro-choice drivers.

In April, major media conglomer-

ates appealed a federal court ruling on ownership. The Tribune Company, along with Fox, CBS and NBC, appealed a federal appeals court ruling that limited their ability to acquire newspapers and broadcast outlets. The media companies' appeal claimed that the latest ruling abridged their First Amendment and due process rights.

In May, the U.S. Supreme Court declined to hear a case regarding reporter's privilege. The decision to not review *Donohue v. Hoey* extended the 33-year span since *Branzburg v. Hayes* in which the Court has not decided a case involving reporter's privilege.

In the same month, the Court declined to hear a Pennsylvania case involving the neutral-reportage privilege. The Supreme Court's decision let stand a ruling by the Pennsylvania Supreme Court that no such privilege exists in Pennsylvania. Several other states, including Florida, currently recognize the privilege.

In June, a single-justice opinion pleased members of the media. Although

Justice Anthony Kennedy denied the petition of a Florida broadcaster who sought a review of a prior restraint against publication, he included critical language in his opinion regarding the issuance of prior restraints.

Also in June, the D.C. Circuit refused an en banc hearing in a widely-publicized case that involved reporter's privilege. *New York Times* reporter Judith Miller and *Time* magazine reporter Matthew Cooper refused to reveal their confidential sources to a prosecutor investigating whether senior Bush administration officials illegally leaked a covert CIA operative's name.

Following the D.C. Court's decision, the pair of journalists petitioned the U.S. Supreme Court in an effort to have their contempt citations overturned. The Court refused to hear the cases, which left Miller and Cooper facing jail time. Miller eventually served almost three months in jail. After her release from jail, Miller testified to a federal grand jury. Cooper avoided jail time after he testified to the prosecutor because his source gave him permission to reveal his identity.

-Anaklara Hering

Florida access statutes receive additional exemptions during 2005 legislative session

TALLAHASSEE – During the 2005 session, Florida lawmakers passed 13 new exemptions to the state's open government laws. This number is close to the 14 exemptions passed in 2004.

Nine of the 13 exemptions were passed unanimously

by legislators in both the Florida Senate and the Florida House of Representatives. In fact, all of the exemptions were passed unanimously by Florida senators.

The two exemptions that faced the most resistance by Representatives were the Funeral, Cemetery and Consumer Services Board exemption and an exemption regarding hurricane data. The first exemption makes some meetings of the Funeral, Cemetery and Consumer Services Board exempt. It also exempts certain investigative records of the board until investigations are complete. The hurricane data exemption creates a public records exception for "reports of hurricane loss data and associated exposure data" specific to a particular insurance company, as reported to the state to develop a hurricane loss projection model. Thirty-nine representatives were opposed to the funeral board bill; 30 voted against the hurricane data exemption.

The Florida Consumer Finance Act, which provided a public records exemption for information pertaining to an active investigation by the Office of Financial Regulation of the Financial Services Commission, was vetoed by Gov. Jeb Bush.

The 11 other open government exceptions passed in 2005 were:

- An exemption for portions of records held by the Child Abuse Death Review Committee that contain information identifying a deceased child's surviving siblings, family members or others living in the home of the deceased. (HB 185)

- An expansion of the current exemption for confidential business information to include potential trade secrets, manufacturing methods and patentable material discovered during H. Lee Moffitt Cancer Center's research. (HB 449)

- A public records exemption for claim

files of the Florida Self-Insurer Guaranty Association, stipulating that the records became public at the end of all litigation and settlement claims arising out of the same incident. (HB 729)

- An exemption for information in court records identifying a minor seeking a waiver of parental notification for an abortion. (SB 798)

- A time-limited exemption for investigative records held by the Independent Education Commission. (HB 1091)

- An exemption for confidential information held by guardians ad litem in relation to the best interests of a child. Also exempts personal information

and photographs of current and former guardians ad litem. (SB 1098)

- A retroactive exemption for the Social Security number, driver's license number and Florida ID number of a voter registration applicant or voter. (HB 1591)

- A retroactive exemption for the records of children enrolled in the state's voluntary Pre-K program. (HB 1695)

- An exemption for parts of meetings of the Domestic Security Oversight Council. (HB 1801)

- An exemption for complaints and records relating to the complaint and preliminary investigation held by a municipal ethics commission. Records become public once complaint is disposed of. (SB 1922)

-Christina Locke

LEGISLATIVE SESSION REPORT

Executive Director recognized for dedication to teaching skill

Sandra Chance, Esq., executive director of the Brechner Center for Freedom of Information at the University of Florida, was named 2005 Journalism Teacher of the Year by the Scripps Howard Foundation.

The award recognizes outstanding contributions in the field of journalism education both in and out of the classroom.

Chance has taught both undergraduate and graduate media law courses at

the UF College of Journalism and Communications for 12 years. Additionally, she lectures nationally and internationally on open government and freedom of information issues to lawyers, judges and media professionals.

Chance was selected from more than 50 candidates nationally for the award. It was presented at the Scripps Howard Foundation's National Journalism Awards Program on April 15 in Washington, D.C.

Brechner Center offers Internet, video resources about access

New freedom of information resources have been added to the Brechner Center Web site, brechner.org.

Visitors to the page can access updated databases that include information on Sunshine Law prosecutions and the amounts of attorney's fees awarded in Sunshine Law cases.

The Brechner Center has also produced a DVD to help citizens understand how state and federal freedom of information

laws operate. It also provides an overview of the freedom of information resources that are available to members of the public who are seeking access to records and meetings. Visitors can also browse past issues of *The Brechner Report*.

In addition, a revised version of the Brechner Center's *Citizen's Guide to Florida's Government-in-the-Sunshine* laws will soon be available in both print and electronic versions.