
THE BRECHNER REPORT

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Federal shield bill adopts stronger protection

WASHINGTON, D.C. – A bipartisan group of senators introduced an amendment to a federal shield bill, known as the Free Flow of Information Act of 2013, being considered before U.S. Congress, according to *The Associated Press*.

In May, the Obama administration called on legislators to revive the legislation, which would provide greater protection for reporters and the confidentiality of their sources in the wake of criticism over the government's seizing of reporters' records, *The New York Times* reported.

The amendment to the legislation seeks to implement some of the recommendations for guideline revisions made by Attorney General Eric. H. Holder Jr.

Holder's suggestions include giving the media advance notice about subpoena requests for journalists' information unless the attorney general deems the notice "would pose a clear and substantial threat" to an investigation, according to *The AP*.

The White House directed Holder to review policies following news that DOJ officials collected the records of

as many as 20 journalists from *The AP*. Most of the journalists were connected to reporting about a CIA-thwarted terrorist plot in Yemen that the Obama administration had previously denied, according to *The Times*.

The federal shield law was first introduced and passed in the House in 2009, but died in the Senate following Wikileaks' release of government archives, *The Times* reported.

Sources: *The Associated Press, The New York Times, U.S. Department of Justice Report on Review of News Media Policies* (<http://www.justice.gov/ag/news-media.pdf>), *Foxnews.com, RCPF.org*

REPORTER'S PRIVILEGE

Groups sue over 'dragnet' policy

NEW YORK – The American Civil Liberties Union (ACLU) filed a federal lawsuit against the Obama administration over the constitutionality of a government "dragnet" phone-tracking program, according to *The New York Times*.

In the lawsuit, filed against the heads of national intelligence agencies, including the National Security Agency (NSA) and the Department of Justice, the ACLU has asked a judge to halt the illegal program and order the records purged, *The Associated Press* reported.

"The practice is akin to snatching every American's address book – with annotations detailing whom we speak to, when we talked, for how long, and from where," according to the complaint. "It gives the government a comprehensive record of our associations and public movements, revealing a wealth of detail about our familial, political, professional, religious, and intimate associations."

"It is also likely to have a chilling effect on whistleblowers and others who would otherwise contact the [ACLU] for legal assistance," the complaint alleged.

The ACLU's lawsuit has since been joined by several others, including a lawsuit filed by the Electronic Frontier Foundation on behalf of a coalition of several other organizations, and another filed by the Electronic Privacy Information Center (EPIC), which says it has filed an emergency petition with the U.S.

Supreme Court asking it to stop the domestic surveillance program, according to *The AP*.

EPIC said it was going directly to the nation's high court because it could not challenge the legality of the NSA program with the Foreign Intelligence Surveillance Court that approved it, and because lower federal courts did not have authority to review the secret court's orders., according to *The Times*.

The government declassified the existence of the program in June, after former NSA contractor Edward J. Snowden exposed its existence amid a larger disclosure of top-secret surveillance information, according to the newspaper.

Sources: *The Associated Press, The New York Times, American Civil Liberties Union v. Clapper, Fox News*

PRIVACY

City changes comment policy

DAVENPORT – The Davenport City Commission agreed to change the public comment format at regular meetings, according to *The Ledger (Lakeland)*.

The change allows the public to comment via comment cards on individual agenda items that are addressed by writing their names, address, the agenda item, and their comments regarding the agenda item, *The Ledger* reported.

The policy is unclear on whether residents can address the commission themselves, or if Mayor Darlene Bradley would read the comments aloud once she reviewed them, according to *The Ledger*.

The new policy would not prohibit residents five minutes at the beginning of each regular meeting to comment on things not on the agenda without having to fill out a comment card, according to *The Ledger*.

Source: *The Ledger (Lakeland)*

ACCESS MEETINGS

U.S. releases names of indefinitely detained prisoners

WASHINGTON, D.C. – The government released a list of several dozen Guantanamo Bay prisoners who are being held indefinitely because they have been designated too dangerous to release but cannot be prosecuted, according to *The Miami Herald*.

The U.S. Department of Defense was required to release the list in response to a federal Freedom of Information Act (FOIA) lawsuit filed by Carol Rosenberg, a reporter for *The Miami Herald*, against the government in March, according to the lawsuit.

In December 2012, Rosenberg filed an

expedited FOIA request with the Department of Defense, seeking a list of Guantanamo detainees. The detainees' status was listed on a 2012 government report as "continued detention" under the Authorized Use of Military Force Act, according to the lawsuit. The act was passed by Congress and signed by George W. Bush in 2001, *The Associated Press* reported.

Rosenberg sued the agency after it refused to grant the expedited request, failed to respond within the FOIA's extended 20-day statutory deadline, and failed to respond to an administrative appeal, according to

the court documents. Until release of the list, the Obama administration had declined to disclose which 46 of the original 240 detainees had been designated for indefinite detention, *CNN.com* reported.

The 15-page list was released hours after a presiding judge for the U.S. District Court for the District of Columbia set a deadline for the government to update the court on how the agency was processing the request, according to *The Herald*.

Sources: *The Miami Herald*, *The Associated Press*, *Carol Rosenberg v. U.S. Department of Defense*, *CNN.com*

Court classifies bin Laden photos

WASHINGTON, D.C. – A unanimous three-judge panel ruled that "quite graphic" and "gruesome" photographs and video taken as part of the U.S. military raid that killed Osama bin Laden, including photos of military personnel burying bin Laden at sea, will remain classified, according to *The Washington Post*.

Judicial Watch filed a federal Freedom of Information Act (FOIA) request, seeking the release of 52 photos of bin Laden after he was killed in the May 2011 raid on his compound in Pakistan, according to *The Post*.

The organization sued after the Central Intelligence Agency (CIA) said it intended to withhold the records because they were "Top Secret," according to the court's opinion.

The U.S. District Court of Appeals for the D.C. Circuit ruled that the CIA properly classified the images, and that the images are exempt from disclosure under FOIA's national security exemption, the opinion stated.

In its opinion, the court sided with the government, ruling that the release of the images taken of the al Qaeda leader after his death could cause "exceptionally grave harm," citing similar incidents inciting violence and riots against U.S. forces.

"It is undisputed that the government is withholding the images not to shield wrongdoing or avoid embarrassment, but rather to prevent the killing of Americans and violence against American interests," the court's order stated.

Source: *The Washington Post*, *Judicial Watch, Inc. v. U.S. Department of Defense and Central Intelligence Agency*, *judicialwatch.org*

4th Circuit says Risen must testify

WASHINGTON, D.C. – The 4th U.S. Circuit Court of Appeals in Virginia ruled that author and *The New York Times* reporter James Risen must testify in the criminal trial of the former Central Intelligence Agency (CIA) official charged with providing him with classified government information.

In a 2-1 opinion, Chief Judge William Byrd Traxler Jr.

wrote for the majority that "[t]here is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify... in criminal proceedings about criminal conduct that the reporter personally witnessed or participated in, absent a showing of bad faith, harassment, or other such non-legitimate motive, even though the reporter promised confidentiality to his source."

The 4th Circuit's decisions apply in Maryland and Virginia where most national security agencies such as the CIA are headquartered, according to *The New York Times*.

The case revolves around information Risen published in his 2006 book, "State of War: The Secret History of the CIA and the Bush Administration," describing a botched CIA plan against the Iranian government as reckless, *The Times* reported.

Former CIA officer Jeffrey Sterling was indicted on Espionage Act charges after being accused of serving as Risen's source, *The Times* reported.

The decision reversed a 2011 ruling that provided Risen a limited reporter's privilege, restricting what prosecutors

could ask Risen about his sources, according to *The Times*.

A coalition of more than a dozen media organizations, including *The New York Times*, filed a friend-of-the-court brief, arguing a qualified reporter's privilege allowing judges to protect reporters from testifying under

some circumstances – was crucial for the "dissemination of news and information to the public."

The majority based its decision on the U.S. Supreme Court's decision in *Brandenburg v. Hayes*, in which the Court rejected an effort by a reporter to avoid testifying before a grand jury. Risen's attorneys argued the ruling was ambiguous, *The Times* reported.

Nearly two dozen journalists have been jailed in the United States in the last three decades for refusing to testify or disclose sources or other types of reporting information, according to a list maintained by the Reporters Committee for Freedom of the Press.

Judge Roger Gregory wrote a dissenting opinion in which he said that, "[t]he paramount importance of a free press guaranteed by our constitution compels me to conclude that the First Amendment encompasses a qualified reporter's privilege...Risen must be protected from disclosing the identity of his confidential sources."

He called his colleagues opinion "sad" and a serious threat to investigative journalism, according to *The Times*.

Sources: *United States v. Sterling*, *The New York Times*, *The Washington Post*, *RCFP.org*, *USA Today*

REPORTER'S PRIVILEGE

County mulls blogs to foster transparency

GAINESVILLE – Alachua County Commissioner Robert Hutchinson has suggested the county create blogs for each commissioner as a new platform to post their views on complex issues and links to related data, as well as answers to common questions about commission procedures and county services, according to *The Gainesville Sun*.

OPEN GOVERNMENT

Hutchinson said the county already has a strong commitment to the Sunshine Law since it posts its emails, meeting agendas and related documents online for members of the public to view.

Commissioners would not be required to use the blog, but Hutchinson says that creating a blog is one more way the county and its officials can promote transparency when it comes to technology, *The Sun* reported.

Although commissioners questioned whether people would construe blogging as an attempt to circumvent Sunshine Law requirements, Assistant City Attorney David Schwartz said that potential sunshine law issues may arise if commissioners responded to one another online, according to *The Sun*.

Source: *The Gainesville Sun*

Judge: no problem in LPD probe

LAKELAND – A retired appellate judge found no problems with the Lakeland Police Department's (LPD) public records request procedures during his initial review, according to *The Ledger (Lakeland)*.

The LPD hired Monterey Campbell last May, a retired 2nd District Court of Appeal judge and lawyer with GrayRobinson in Lakeland, to examine its policies after *The Ledger* reported the LPD refused to provide records requested by the newspaper.

At the time, Lakeland Police Chief Lisa Womack said LPD sometimes plays a "cat-and-mouse" game with the media when it comes to turning over records, but assured a *Ledger* reporter the agency had turned over all records related to the newspaper's request, according to *The Ledger*.

Campbell told *The Ledger* he examined the policy itself, not any incidents or applications of the policy, and found proper procedures in place for handling records requests. So far, he has charged the city

\$8,148, according to *The Ledger*.

Some access experts have questioned the LPD's use of a form to record the names of people making public records requests. When the newspaper asked Campbell about the form, he said he planned to get a copy of it, *The Ledger* reported.

A grand jury investigating the LPD in the wake of the report of records problems filed no criminal charges against the department, according to *The Ledger*.

The media requested release of the report detailing the jury's findings, but lawyers representing some of the city employees who testified before the grand jury challenged its release, *The Ledger* reported. So far, Lakeland has spent \$150,000 keeping the report, which has yet to be made public, under seal. The jury's findings are usually temporarily sealed to allow for challenges.

Source: *The Ledger (Lakeland)*

ACLU sues DOC over records

SANTA ROSA COUNTY – The American Civil Liberties Union (ACLU) of Florida filed suit against the Florida Department of Corrections (DOC), alleging the DOC violated the state's Public Records Law by failing to hand over records.

The Florida ACLU filed a public records request in November and May for computerized information about housing assignments and cell or bunk assignments at the Santa Rosa Correctional Institution, according to NorthEscambia.com.

Following each of those requests,

DOC staff members failed to provide the responsive documents, stating they were working with "antiquated" technology, NorthEscambia.com reported.

The state department refused to provide the records because the information requested was not in any existing record.

The ACLU says inmate housing assignments, along with cell or bunk assignments, are public records regardless of how they are stored, according to NorthEscambia.com.

Source: *NorthEscambia.com*

Fox News fights Holmes subpoena

NEW YORK – Lawyers for Jana Winter, the Fox News reporter ordered to reveal her sources for a story published last year in the wake of the Aurora, Colo., theater shooting asked the New York Court of Appeals to quash a subpoena upheld by lower New York courts, according to *The Denver Post*.

Winter's lawyers argued the subpoena

should be overturned because it would violate the state's shield laws protecting journalists' sources, Fox News reported.

Her attorneys were joined by 43 news organizations that argued in a friend-of-the-court brief that that the lower court "erred in failing to adequately consider New York's strong public policy protecting journalists

and their confidential sources" when it granted the Colorado subpoena compelling Winter to testify regarding her confidential sources, according to the amicus brief.

Winter was subpoenaed to appear at a Colorado hearing, following a leak that James Holmes, accused of murdering 12

people and injuring 70 others in the

shooting, mailed a notebook to a psychiatrist before the attack containing violent drawings, according to Fox News.

Sources: *FoxNews.com, Brief Amici Curiae of the Reporters Committee for Freedom of the Press Plus 42 News Organizations in Support of Respondent-Appellant Jana Winter, The Denver Post*

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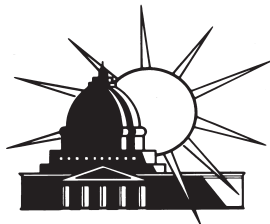
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NEWSGATHERING

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“News delayed is news denied:” prompt access to criminal affidavits

It’s an everyday occurrence in Florida – a person is arrested for committing a crime. The unfortunate part is that as a surrogate for the public, the media is frequently denied access to public records regarding the arrest.

While Florida has one of the broadest and most storied public records laws in the United States, when reporting on arrests and other criminal matters, the media often has its access frustrated by the assertion of the active criminal investigative information exemption found in Section 119.071 (2)(c)1 and defined in Section 119.011(3) of the Florida Statutes. Such assertions are sometimes justified, but not always.

A recent example of the assertion of the active criminal investigative information exemption revolved around the May 18,

The Back Page

By *Gregg Thomas*
and *Paul McAdoo*

2013, arrest of Tyren Malik Sanders by the Lakeland Police Department (LPD) for robbery with a firearm, carjacking and grand theft.

On May 20, 2013, The Ledger (Lakeland) reporter Matthew Pleasant requested the arrest affidavit for Sanders, which is sometimes also referred to as the arrest report. The initial written response the reporter received was that the report was not being released because the case was ongoing and there were hopes of other arrests related to the case.

Later on May 20, 2013, Pleasant received the arrest affidavit cover sheet, but was not given the accompanying narrative. The LPD officer who was handling his public records request claimed that the narrative was exempt under the active criminal investigative information exemption. Pleasant was then referred to LPD’s counsel for any further discussion on the issue.

Not to be denied, Pleasant responded that the “exemption doesn’t apply because this record is required to be given to the person arrested, rendering it public.” The exception to the active criminal investigative information definition Pleasant was referring to states that information is not criminal investigative information where the documents were “given or required by law or agency rule to be given to the person arrested.”



Gregg Thomas



Paul McAdoo

LPD’s counsel responded by saying that “[n]either, however, the law, nor our agency ‘rules’ require that we give any document to the arrestee we have not already provided to you.” Counsel for LPD further explained that the criminal rules of procedure on first appearances were vague and that while the documents may have been provided at Sanders’ first appearance before a judge, he had no knowledge of “when the arrestee in this case appeared.”

Fortunately, the criminal rules of procedure are perfectly clear. Florida Rule of Criminal Procedure 3.130(b) states that “[a]t the defendant’s first appearance the judge shall immediately inform the defendant of the charge, including an alleged violation of probation or community control and provide the defendant with a copy of the complaint.” The arrest affidavit is part of the complaint. Defendants almost always have their first appearance within 24 hours of their arrest. In Sanders’ case, he had his first appearance on the same day the records were requested, May 20, 2013.

LPD eventually released the narrative, but only after several emails from the reporter and additional calls from The Ledger’s attorneys. Moreover, the narrative was not provided until after The Ledger’s lawyers provided a web link to the Polk County Clerk of Court’s website that showed the first appearance had already occurred.

As the Florida Supreme Court has said, “News delayed is news denied.” While the arrest records might have been available from the clerk of court or even the state attorney’s office, access through those agencies likely would have taken more time than getting the document from the agency that created it, in this case LPD.

Reporters seeking records on people who have been arrested can use this simple work-around to get quicker access to criminal arrest affidavits if they encounter recalcitrant law enforcement agencies.

Gregg D. Thomas is a partner at Thomas & LoCicero PL in Tampa, and Paul R. McAdoo is a former associate of Thomas & LoCicero PL who recently relocated to Michigan.