
THE BRECHNER REPORT

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DMCA takedowns require fair use consideration

SAN FRANCISCO – A copyright owner must consider whether another person’s unauthorized use of the work constitutes fair use before sending a takedown notice, according to a ruling by a three-judge panel of the 9th Circuit Court of Appeals.

The case involved a 29-second YouTube video posted by Stephanie Lenz of her two young children dancing

to a song by the Artist known as Prince. Universal Music issued a takedown notice to YouTube, and Lenz sued Universal following an unsuccessful request to reinstate the video.

Judge Richard C. Tallman, writing for the court, stated that the

Digital Millennium Copyright Act requires copyright owners to form a “subjective good faith belief the allegedly infringing material does not constitute fair use.” If

copyright holders fail to comply with this ruling, they could be subject to liability for misrepresenting the content as infringing. However, the copyright owner’s “consideration of fair use need not be searching or intensive,” wrote Tallman.

The court also clarified that the Copyright Act of 1976 authorizes the fair use doctrine and it is a misnomer to label fair use solely as an “affirmative defense.”

Source: Lenz v. Universal Music Corp, No. 13-16106

COPYRIGHT

Florida sued over public records

TALLAHASSEE – AT&T and Embarq Florida have filed a lawsuit against Gov. Rick Scott’s administration, claiming the state has once again violated the state’s Public Records Law, according to the Tampa Bay Times.

The two telecommunications companies contend that the Department of Management

Services is refusing to provide emails and other documents about a \$360 million contract the state recently awarded for Internet, email and file sharing services, the paper reported. The state agency

instead delivered heavily redacted documents, claiming the materials contained trade secrets, according to the paper.

AT&T spokesman Marty Richter said the state agency was uncooperative with AT&T’s several attempts to obtain the public records, the paper reported.

Department of Management Services spokeswoman Natalee Singleton defended the agency’s decision to withhold the redacted information, according to the paper. “It is up for the court to decide what is and what isn’t proprietary information,” she said.

Source: Tampa Bay Times

**ACCESS
RECORDS**

Judge rules in Martin County

MARTIN COUNTY – A Martin County circuit judge denied multiple claims that the county had violated the Florida Public Records Law.

Plaintiffs Lake Point Phase I, LLC, and Lake Point Phase II, LLC, alleged that the county had willfully destroyed, altered, and delayed the production of public records, in violation of state law.

The plaintiffs also claimed the county destroyed the county commissioner’s notes from a public meeting and altered emails

between commission members.

Judge F. Shields McManus, writing for the court, said the commissioner’s meeting notes were personal and, therefore, not considered public records. McManus also found the county had made a reasonable effort to fulfill the public records requests for the emails by the time the plaintiffs filed the lawsuit.

Both parties’ claims for attorney’s fees were also denied.

Source: Lake Point Phase I, LLC v. South Florida Water Management District, No. 13-1321

**ACCESS
RECORDS**

Scott’s office alters report

TALLAHASSEE – Gov. Rick Scott’s office removed a statement from a press release, written by the Agency for Health Care Administration, which could have absolved Planned Parenthood from claims that it mishandled fetal remains, according to Politico Florida.

A public records request by

**OPEN
GOVERNMENT**

Politico Florida revealed emails between Scott’s office and the AHCA, which show that Scott’s office deleted information the AHCA had included in a proposed agency press release, according to the website. The omitted sentence stated that “there is no evidence of the mishandling of fetal remains at any of the 16 clinics we investigated across the state,” the website reported.

Scott asked the AHCA to inspect the Planned Parenthood clinics following recent protests over videos filmed at the clinics, according to the website.

Source: POLITICO Florida

Newspaper sues over access to prison records

MIAMI-DADE COUNTY – The Miami Herald is suing the Florida Department of Corrections, claiming the agency violated the Public Records Law.

For almost a year, The Herald has investigated suspicious deaths and alleged physical, mental and sexual abuse of inmates at the hands of state prison officers, according to the paper.

Prisons have allowed staff to conduct internal investigations of abuse in some cases, the paper reported. Inmates and DOC investigators say “the agency

systematically covers up corruption,” according to the paper.

The Herald’s requests for reports relating to the agency’s investigations of these cases have been answered with heavily redacted documents, the paper reported. The DOC’s responses do not cite specific exemptions that would allow the agency to withhold the information regarding inmate deaths, sexual harassment and abuse, according to the paper.

DOC Secretary Julie Jones, in a

statement said, “It is the responsibility of the department to safeguard information related to the health and safety of our inmates, and the security of our institutions, as mandated by law, throughout the public records process,” the paper reported.

In its lawsuit, the Herald is asking the court to order the release of information it believes to be public, including video footage from the prisons, according to the paper.

Source: The Miami Herald

Policemen demoted over records

HOLLYWOOD, Fla. – Two Hollywood Police Department officers have been demoted for violating Florida’s Public Records Law and police department policy, according to the South Florida Sun-Sentinel.

The former assistant chief, Ken Haberland, and former major, Norris Redding, have been demoted to lieutenant positions and were suspended for two weeks without pay, the paper reported.

The two were accused of destroying Internal Affairs reports in which they or some of their colleagues had been involved, according to the paper. The 14

missing documents were deleted when both officers were in charge of Internal Affairs, but the files have since been restored, the paper reported.

According to a letter from Police Chief Tomas Sanchez, the two officers argued that their actions were excused by a “lack of training,” the paper reported.

Haberland and Redding were cleared of any criminal charges after a lengthy investigation and avoided civil fines, according to the paper. The men are now appealing their demotions, the paper reported.

Source: South Florida Sun-Sentinel

Pensacola changes email policy

PENSACOLA – Pensacola City Administrator Eric Olson reversed an email policy he recently had implemented after learning the policy might violate Florida’s Public Records Law, according to the Pensacola News Journal.

Olson’s flawed email policy ordered city staff to respond to emails sent from government accounts by asking the sender to instead use their private email

addresses, the paper reported.

Olson reversed the policy after the State Attorney’s Office warned that the policy may violate state law by making it more difficult for a person to make a public records request, according to the paper.

Olson apologized and said it was not his intention to inhibit communication with the city, the paper reported.

Source: Pensacola News Journal

County triumphs in records case

TALLAHASSEE – The Florida Supreme Court declined to consider whether Union County should have to pay attorney fees in a public records case, according to The Gainesville Sun.

The lawsuit focused on an anonymous records request seeking county employee email addresses, according to the paper. Consumer Rights LLC filed the public records lawsuit five months after the request went unanswered, the paper reported. Even though the county

eventually provided the records, the county faced the possibility of having to pay attorney fees, according to the paper.

In light of the Supreme Court’s decision not to hear the case, the 1st District Court of Appeal’s ruling in favor of Union County stands. The appellate court ruled the county did not owe attorney fees because the county acted in good faith by not initially responding to the anonymous request, according to the paper.

Source: The Gainesville Sun

Hulk Hogan records to remain sealed

ST. PETERSBURG – A Florida judge denied a group of media outlets’ motion to make Hulk Hogan’s sex-tape trial records public, according to the Tampa Bay Times.

Terry Bollea, better known as former WWE wrestler Hulk Hogan, has filed a lawsuit against Gawker after the news website leaked a video of the former wrestler having sex with his friend’s then-wife, the paper reported. After the FBI investigated the matter, Gawker filed a public records request for documents related to the investigation, and the judge ordered them released, according to the paper.

COURT RECORDS

But the judge then sealed the records after they

were put into public record in the civil suit, the paper reported.

Charles Tobin, a lawyer representing the media companies, said, “It’s highly unusual for this much secrecy to surround a civil proceeding.” The Associated Press reported. “Ordinarily, whether it’s a celebrity or an average citizen, once you ask the court to help solve a dispute you open the proceedings up to public review. What’s going on in Hulk Hogan’s case certainly is not the norm when it comes to public transparency of the courts,” he said.

Source: Tampa Bay Times, The Associated Press

Sunshine Law trial indefinitely postponed

SARASOTA – The trial for a city commissioner charged with violating Florida’s Sunshine Law has been indefinitely postponed, according to the Sarasota Herald-Tribune.

The nonprofit Citizens for Sunshine filed a lawsuit against Sarasota City Commissioner Susan Chapman, claiming Chapman violated the Sunshine Law in a 2013 meeting with local business owners to discuss homelessness, the paper reported.

Chapman is arguing that the Sunshine Law is being applied too broadly and that her First Amendment rights to freely assemble and speak are being violated, according to the paper.

Chapman’s legal fees in the case have cost the city more than \$243,000, the paper reported. The city voted to stop funding her defense last year, but that decision was overturned in January, according to the paper.

The lawsuit accused Chapman and fellow City Commissioner Suzanne Atwell of violating the Sunshine Law, according to the paper. Atwell settled for more than \$17,000 in November 2013 without admitting any wrongdoing, the paper reported.

Source: Sarasota Herald-Tribune

Ex-mayor faces Sunshine trial

PORT ST. LUCIE – Former Port St. Lucie mayor, JoAnn Faiella, could be back in court after an appellate court reversed a dismissal of charges that she violated Florida’s Sunshine and Public Records Laws, according to the St. Lucie News Tribune.

Last year, a Martin County judge dismissed two charges against Faiella for privately speaking with another City Council member about official city business and for deleting text messages from her business cellphone, the paper reported. The judge dismissed the cases because they had expired under the speedy-trial rule of criminal procedure,

according to the paper.

A panel of circuit judges, serving as an appeals court, reversed the ruling on the grounds that Florida Rules of Criminal Procedure do not apply, the paper reported.

Faiella plans to appeal the decision, but if the appellate court upholds the ruling, the case could go to trial early next year, according to the paper.

Faiella and two others were originally charged in 2013 after a discovery of 85 pages of emails and text messages suggested city officials were conducting business in private, the paper reported.

Source: St. Lucie News Tribune

Florida bans prison newspaper

TALLAHASSEE – A judge in the U.S. District Court for the Northern District of Florida ruled that a ban on a prison newspaper inside correctional facilities did not violate the First Amendment.

Writing for the court, Judge Mark E. Walker held that Prison Legal News failed to prove that the Florida Department of Corrections’ censorship of the publication was not “reasonably related to legitimate penological interests.”

The FDOC banned the newspaper for advertising several prohibited services for prisoners, including three-way calling and pen pal services.

Despite the FDOC’s victory in the First Amendment claims, Walker voiced his

concern that Florida stands alone among the 50 states in censoring the newspaper for its advertising content.

Walker also found it troubling that the law allowing for such censorship could be invalid because it is not sufficiently clear.

However, he said he could not address the issue because no such claim was pending in the lawsuit.

“This is not the parties’ first rodeo,” Walker said. The FDOC began censoring the newspaper more than 12 years ago due to the nature of its advertising, and the parties have since been in several legal battles, he noted.

Source: Prison Legal News v. Jones, No. 4:12cv239-MW/CAS

FIRST AMENDMENT

THE BRECHNER REPORT

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Kerry hires FOIA ambassador

WASHINGTON – Secretary of State John Kerry appointed a new ambassador to improve transparency at the U.S. Department of State, according to Kerry’s press statement.

Kerry has asked the newly-appointed transparency coordinator, Janice Jacobs, to focus on improving the department’s systems for responding to Freedom of Information Act requests, according to the statement. The position was created because the systems and resources were struggling to keep up with the growing number of records request, Kerry said.

State Department spokesman John

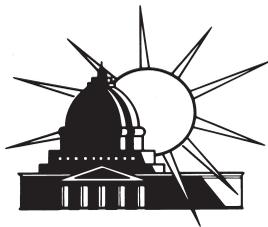
Kirby said that the motivation to create the position stemmed, in part, from the public attention over Hillary Clinton’s use of a private email account, according to Politico.

Kirby stated there were other factors that also led to the decision, including a three-fold increase of FOIA requests since 2008, in addition to rising congressional requests for records, Politico reported.

Source: U.S. Department of State Press Statement (released Sept. 8, 2015); POLITICO

FREEDOM OF INFORMATION

October 2015



UF UNIVERSITY of
FLORIDA

Understanding what we need to see – and do not

Murder. Real. Live.

The shooting of two TV journalists. Viewable from two perspectives, including that of the gunman himself.

We saw—or could see if we wished, and apparently millions of us did—the awfulness of it, immediately. And over and over again, on TV and online.

The news was that WDBJ7 reporter Alison Parker and photographer Adam Ward were dead, and interviewee Vicki Gardner wounded, during one of those all-too-familiar morning news “live shots.” Shot multiple times by a man identified by police as a former colleague of Parker and Ward, Vester Lee Flanagan II, who later fatally wounded himself as police closed in on his car.

And then there were the videos. First, from the Ward’s own camera, airing “live” in all its stupefying, banal-to-shocking 40 seconds or so as the interview turned into horror. Later, in truncated bits and pieces, as networks and online news operations made individual decisions.

CNN didn’t show it, and then showed it with ample warning to viewers, and later not at all. Other news operations stopped the videos

just before the shooting started, or showed still images taken from WDBJ7’s video.

And then, two videos posted on social media, apparently by the gunman himself, showing the murders as he must have viewed them—taken down quickly by Twitter and Facebook, but not before thousands viewed—and perhaps shared.

Once again, the questions arise: When does responsible journalism mutate into sensationalism and voyeurism? When does a free press need to show—and society needs to see—reality in all its awfulness? And when is it just “what we do because we can?” For online sites, when does “a right to do” lose its connection with “the right thing to do?”

While the drama played out on social media and on the web, it was a newspaper that provoked criticism the next day. The New York Daily News cover showing Parker being shot, from the killer’s perspective, which drew a description of “death porn” from one media critic.

A 1928 Daily News photo cover—taken without official permission—of a woman at the moment of her execution in a



Gene Policinski

Sing Sing Prison electric chair, remains a landmark item in the debate over what should or should not be shown. Magazine photos of racially motivated lynchings brought that terrible practice into subscribers’ homes. In the 1950s and 1960s, the then-new medium of TV turned the conscience of a nation by broadcasting the ugly images of racism.

In this newly interconnected global media hothouse, live images of violent death seem ever-more frequent; it was just one year ago that ISIS terrorists used social media to show video of the beheadings of journalists James Foley and Steve Sotloff. Not long after, it was a hostage being burned alive. On April 4, in North Charleston, S.C., a citizen video recorded the shooting by a police officer of a man fleeing in a park after being stopped for a traffic violation.

This on-camera tragedy should bring a new level of concern and discussion over what we can see, and whether we should see it—and how new technology may not only record and distribute, but even empower a killer to invite to watch as it happens.

USA Today reported that “at 11:14 a.m., Flanagan tweeted two short videos and posted a 56-second video to Facebook” that showed him approaching Parker, Ward and the person being interviewed. The gun, in his right hand, comes into view—unnoticed by the trio until the gunman fires. The Twitter text posts are updated six times in 20 minutes, according to The New York Times. The alleged gunman tweeted “I filmed the shooting see Facebook.”

To be sure, as history demonstrates, there are times we need to see—and remember for generations—what real terror and horrific events are like. Holocaust deniers can never overcome the truth carried by stark images now preserved for the ages.

Once again, the challenge for journalists reporting on our behalf—and now for those re-tweeting and repeating the killer’s cold-blooded social media posts—is to find the balance that lets us both see to understand and to understand what we need to see. And what we do not.

Gene Policinski is chief operating officer of the Newseum Institute and senior vice president of the Institute’s First Amendment Center in Washington, D.C. Follow him on Twitter: @genefac. A version of this column was originally published on www.newseuminstitute.org on Aug. 27, 2015.