

The BRECHNER Report

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Patriot Act broadens powers of intelligence agencies

WASHINGTON – A new law gives intelligence agencies broader surveillance powers, including a new authority to monitor Internet activities and greater access to credit, medical and student records.

The Uniting and Strengthening America by Providing the Appropriate Tools Required to Intercept and Obstruct Terrorism ACT (USA Patriot Act) was signed into law in late October. The new law authorizes the FBI to investigate anyone linked to terrorism or anyone who “harbors” or assists a suspect. (*Brechner Report*,

November 2001)

The law allows the FBI to request a warrant from a secret federal court to monitor the Internet, including

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collecting the e-mail of anyone else who uses the same public Internet

connection as a suspect. Internet Service Providers (ISPs) also may voluntarily give law enforcement access to their networks. Currently, ISPs cannot provide network access without customer permission or a warrant.

Under the law, federal agencies can collect credit, medical and student

records using a secret court warrant despite any state privacy law to the contrary. The FBI can share grand jury information with the CIA, something that was previously restricted.

Records of bank deposits of more than \$10,000 and records from any deposits that bank tellers think are “suspicious” will be turned over to intelligence agencies. Customers will not have to be informed if their records are turned over to the government. A sunset provision in the law authorizes some of the new powers only until Dec. 31, 2005. (10/25/01 – 10/27/01)

Bush blocks access to Reagan records

WASHINGTON – President Bush signed an executive order blocking the release of approximately 68,000 documents from the Reagan administration.

The records fall under the Presidential Records Act of 1978, which made presidential records, starting with Reagan’s, property of the government rather than the president. The act requires public release of the records after 12 years.

An executive order, signed by Reagan, requires the National Archive to inform the sitting president when a records disclosure is pending.

The Reagan papers’ release, scheduled for Jan. 1, 2001, was delayed three times by Bush, who asked for

extensions to review the materials.

President Bush’s order gives both the sitting president and the former president the right to withhold records.

ACCESS RECORDS

The House Subcommittee on Governmental Efficiency, Financial Management and Intergovernmental Relations held a hearing on the Bush

order in early November. Edward Whelan, an acting assistant attorney general, told the committee that Bush’s order only clarifies the wording of earlier presidential orders regarding the release of records. However, Scott Nelson of the Public Citizen Litigation Group said Bush’s order created new guidelines that are counter to some of the goals of the Presidential Records Act. (9/7/01 – 11/6/01)

Special sessions consider access limits

TALLAHASSEE – While no public records exemptions were enacted during the Florida Legislature’s Special Session “B” in October, the Senate passed new rules closing some meetings (*see story page 3*), and both the House and Senate approved several bills that would have limited public access.

None of the Sunshine Law bills were approved by both chambers. However, the Legislature is expected to consider public records bills again during the Legislature’s Special Session “C,” which was ongoing as this edition of the *Brechner Report* went to press.

The House and Senate considered several public access bills during Session “B,” including bills that sealed hospitals’ terrorism-response plans and the location of pharmaceutical stockpiles. Other bills would have exempted the security systems of public agencies and private businesses and would have sealed the numbers and billing records of law enforcement cell phones and pagers. One bill would have sealed for seven days public records considered critical to a terrorism investigation. (10/29/01 – 11/1/01)

Defense Department restricts access to photos

WASHINGTON – The U.S. Department of Defense blocked media access to high-resolution photographs of Afghanistan from space by signing an exclusive contract with a private company that sells high-resolution satellite images.

Space Imaging’s photographs can

show objects as small as one meter, and media outlets could purchase photos from Afghanistan for \$500 a piece.

The Defense Department signed an exclusive contract with the company, which prohibits them from selling or releasing Afghanistan photographs to anyone else. (10/19/01)

Ashcroft to support FOI denials

WASHINGTON – A memorandum from U.S. Attorney General John Ashcroft says the Department of Justice will support federal agencies' denials of Freedom of Information requests.

FOI denials that do not have a "sound legal basis" or those that might lead to a court decision that would impair the government's future efforts to deny records are the only denials the department will not support, according to the memorandum.

The memorandum supersedes a policy established in 1993 by then-

Attorney General Janet Reno that directed federal agencies with the discretion to release records to use a "foreseeable harm" test and to favor openness when considering requests.

Ashcroft wrote that the Department of Justice was "committed to full compliance with the Freedom of Information Act." He also wrote that the department was committed to other values such as national security, law enforcement effectiveness, the protection of business information and privacy. (10/18/01 – 10/24/01)

AGO: Exemptions exist for security material

TALLAHASSEE – State law provides exemptions from the Public Records Law for materials related to security and for materials that are part of an active investigation, according to an opinion issued by Attorney General Bob Butterworth.

Butterworth was responding to questions from Florida Sen. Rod Smith, D-Gainesville. Smith was concerned that the Public Records Law might need to be amended in light of the September 11 terrorist attacks and asked Butterworth about existing exemptions for security and investigative materials.

According to the opinion, state law

currently exempts from disclosing security plans and security needs assessments, including security information that a private entity provides to a government agency.

State law also exempts subpoenas issued by a criminal justice agency to a non-criminal justice agency when that subpoena is part of an active criminal or intelligence investigation, Butterworth wrote. Additionally, the Florida Department of Law Enforcement is not required to fill public records requests that would divulge the existence of an active investigation, according to the opinion. (10/24/01; AGO 2001-75)

Judge orders records released in murder case

TAMPA – A circuit court judge refused a defense attorney's request to seal public records in the case of a man accused of killing a TV news director.

Melvin Givens is charged with murder in the death of Danielle Cipriani, a former news director at WFLA – Channel 8.

Hillsborough Public Defender Julie Holt asked Judge Daniel Perry, 13th Judicial Circuit, to seal the records, saying that releasing the records would harm her client's chances for a fair trial.

Perry refused the request and ordered the records released. (10/6/01 – 10/9/01)

Employees ordered to withhold information

WASHINGTON – The U.S. Department of Defense ordered employees to withhold information, including unclassified information, about the department's operations from the public.

In a memorandum from Paul Wolfowitz, deputy secretary of defense, employees were encouraged to "exercise great caution" in discussing their Defense Department jobs, no matter what their duties. They were ordered not to conduct any work-related conversations in common areas, public places, during commutes or over unsecured channels.

Employees also were cautioned about discussing even unclassified material because it can "often be compiled to reveal sensitive conclusions," according to the memorandum. (10/24/01)

Mother sues to access son's FCAT booklet

LARGO – A mother has filed a lawsuit against the Florida Department of Education to access the test booklet and answer sheet from her son's Florida Comprehensive Assessment Test.

The Education Department denied Betty J. Shields' records request, saying the exam was confidential under Florida law. (*Brechner Report*, November 2001) Shields' son took the test last year but did not score high enough to meet the state's graduation standard. In her lawsuit, Shields is not arguing that the FCAT booklet and answer sheet are public records. She is arguing that the booklet and answer sheet are part of her son's student record. (11/7/01)

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.

Newspaper files suit to get defendants' records

TALLAHASSEE – The *Sarasota Herald-Tribune* filed a lawsuit against the Department of Children and Families to access records regarding the Mentally Retarded Defendant Program.

The newspaper is requesting records on the Mentally Retarded Defendant Program, which attempts to train defendants to communicate with their attorneys, assist in their own defense and understand the court proceedings. If the defendants are not found competent to stand trial within two years, the charges are dismissed, but a defendant

can be held longer on a judge's order.

The newspaper first filed a public records request on May 2. DCF officials have partially filled some requests and denied others. "What we are trying to do is to determine how a program that deals with some of the state's most vulnerable individuals is being administered," said Janet Weaver, the *Herald-Tribune's* executive editor.

The newspaper reported that internal memos indicate that the DCF's attorneys disagree about whether the requested material is public record. (10/9/01)

Newrulesallowsecretmeetings

TALLAHASSEE – The Florida Senate approved changes to its rules that allow committees to meet in secret to discuss security and terrorism issues.

A committee-approved plan would have kept some votes secret, but a last minute compromise makes public “records, research, information and remarks” after 30 days. Votes, bills and

amendments will also be open.

The Senate president, however, can keep the information sealed past 30 days.

“Hopefully, we never have to invoke it, but should it be a necessity I think we’d be glad to have that ability,” said Senate President John McKay, R-Bradenton. (10/26/01 – 10/27/01)

Pressdeniedaccessstofederalhearing

ORLANDO – A U.S. magistrate denied a newspaper request to allow public access to a federal court hearing regarding an unidentified man.

Judge David A. Baker, a federal magistrate, refused an *Orlando Sentinel* request to open the session, refused to release the name or details about the man, and refused to comment on the

nature of the hearing.

Prosecutors and public defenders also refused to release details or comment on whether the hearing was related to the September 11 terrorist attacks, saying only that it was a sensitive issue. During the 40-minute hearing, the entire courthouse floor was cleared of outsiders. (9/20/01)

U.S.SupremeCourtrefusestohearNationalGeographicappeal

WASHINGTON – The U.S. Supreme Court refused to review an 11th Circuit U.S. Court of Appeals decision in favor of a freelance photographer who sued *National Geographic*.

The appeals court ruled that the *National Geographic* magazine violated Jerry Greenberg’s copyrights when it published back issues of the magazine on CD-ROM. The republished issues contained freelance photos by

Greenberg. Greenberg argued that the magazine needed his permission to use the photographs in a new medium and should have paid him an additional fee for the work appearing on the CD-ROM. (*Brechner Report*, October 2001)

Magazine attorneys appealed, hoping that the Supreme Court would overturn the *National Geographic* decision in light of the Supreme Court’s recent

Codeboardmembers acquittedofcharges

MIAMI – Former state Rep. Eladio Armesto-Garcia and City Commission candidate Angel Gonzalez were acquitted of charges that they violated Florida’s Open Meetings Law while serving on the Miami Code Enforcement Board.

The two men were accused of talking about two codes enforcement cases outside a public meeting. (*Brechner Report*, July 2001)

Miami-Dade County Judge Henry Leyte-Vidal, 11th Judicial Circuit, listened to two days of testimony and reviewed tapes and transcripts. He concluded that prosecutors did not prove Armesto-Garcia and Gonzalez communicated in private. (10/2/01 – 10/4/01)

COPYRIGHT

decision in another copyright case, *New York Times v. Tasini*. While *Tasini* also was decided in favor of freelancers, attorneys for *National Geographic* were hoping that language in the *Tasini* decision defining copyright law as “medium neutral” would help them win an appeal based on an argument that the CD-ROM is more like a microfilmed copy of the magazine rather than a new work. However, the Supreme Court refused to hear the appeal. (10/10/01)

ACCESS RECORDS CONTINUED

Mediaoutletswantaccessstosealedmaterial

TAMPA – A newspaper and two television stations have asked a federal judge to unseal documents in the case against Steve and Marlene Aisenberg.

The Aisenbergs were charged in 1999 with lying about the 1997 disappearance of their daughter Sabrina, who remains missing. The charges were dropped, and federal prosecutors agreed to pay the

couple’s legal fees.

However, prosecutors still are filing documents under seal. *The Tampa Tribune* and two television stations are seeking access to the sealed files because of a “compelling public interest in the complete record of this aborted prosecution,” according to the motion filed with the court. (9/22/01)

JudgereviewingrecordsinTampamurdercase

TAMPA – A circuit court judge issued a temporary ban on the release of public records in the case of a woman accused in the killing of a police officer. Judge Cynthia Holloway, 13th Judicial Circuit, ruled that restricting public records in the case would ensure that Paula Gutierrez received a fair trial. Gutierrez is charged in the death of

Officer Lois Marrero. The *St. Petersburg Times* and *The Tampa Tribune* requested documents in the case. If defense attorneys object to the release of any of the documents, the judge will review the records in private and decide what to release to the public. Some records were released in early November. (9/11/01 – 11/7/01)

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Court has chance to clarify access to judicial records

Consider the following hypothetical: A male trial court judge sends a series of e-mails to female judges containing inappropriate and sexually suggestive remarks. The chief judge of the circuit learns of the conduct, conducts his own investigation, and obtains copies of the sexually suggestive e-mails. He goes even further, interviewing and receiving affidavits from other

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courthouse personnel who claim to have been subjected to sexual harassment by the trial judge. Are the documents that the chief judge has gathered in his role as chief administrative officer of the court open to public review under the Florida Constitution and the Rules of Judicial Administration?

That was the very real question facing the 2nd District Court of Appeal in *Media General Convergence, Inc. v. Chief Judge of the Thirteenth Judicial Circuit*, Case No. 2D0-1346. In a split decision, the Court reached the surprising – and disappointing – conclusion that the documents were not open to public scrutiny because they were not “judicial records” and, even if they were “judicial records,” they were confidential under personnel procedures employed by the State Courts System.

Despite this conclusion, the appeals court conceded that it found itself in “uncharted waters” and that it had “navigated a course based on assumptions.” In light of this uncertainty, the appeals court took the wise step of certifying to the Florida Supreme Court a question of great public importance concerning when such sensitive records are subject to public disclosure.

The uncertainty expressed by the majority in the *Media General* decision underscores the difficulties faced by parties seeking access to records from the judicial branch. As opposed to the legislative and executive branches, which are subject to the Public Records Law, the judicial branch and its records fall within the ambit of the Florida Rules of Judicial Administration. But those rules are not especially clear, do not contain detailed rules of procedure, and have not been well-developed by years of case law. The *Media General* case starkly illustrated these



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deficiencies. Indeed, one of the most remarkable features of the *Media General* decision is that it was built on an untenable foundation of “assumptions.” Despite the fact that the case was before the 2nd District Court of Appeal for more than a year, the petitioners – *The Tampa Tribune* and WFLA-TV/News Channel 8 – were not allowed to take the deposition of the chief judge whose records they sought. *The Tribune* and WFLA also requested that the court appoint a special master to review the records *in camera*. That request was never ruled upon, and the court announced its decision without ever even seeing the disputed records.

Of equally great concern, the 2nd District Court failed to hold oral argument and, as noted above, took more than a year to render its decision. This enormous delay violates the letter and the spirit of the Rules of Judicial Administration, which require that petitions for access to judicial records be reviewed on an **expedited** basis.

As this matter proceeds to the Florida Supreme Court, then, it presents a perfect forum in which the Supreme Court can and should spell out the procedures for seeking access to judicial records, particularly when the parties are litigating before the district courts of appeal, courts that are not well-equipped to oversee litigation of original proceedings. Specifically, the Court should seize this opportunity to establish that when a party brings an original proceeding in the district court of appeal, the records sought must be made available to the court of appeal for *in camera* review. In addition, a special master should be appointed and the parties should be authorized to conduct limited discovery. Finally, the Court should remind the lower courts that expedited review of access claims is not just an aspirational goal but a legal necessity. These procedures would go far to ensure that Florida’s courts conduct their business as they are constitutionally required to do – not in the dark, but in the bright sunshine.

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