
THE BRECHNER REPORT

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Judge sets deadline for release of task force records

WASHINGTON – Seven federal agencies involved with Vice President Dick Cheney’s energy policy task force have been given deadlines ranging from March 25 to May 15 to hand over all documents related to the meetings. U.S. District

Judge Paul L. Friedman dismissed the U.S. Department of Energy’s argument that the plaintiff be asked to refile its request, since the government did not

ACCESS RECORDS

have enough time to process the information before the lawsuit was filed. Judicial Watch, a legal watchdog group, made an FOI request for the records in April 2001.

In a related lawsuit, U.S. District Judge Gladys Kessler strongly rebuked the Department of Energy for failing to comply with a freedom of information request from the Natural Resources Defense Council, which also has been

seeking records from the energy policy task force since April 2001. Kessler said the department offered no “legal or practical excuse” for its lack of compliance. Apparently, the department cited the existence of 11 additional requests for similar information as a justification for its failure to respond to the NRDC request. The judge gave the Energy Department until March 25 to respond to the NRDC request. (3/3/02 - 3/7/02)

Computer records destroyed by virus

DUNEDIN – A computer virus destroyed more than 8,000 city e-mail messages considered public records under Florida law. The computer worm, named Goner, disrupted computers in Europe and across the United States. The city installed a new e-mail system 11 months before the attack, but it was not equipped with the anti-virus software that might have prevented the attack.

City Manager John Lawrence said that most of the city’s e-mails were not affected, since most members of the city government used a free, private e-mail service, Hotmail, that was in use before the city installed its own e-mail system.

State law requires agencies to back up computer records regularly, in order to protect them in case of technical problems or human error. Lynn Rawls of the Bureau of Archives and Records said that if records intentionally had been kept in a manner that did not meet state requirements, it would be a misdemeanor offense. However, she said it was not clear how a mechanical failure that destroyed records should be treated. (1/28/02)

Hybrid hospital must operate in sunshine

DELAND – A circuit court judge has decided that tax-supported Florida-Deland Hospital’s attempts to bar the public from its business meetings violate Florida’s Constitution. Circuit Judge Joseph Will found a 1998 law that exempted private corporations charged with running public hospitals from Florida’s sunshine laws unconstitutional, and also found the hospital’s efforts to close records between 1994 and the passage of the law in 1998 unconstitutional.

Memorial Health Systems directors lobbied heavily for the passage of the 1998 law, saying that it was unfair for them to have to operate in the sunshine in the competitive health-care environment. The hospital must now figure out how to retroactively comply with Florida’s open meetings and open records statutes.

The hospital is overseen by the public West Volusia Hospital Authority, but was managed by a private corporation, Memorial Health Systems, between 1994 and 2000. It is now managed by a different private corporation, Florida Hospital. About 20 other state hospitals operate under this hybrid system, so the ruling may have implications across

Florida.

Officials for the new manager, Florida Hospital, which is owned by the Adventist Church, note that it will be difficult to recreate some records, since another company managed the hospital for six of the years in question. “We’re at a disadvantage to produce those records and revisit the actions taken at those meetings,” said Becky Niemann, a spokesperson for Florida Hospital. The Florida Hospital takeover of

Florida-Deland is one of the events that took place out of the sunshine that will now be subject to public scrutiny.

Attorneys for the *Daytona Beach News-Journal*, which brought the suit against the hospital, said they were not interested in reversing any decisions made by the hospital boards during the six years in question, but were interested in understanding the process through which the decisions were made. However, Pat Gleason, an attorney with the Florida Attorney General’s office said that when a court finds the law has been violated, the board’s actions might be declared void. Officials from the hospital have said they will not appeal the ruling. (1/18/01-1/23/02)

ACCESS MEETINGS

October Ascroft memo supports FOI denials

WASHINGTON— In the wake of the Sept. 11 attacks, Attorney General John Ashcroft told federal agencies that they could expect strong support when denying FOI requests. This has prompted Sen. Patrick Leahy (D-Vt.) to ask the General Accounting Office to investigate how FOI requests are being handled by agencies since of the Sept. 11 terrorist attacks. Leahy says that Ashcroft's memo suggests federal

employees comply with FOI requests only after "full and deliberate consideration of the institutional, commercial and personal privacy interests" have been evaluated.

For its part, the House Government Reform committee, underscoring its commitment to FOI, has reissued its publication, *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request*

Government Records, to affirm: "The history of the act reflects that it is a disclosure law. It presumes that requested records will be disclosed, and the agency must make its case for withholding in terms of the act's exemptions to the rule of disclosure." Rep. Henry Waxman (D-Calif.) submitted the changes; they were approved by Rep. Dan Burton (R-Ind.). (3/7/02)

Computer records come with \$12 million price tag

MIAMI— Miami-Dade County wants \$12.1 million to comply with a *The Miami Herald* request for e-mail records. Reporter Joe Mozingo requested the e-mail records of all county employees who had sent messages to sshiver@shiver.com, County Manager Steve Shiver's personal address. County communication director Juan Mendieta said that sorting through

the e-mails would take about 186,420 hours – or approximately 90 years, based on one employee working 52, 40-hour weeks per year. The IT department charges \$65 per hour to work on FOI requests, which comes to \$12,117,300.

Given the degree of automation in e-mail systems, not everyone believes Mendieta's estimate is correct. Sam Terilli, former general counsel for *The*

Herald and now an attorney with Ford & Harrison, believes the government is stonewalling. "The county can quickly determine if any employees or elected officials are sending e-mails to a personal e-mail account...If the county's IT department needs help on the matter, I'll send them my 17-year-old son, who could do it for a lot less." (1/25/02)

COURTS

Georgia judge narrows gag order in crematorium case

WALKER COUNTY, GA. – A Georgia judge has limited the original gag order issued in the case of the Walker County crematorium that allegedly failed to properly dispose of more than 300 bodies.

The original gag order prohibited almost every person involved with the case from speaking about it, including witnesses. However, the modified gag order only prohibits the defense, prosecution, court staff, sheriff's department, Georgia Bureau of

Investigation and the county coroner from discussing the case.

A number of groups have opposed the gag orders. Georgia State Rep. Brian Joyce, who represents the affected area of Lookout Mountain, wrote a letter opposing the gag order. "It would be detrimental to the community to foster an atmosphere of rumor and gossip, which surely a gag order will do," noted Joyce.

Superior Court Judge William Ralph Hill modified the order to ensure that

family members received adequate information about the deceased, and that the public was advised about health, environment and safety risks. The judge defended retaining significant restrictions on speech in the case, however, in order to guarantee the defendant, Ray Brent Marsh, a fair trial.

Ken Poston, an attorney for Marsh, suggested excessive media interest in the case was contributing to a "carnival atmosphere" that was "poisoning the pool of jurors" for the case. (2/11/02)

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.

No gag in Florida cemetery case

FORT LAUDERDALE— A state appeals court chose not to review Broward County Circuit Judge Leonard Fleet's order to open depositions in a cemetery mismanagement case.

Attorneys for Menorah Gardens & Funeral Chapels and its parent company, Service Corp. International, the world's largest cemetery company, argued that releasing the evidence might subject survivors to "emotional harm." They were also concerned that the release of information might influence potential

jurors. However, the judge found that the public had a significant interest in the case, and that information regarding the investigation should be released.

Former cemetery workers have accused Menorah Gardens of improper burials, including the desecration and mismarking of graves.

In the wake of the allegations against SCI, state lawmakers and members of Congress are calling for increased oversight of the cemetery system. (2/9/02-3/15/02)

Dear Reader,

Protecting access to public records and meetings has never been more important. It's also never been more difficult as the Florida Legislature is considering a record number of exemptions which will drastically impact on our ability to hold our public officials accountable.

To help inform the public about the importance of public access laws, the Brechner Center for Freedom of Information and the College of Journalism and Communications at the University of Florida worked with advertising and public relations students this past semester to create a public service campaign: Keep Florida in the Sunshine. Our goal is to help focus public interest and concern on protecting the public's right to government information. The Florida Society of Newspaper Editors, the Florida Press Association, and the First Amendment Foundation have all endorsed this effort.

The first part of the campaign is a series of five public service ads. These ads are free and available in pdf format at the Brechner Center web page <http://brechner.org>. We're asking the state's media to help in the campaign. A number of publishers and editors from around the state have started running these ads in their newspapers. Many newspapers will continue to run the ads throughout the legislative session.

We're at a critical juncture in defending our right to access governmental information. As Thomas Jefferson said: "A nation that expects to be ignorant and free expects what cannot and should not be." Join us in protecting our freedoms by helping Keep Florida in the Sunshine.

Sincerely,

Sandra F. Chance

Sandra F. Chance, Esq.
Director, Brechner Center for Freedom of Information
Associate Professor of Journalism

PUBLIC SERVICE ADVERTISEMENTS

**Public access laws won't give out your credit information...
but they will tell you who stole your credit card.**



Access to public information is a basic right in Florida. We have a long and rich tradition of open government. Our Constitution and state "Sunshine Laws" guarantee us the right to attend public meetings and see public records so we can make the best decisions for ourselves, our families, and our communities.

However, each year the Florida Legislature passes new exemptions to these laws, sealing more records. Some exemptions are necessary. Many are not.

Public access laws are based on the democratic principle that the more we know, the better decisions we can make. So, the next time you hear about a new exemption, ask if it will help you make a more informed decision.



**Public access laws could have prevented his mistreatment...
but nursing home abuse records are now sealed.**



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**Public access laws won't tell you her date's GPA...
but they will tell you he was convicted of rape.**



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**These soldiers fight to protect your basic rights...
They even defend the ones you don't know about.**



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**Public access laws won't tell you why this woman needed surgery...
but they will tell you the name of the surgeon at fault.**



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For more information, or to download these public service announcements, visit <http://brechner.org>.

FIRST AMENDMENT

Abortion rights group sues over license tag fees

MIAMI— Saying it violates the First Amendment guarantee of separation of church and state, pro-choice groups are suing to stop the distribution of fees from Florida license plates that bear the “Choose Life” slogan. State law requires that funds raised through the sale of the tags go to non-governmental, non-profit agencies that help pregnant women and are committed to adoption on a county-

by-county basis.

The pro-choice groups are asking distribution of the funds be stopped, because only anti-abortion groups are eligible to receive the money. Attorneys for the state have argued that the groups have no right to sue, since no pro-choice, adoption counseling service has been denied access to the funds.

Florida has distributed more than

\$500,000 from the distribution of the “Choose Life” tags. Catholic Charities, which runs a number of adoption services across the state, has received money from a number of counties. Brigitte Amiri, an attorney for the New York-based Center for Reproductive Law and Policy, says the distribution “demonstrates that the counties prefer one religion over all others.” (2/2/02)

NEWS NOTES

“Sunshine Under Attack” Conference

More than 200 journalists, freedom of information advocates and media lawyers are expected to attend the “Sunshine Under Attack” conference, May 3-4, in Orlando, Fla. The conference will focus on access to information after Sept. 11 in Florida, across the country and around the world. Workshops on libel, privacy and secret trials will also be held. The conference is cohosted by the Florida Bar Media & Communications Law Committee, the National Freedom of Information Coalition, the Brechner Center for Freedom of Information and the Florida First Amendment Foundation. For conference information, visit <http://www.nfoic.org>.

2001 Joseph L. Brechner Center for Freedom of Information Award. A five-month series of articles and editorials chronicling the battle between a juvenile court judge, and the *Arkansas Democrat Gazette* was the recipient of a \$3,000 cash award from the Brechner Center. The newspaper was held in contempt for violating a gag order, but the Arkansas Supreme Court ruled in favor of the newspaper, calling the gag order a “gross abuse of discretion.” For more information on the campaign, visit the Brechner Center Web site at <http://Brechner.org>.

2002 Government-in-the-Sunshine Manual available. The 2002 Government-in-the-Sunshine Manual is now available. The manual is produced every year by the Florida Attorney General’s office to help citizens understand the state’s open meetings and open records statutes. To order, call 850-222-3518 or 800-337-3518.

California “Son-of-Sam” statute struck down

SACRAMENTO, CA.— The California Supreme Court struck down a law that prevented convicted criminals from profiting from their crimes by participating in the creation of books, movies or other expressive materials detailing their crimes. Barry Keenan, who was convicted of kidnapping Frank Sinatra Jr., challenged the law charging that it violated his First Amendment rights. Columbia Pictures bought the rights to a *Los Angeles Times* story that detailed the kidnapping, and Keenan

would have received some money from the deal, but Sinatra sued.

The California statute was modeled after New York’s “Son-of-Sam” law, which was passed in order to keep David Berkowitz from profiting from the story of his serial killing spree. The U.S. Supreme Court struck down that law in 1991, calling it overly broad. In a unanimous decision, the state Supreme Court said its law was also overly broad, since it sought to “confiscate all income from a wide range of protected expressive works...because those works include...accounts of the prior felonies.”

The Court suggested that the law as written might have been applied to works such as *The Autobiography of Malcolm X* or John Dean’s *Blind Ambition*, both of which described past crimes in some detail. (2/22/02; 3/11/02)

Web site offers copyright advice

SAN FRANCISCO – In order to help Web site operators understand their First Amendment rights in cyberspace, the Electronic Frontier Foundation, along with the Harvard, Stanford, Berkley and University of San Francisco law schools, has created the Chilling Effects Clearinghouse, available at www.chillingeffects.org. According to the group’s homepage, “Anecdotal evidence suggests that some individuals and corporations are using intellectual property and other laws to silence online users.” The organization hopes that providing information to online Web site operators will empower them to fight such actions.

The Chilling Effects Clearinghouse gathers “cease and desist” notices from corporations that are attempting to assert copyrights and intellectual property rights online. Clinical law students will then examine the notices, and help determine whether or not the online activities constitute fair use. Later, the group will analyze the notices received, and issue a report about which kinds of online activities are most likely to draw corporate action. (2/25/02)

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Florida FOI survey finds knowledge of rights low

At one time, we could say Florida led the nation in securing the people's freedom of information. But state legislators appear increasingly contemptuous of these rights, packing exemption after exemption onto the Sunshine Laws. Last year, FOI advocates went from concerned to alarmed when the Legislature exempted

The Back Page

By Linda Perry

advocates, Terry Hynes, dean of the College of Journalism and Communications, and Sandra Chance, director of the Brechner Center for Freedom of Information, agreed on the need for a public information campaign in support of freedom of information. The first step was to determine residents' baseline of knowledge and support.

In a statewide public opinion poll, we found the baseline of knowledge alarmingly low. While half of the knowledge questions were about recent and pending exemptions, half were about how the law basically works. A majority knew records are presumptively open unless specifically exempted by statute. But less than half knew requesters do not have to state a purpose for seeing a record, and less than a third knew requesters do not have to show identification, be a Florida resident or put a request in writing.

Support for freedom of information was mixed, but registered voters were more likely to be supportive than non-voters. The strongest support was for access to information cut off by the Legislature last year. Respondents were nearly unanimous (98 percent) that they should be able to inspect records revealing nursing homes' quality of patient care. And while that indicates the Legislature was out of sync with public opinion when it closed those records, *less than half* the respondents knew the Legislature had done so.

Mixed support was most apparent in questions about access to medical examiners' records. Nearly 70 percent agreed that if someone they knew died, they should be able to see the autopsy photos that might explain what happened. But when that right of access runs counter to the right of privacy, nearly 65% would

nursing homes' incident reports and when the war on terrorism intensified attacks on our right to know. Two of those



Linda Perry

tip the scales in favor of privacy. Related is the finding that 86 percent believe the right of privacy is essential to democracy.

Opinion was divided on the need to restrict access to public meetings because of the threat of terrorism. About 40 percent disagreed it is necessary to curtail access to meetings in Florida to curb terrorism; 38 percent agreed. Public opinion was still fluid, with more than a fifth unsure where they stood on this issue.

Support was not as strong for rights of access to public records as for public meetings. Nearly 56% agreed it is necessary to curtail access "to some Florida public records because of the threat of terrorism." But public opinion is fluid on this issue as well, with more than a fifth unsure about it.

Respondents were concerned about new anti-terrorism laws in Florida, but again public opinion was fluid. Nearly a third were more concerned that the state would not "pass good anti-terrorism laws because of freedom of information and First Amendment concerns," while a third were more concerned anti-terrorism laws would restrict these freedoms too much.

Although 78 percent believe freedom of the press is essential to democracy, it ranked fifth among the six rights queried, ahead only of the right to bear arms (60.7 percent). While 83 percent of white respondents found a free press essential to democracy, only 52 percent of black respondents did. It's not that black respondents necessarily disagree that a free press is essential, it's that 38 percent just aren't sure.

Support for a free press and freedom of information starts with knowledge. The press can help educate readers, viewers and listeners about these rights as well as the issues and legislative actions that threaten them. But we must reach out to *future* voters as well with lessons on the essential role of a free press and freedom of information to democracy.

Linda Perry is an assistant professor in the College of Journalism and Communications at the University of Florida. Perry and Professor Mary Ann Ferguson directed the FOI survey, which was funded by the College of Journalism and Communications at the University of Florida, with assistance from the Brechner Center. The full report is at <http://www.jou.ufl.edu/faculty/lperry/foi.html>.