THE
BRECHNER REPORT

Volume 26, Number 11 ■ *A monthly report of mass media law in Florida*
Published by The Brechner Center for Freedom of Information ■ *College of Journalism and Communications* ■ *University of Florida*

November 2002

Agency allowed to release names

TALLAHASSEE – A Leon County judge issued an order that allowed the state Department of Children and Families to release information about children missing from DCF custody.

Gov. Jeb Bush and DCF officials petitioned the court to allow them to release what are usually confidential records, saying they hoped the release would help a statewide taskforce in tracking down children missing from state custody.

Judge Nikki Ann Clark agreed to let the agency release the names, dates of birth, dates of disappearance, and dates last seen for missing children, as well as agency records that document DCF's efforts to find the children.

ACCESS RECORDS

Clark authorized the information release for 393 children missing as of September 13. The DCF will have to return to court to petition for the release of any additional names, the judge ruled.

The judge also barred the DCF from releasing other information from the children's files, including names of parents or guardians. During a hearing, she pressed the DCF about how it planned to protect the privacy of children in its care.

"In no event shall a missing child's entire abuse or neglect report be disclosed to the public," according to the order.

The Florida Department of Law Enforcement said it had found 139 of the 393 missing children.

Since the ruling in mid-September, the DCF has posted the names and dates of birth for approximately 50 children. (8/19/02 – 10/12/02)

Judge keeps Bush hearings open

ORLANDO – An Orange County circuit judge denied a motion to close public access to Noelle Bush's drug court proceedings, saying the public's right to access outweighed a defendant's right to privacy.

Attorneys for Noelle Bush, daughter of Gov. Jeb Bush, had asked the court to close all proceedings involving her drug case because of extensive publicity and media attention.

ACCESS COURTS

They argued that Noelle Bush had an expectation of privacy when discussing her drug treatment and that drug courts were not like criminal courts because they focus on rehabilitation of the drug offender rather than punishment.

Judge Reginald Whitehead, 9th Judicial Circuit, ruled against the Bush motion, saying that drug court hearings "were first and foremost a criminal court proceeding."

Access to the drug courts provides the public an opportunity to oversee the effectiveness of the program, according to the ruling.

"Open access is necessary in order to demonstrate that the program is worthy of public support," Whitehead wrote. "It is vital that the community realize that drug court works so that its graduates can become productive members of society, that jobs will be available to them and that other community support will be forthcoming."

In a later hearing, Whitehead sentenced Noelle Bush to 10 days in jail for violating the terms of her drug treatment program.

In another hearing related to the case, Judge Belvin Perry Jr., 9th Judicial Circuit, released the transcript from a closed hearing regarding an allegation that drug center employees found crack cocaine hidden in Bush's shoe.

During the hearing, Perry ruled that the center employees could not be made to cooperate with police, saying the confidentiality rights of drug patients were more important than law enforcement officials' right to investigate the patients.

Although he closed the hearing, Perry released transcripts of the hearing with Noelle Bush's name redacted. (10/3/02 – 10/18/02)

Commissioner pleads no contest

PENSACOLA – Suspended Escambia County Commissioner W. D. Childers entered a "no contest" plea to one count of violating the state's Open Meetings Law.

Childers, who was convicted this summer on one count of violating the Government-in-the-Sunshine Law and acquitted of two others, faced a retrial on a fourth count after a jury deadlocked on the charge.

Okaloosa County Judge T. Patterson Maney refused to overturn Childers' conviction on the first count. (*Brechner Report*, October 2002) He also refused to move the retrial on the fourth count to another county, saying that Childers' first Sunshine trial proved he could get a fair hearing in Escambia County.

Childers pleaded "no contest" on the fourth count, avoiding a retrial. Open Meetings convictions carry at maximum penalty of $500 and 60 days in jail. Childers has not been sentenced for the Sunshine violations. Gov. Jeb Bush suspended Childers and two of his fellow commissioners for Open Meetings violations. (9/15/02 – 10/9/02)

Judicial Watch files suit to see primary ballots

MIAMI – Judicial Watch, a conservative political watchdog group, has filed a lawsuit requesting all the records related to ballots and voting problems in Broward and Miami-Dade counties during the September primary.

Judicial Watch, the NAACP, the ACLU and other groups, filed public records requests with elections supervisors after the primary, and Judicial Watch asked for a response within a week. When Judicial Watch hadn't heard from officials within a week, they filed the lawsuits.

Judicial Watch said they wanted to determine the nature and extent of voting problems in the two counties. The group also wants all communications from Miami-Dade Mayor Alex Penelas about the election.

Judicial Watch is considering a civil rights lawsuit against the counties and/or the state.

"We now have a pattern of violations of the civil rights of Florida's citizens," Larry Klayman, chairman of Judicial Watch, told the *South Florida Sun-Sentinel*. "We want the courts involved so this won't happen again in the November election."

The other groups who filed public records requests did not join the lawsuit. (9/14/02 – 9/18/02)

AGO: Expunged records must be destroyed

TALLAHASSEE – If a judge orders a person's records expunged, the police department must physically destroy the records, according to an Advisory Legal Opinion from Attorney General Bob Butterworth.

Chief Jim Farley asked Butterworth to describe what information collected by a police department may be expunged and whether a law enforcement agency can keep expunged records in a sealed file. In August, the Crystal River Police Department released arrest paperwork on school board candidate Don Bates to the *St. Petersburg Times*.

A judge had ordered Bates' records expunged. However, the police department still had a copy of the arrest record and released it to the newspaper. Farley said the police department has kept a copy of expunged records in a sealed cabinet, and asked Butterworth if expunged records could be kept in such a sealed file.

Law enforcement agencies must physically destroy all criminal history information once an order to expunge records has been issued, according to the opinion. Criminal history material includes "identifying descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges and the disposition of those charges."

Criminal intelligence information and criminal investigative information do not have to be expunged, Butterworth wrote. (AGO 2002-68; 10/3/02)

Panel allows immigration hearings to be closed

COURTS

PHILADELPHIA – The 3rd U.S. Circuit Court of Appeals overruled a trial court and said that the Department of Justice can close automatically immigration proceedings in "special interest" cases where the defendant is suspected of links to terrorism. The 3rd Circuit ruling conflicted with a recent 6th Circuit decision, which said that the immigration hearings should not be automatically closed. (*Brechner Report*, October 2002)

Citing security threats, the three-judge panel voted 2-1 to overturn a ruling by a district court judge that required the government to prove a need for closure on a case-by-case basis. The Justice Department argued that these "special interest" cases should be automatically closed because they represented a threat to national security.

"We are keenly aware of the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis," according to the panel's opinion. "On balance, however, we are unable to conclude that openness plays a positive role in special-interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension."

Judge Anthony J. Scirica dissented, saying that claims of threat to national security should be considered on a case-by-case basis.

In an earlier case, the 6th Circuit found that the Justice Department policy of closing "special interest" proceedings without first holding a hearing to determine if closure was necessary was unconstitutional. (10/9/02)

AGO: Don't permanently remove numbers

TALLAHASSEE – A new law requiring court clerks to redact social security numbers and certain financial records on request does not mean court clerks should permanently remove the numbers from original court records, according to Attorney General Bob Butterworth.

Rep. Frederick C. Brummer asked for an Advisory Legal Opinion on whether the new law meant clerks should make permanent changes to judicial records.

The law requires that clerks redact social security numbers, bank account and debit, charge or credit card numbers from public records if the holder of those numbers makes a written request.

But those records are not meant to be permanently removed from the court file, Butterworth wrote. "The courts of this state and this office have used the term 'redact' to refer to the deletion of confidential or exempt material from public records," he wrote. "In reviewing such opinions, however, there is no evidence that permanent destruction of the original record was contemplated." (AGO 2002-69)

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.

ACCESS MEETINGS CONTINUED

Panel: Meetings should have been open

ATLANTA – The 11th U.S. Circuit Court of Appeals ruled that Miccosukee Indian Tribe was illegally banned from advisory meetings on Everglades restoration.

The three-judge appeals panel reversed a lower court decision and said that the Southern Everglades Restoration Alliance, which advises the government on the restoration, should provide notice of meetings and hold them in public under the Federal Advisory Committee Act (FACA).

The alliance, which disbanded shortly after the lawsuit was filed, included members from the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the National Park Service, state agency representatives and consultants.

The tribe continued with its lawsuit, saying the federal agencies were still following the committee's advice.

The appeals panel said the alliance fell under the FACA's requirements and that FACA required the meetings to be open. It sent the case back to federal district court in Miami to determine if and how the Miccosukee were injured, and it ordered the lower court to deliver a new ruling based on the appellate court's findings that the FACA was not followed. (9/18/02)

Judge closes hearing, issues gag order

BARTOW – A circuit judge imposed a gag order on participants in a parental rights case and closed hearings about the case to the public.

The state Department of Children and Families is seeking to terminate the parental rights of Jeanna Swallows. Swallows left her 2-year-old son, Alfredo Montes, in the care of baby sitters who are accused of killing the boy and dumping his body along Interstate 275. The state wants to sever Swallows parental rights to her 4-year-old daughter, Rheyna.

The Guardian Ad Litem Program asked that all proceedings involving Reyna be closed to the public. Cookie Rousos, director of the guardian program for the 10th Judicial Circuit, said that closing the hearings would prevent Rheyna from suffering "further exploitation." *The Ledger* of Lakeland opposed the closure request, but Judge Donald Jacobsen closed the hearing based on a state statute that says parental rights termination cases are confidential.

However, Jacobsen refused to impose sanctions on DCF for releasing Alfredo's family history. The records contained information about Rheyna, Swallows and other family members. Family attorneys asked for sanctions against the DCF and wanted Jacobsen to order the media to return the records. Florida law allows the DCF to release abuse reports in cases where children die as a result of abuse. Jacobsen said the law does not specify whether the DCF must remove information dealing with other people not involved in the abuse. (7/26/02 – 8/2/02)

ACCESS RECORDS CONTINUED

Opinion: Petition cards should be open

TALLAHASSEE – Petition cards submitted by political candidates during qualifying are public records and available for inspection even when they are used by voters as change of address notifications, according to an opinion from Attorney Bob Butterworth.

Butterworth issued two Advisory Legal Opinions in response to questions from the supervisor of elections in Duval County and the Longwood city attorney.

John Stafford, Duval's supervisor of elections, asked if the petition cards were open to inspection once they were verified by the elections office. Generally, voter registration materials are exempt from inspection. However, Butterworth said the petition cards were not a substitute for registration records so were not exempt from public inspection.

Richard S. Taylor Jr., a city attorney for Longwood, asked if petition cards become exempt when voters use them to change their addresses. Petition cards do not become registration records when they are used to make address changes because checking the address-change box does not change the primary purpose of the petition card, Butterworth wrote. (AGO 2002-63; AGO 2002-67)

PRIVACY

Mothers challenge adoption ad law

TALLAHASSEE – Six mothers filed a lawsuit challenging a state law that requires them to publish newspaper ads that detail portions of their sexual history before they can give a baby up for adoption. The women say the law violates their privacy rights.

The ad is required in cases where the mother wants to place her child up for adoption but cannot find the father or doesn't know the father.

The ads must run four consecutive weeks in the county where conception is believed to have taken place. The mother must list her name, height, weight, hair color and other features as well as those of the child.

The mother must name any men she believes could be the father or describe their appearances. Two of the six women who filed a lawsuit in Palm Beach County were victims of rape. Another was a 12-year-old girl who had sex with multiple classmates. A fourth was a mother with a history of drug abuse who will have to name all the drug abusers with whom she had sex.

In July, a Palm Beach County judge struck down the notification requirement in cases of forced sexual battery. (8/15/02 – 8/19/02)

THE BRECHNER REPORT

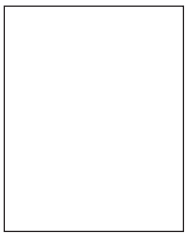
Brechner Center for Freedom of Information
3208 Weimer Hall, P.O. Box 118400
College of Journalism and Communications
University of Florida, Gainesville, FL 32611-8400
http://www.jou.ufl.edu/brechner/
e-mail: brechnerreport@jou.ufl.edu

Sandra F. Chance, J.D., Director/Executive Editor
S. Camille Broadway, Editor
Alana Kolifrath, Production Coordinator
Courtney Rick, Production Assistant
Whitney Morris, Production Assistant

The Brechner Report is published 12 times a year under the auspices of the University of Florida Foundation. *The Brechner Report* is a joint effort of The Brechner Center for Freedom of Information, the University of Florida College of Journalism and Communications, the Florida Press Association, the Florida Association of Broadcasters, the Florida Society of Newspaper Editors and the Joseph L. Brechner Endowment. *The Brechner Report* thanks Colleen Connolly-Ahern for her contributions to this issue.

Florida's law helps ensure open election process

Sandra Chance



Colleen Connolly-Ahern

The BackPage

By Sandra Chance & Colleen Connolly-Ahern

After September's primary, Florida's election process was the focus of national headlines. "It's déjà vu all over again," a friend joked in an e-mail, referring to the uproar over Florida's role in the 2000 presidential election drama. Various groups are again asking to see the ballots, just like they did after the 2000 general election. By requesting to see the 2000 ballots, news organizations and private groups studied whether the votes in one of the tightest elections in presidential history had indeed been counted correctly.

In the process, the state and its chads took a lot of hits –and not just from late night comedians. A number of governmental officials spoke out against the recount, many of them predicting dire consequences for the presidency in the wake of the ballot review.

In spite of the predictions of doom by these opponents of freedom of information, the ballot reviews were completed. And, democracy as we know it came to no harm. Florida's citizens were in the enviable position of being able to hold their public officials accountable for their actions during the 2000 election and beyond it, thanks in large part to the state's expansive FOI laws.

However, researchers in the Brechner Center wondered how many other citizens in the U.S. would have the same opportunity. So the Center studied the public records status of ballots in the other 49 states. The Center e-mailed the Secretary of State's offices in the other 49 states and asked three questions: Are presidential election ballots considered public records in your state? What about absentee ballots? Could ballots in your state be accessed by the press, as Florida's were after the Bush/Gore election?

The results of our survey were shocking. Only Florida and Texas specify that voted ballots are public records. However, Texas' statute denies access to those public records for 22-months, largely nullifying the benefit of making them public records in the first place. Officials in 13 other states said they considered both executed ballots and executed absentee ballots public records, although ballots are not specifically covered by the law.

Officials in four states indicated that the status of ballots is unclear under state law. In Pennsylvania, general election ballots are specifically exempted from the public records law, while absentee ballots are not. Officials from 31 states indicated that neither executed general election ballots nor executed absentee ballots are public records. While confirming Florida's unique treatment of ballots as public records, the Center's study yielded another important finding. Despite all the national media attention on accessing Florida's ballots, many state election officials initially couldn't give a simple "yes" or "no" answer to the question of whether or not ballots in their states would be considered public records.

It's not that these officials were unhelpful – quite the opposite. Many made inquiries with their own state attorneys to determine the status of the ballots. However, the fact remains that officials responsible for ballots across the country were unaware of how their own access laws might impact the status of those ballots in the case of a recount scenario.

In the movement to reform the election process, most legislation has focused on technological advances, mandating funds to upgrade older voting apparatus. The greater issue, transparency in government, has been largely ignored. The point of voting reform should not be to avoid recounts in the future. Rather, it should be to secure for all citizens the right to hold their public officials accountable for their actions during elections by ensuring that all voting materials become public records. Election officials in the 32 states that deny access to ballots risk losing their credibility in a close election. Without public inspection of ballots, questions of fairness and legality could lead to mistrust and divisiveness. If that happens, the doomsday prophesies about threats to "democratic stability" may be fulfilled.

Sandra Chance is the director of the Brechner Center for Freedom of Information. Colleen Connolly-Ahern, a Ph.D. student in the College of Journalism and Communications, was the Marion Brechner Graduate Research Assistant who helped with this study.