

THE BRECHNER REPORT

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Appeals courts say export licenses still confidential

ATLANTA – An executive order kept an exemption to the federal Freedom of Information Act in operation and bars the U.S. Department of Commerce from releasing information sought by two newspapers, a three-judge federal appeals panel ruled.

The Tampa Tribune and the *St. Petersburg Times* filed an FOIA request with the U.S. Department of Commerce

for the names of companies licensed to export goods and services to Cuba from 1996 to 1999.

ACCESS RECORDS

The department denied the request, saying the Export Administration Act exempted export licenses from release.

The newspapers argued that the act had expired in 1994 and no longer protected the records.

A U.S. District Court judge in Florida

granted the newspapers summary judgment and ordered the records released, but the appeals court reversed the decision and remanded the case.

Judge Frank M. Hull, U.S. Court of Appeals for the Eleventh Circuit, wrote on behalf of the panel that an executive order from President Clinton kept the export law and the exemption in operation even after the law expired in 1994. (1/6/01)

Official ordered to separate votes

SARASOTA – A Charlotte County elections supervisor who once said that she would not use machines to separate ballots for groups conducting recounts was ordered in January to separate out the overvotes and undervotes for media requesters.

Judge Sherra Winesett, 20th Judicial Circuit, ordered Judy Anderson to separate the 3,156 uncounted ballots from the 70,100 ballots cast on election day. Anderson had argued that sorting the ballots would be equivalent to a

“recount” prohibited by the U.S. Supreme Court.

A group including *The New York Times*, *The Orlando Sentinel* and the *South Florida Sun-Sentinel* sued to get the requested ballots. The media estimated that with the help of machine sorting, the count would take less than a week compared with two months to separate by hand. Winesett ruled that separating ballots didn’t constitute a recount and ordered the machine sorting. (12/14/00 – 1/20/01)

Citrus panel wants out of Sunshine

LAKELAND – Members of a committee for the Florida Citrus Commission want to avoid the glare of the state’s Sunshine Law.

The Blue Ribbon Committee is charged with helping boost the sales of domestic grapefruit, but members want to disband unless they find a way to meet in private.

ACCESS MEETINGS

Members say the requirements of meeting in public and the possibility of being quoted in the news media keep them from fully talking about the issues.

“I, for one, would be very reluctant to put things on the table that need to be put on the table,” committee member Dennis Broadway told *The Lakeland Ledger*. (1/5/01)

Clearwater stopped from deleting e-mail

ST. PETERSBURG – City officials in Clearwater must not destroy e-mail messages while a lawsuit with the *St. Petersburg Times* is pending, a circuit court judge ruled.

The newspaper requested the release of e-mail from Clearwater’s assistant city manager and its planning and development administrator. City officials

released some e-mail but refused to release e-mail messages that they said were personal. Some of the personal e-mail was also deleted. Judge Anthony Rondolino, 6th Judicial Circuit, granted an injunction that prevents the city from destroying any more messages. A March 1 hearing will determine if additional messages will be released. (1/14/01)

Police survey must be released to public

PINELLAS PARK – A survey of police employees done by a private company is public record, a circuit court judge ruled.

The *St. Petersburg Times* requested a copy of the survey, which examined police employee satisfaction, but

Pinellas Park officials and the private company that conducted the survey refused to release the information.

Judge David A. Demers, 6th Judicial Circuit, ruled the survey was public record and ordered the city to provide the newspaper with a copy. (1/4/01)

SPECIAL REPORT

A preview of Sunshine Law issues scheduled for consideration during the Florida Legislature’s 2001 session, p. 3-4.

Filmmakers use tape released through Public Records Law

GAINESVILLE – The Public Records Law made it possible for a video of a University of Florida fraternity party to become part of a film documentary on the controversy surrounding a rape accusation by a stripper at the party.

The videotape was collected by the state attorney's office, which investigated stripper Lisa Gier King Peterson's claims that a Delta Chi

member raped her after she performed at a party. "Raw Deal: A Question of Consent," which was screened at the Sundance Film Festival in January, cuts between video of the party and interviews about the party and the accusation.

Filmmakers Billy Corben and Alfred Spellman got copies of the video, which includes explicit sex, through a public

records request. The two also unsuccessfully requested an audiotape of UF's disciplinary hearings in the matter. The audiotapes were ruled student records and not subject to the Public Records Law. (*Brechner Report*, Nov. 2000)

The filmmakers were criticized by some Sundance audiences for the explicit footage. (1/27/01 – 2/3/01)

Man changes plea to avoid Website

NORTH PALM BEACH – A man who was allowed to change his plea in a 1991 sexual-assault case because of the state's online sex offender registry, pleaded guilty in January to a misdemeanor battery charge instead.

Florida's 4th District Court of Appeal in 1999 allowed Bruce Brian Wiita to change his plea in a 1991 case.

Wiita originally pleaded guilty to charges of lewd assault and sexual activity with a child for an incident involving a 15-year-old family baby sitter.

The court wrote that Wiita would not have pleaded guilty if he had known the legislature would later pass a law creating the Web site, which posts the names and photos of Florida's sex offenders.

Wiita, who settled a civil lawsuit with the former baby sitter in October 2000, pleaded to misdemeanor battery after the baby sitter told prosecutors she didn't want to testify at a new sexual-assault trial. He received no prison time and three months probation. (12/22/00)

Commission releases tape of secret meeting

JACKSONVILLE – A man suing Nassau County commissioners for reported violations of the Public Records Law will get to hear an audiotape of the commission discussing how to deal with his lawsuit.

At a Dec. 6 secret meeting, commissioners discussed whether to settle the lawsuit with Clark V. Hoshall Jr. or request mediation. Hoshall filed a public records request to listen to the tape of the closed meeting. The

commission sent the tape, a transcript and Hoshall's request to a circuit court judge for a ruling.

Judge L. Haldane Taylor, 4th Judicial Circuit, ordered the commissioners to turn over the tape or file a request for a hearing on closing the record. The commission unanimously decided not to fight the request.

The public records lawsuit is scheduled to go to trial on March 27. (1/17/01)

PRIVACY

Judge dismisses lawsuit against newspaper

TAMPA – A federal judge dismissed a lawsuit against the Sarasota News Network that claimed the news organization violated federal wiretap law and infringed on the civil rights of a criminal defendant by reporting information from a recorded phone conversation.

Lisa Marie Knautz, who pleaded guilty to a 1996 plot to kill her husband, was taped by an undercover detective posing as a hit man making arrangements for murder. The *Sarasota Herald-Tribune* published an article in 1996 containing information from the

recorded conversations.

Judge James S. Moody Jr., U.S. District Court for the Middle District of Florida, denied the complaint against the Sarasota News Network, a division of the *Herald-Tribune*, because the statute of limitations for filing the suit had expired.

Moody wrote that even if the statute of limitations hadn't expired, the taping and article didn't violate the law since the taping was done voluntarily by the informant, not by law enforcement. (*Knautz v. Wilson*, 28 Media Law Reporter 2589, Dec. 12, 2000)

FIRST AMENDMENT

Attorney advises against removing library book

OCALA – An effort by the Marion County Commission to remove a controversial book from library shelves would be unconstitutional, according to a county attorney opinion.

"It's Perfectly Normal," a sex education book for children, has come under attack from some community members who call the book "pornographic."

In response to the book controversy,

the County Commission changed library policy in December to give the commission authority over which books stay on the shelf.

However, if the Commission attempts to remove or restrict access to a book based on its content, the federal courts would consider it "unconstitutional censorship," wrote County Attorney Gordon Johnston. (12/5/00 – 1/11/01)

DECISIONS ON FILE

Copies of case opinions, 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, University of Florida, Gainesville, FL 32611-8400, (352) 392-2273.

Several bills would affect Sunshine Law exemptions

TALLAHASSEE – The state legislature will consider numerous bills dealing with Florida's Sunshine Law during this year's session, which begins on March 6.

Below is the list of bills, as of Feb. 19, which were taken from the Florida Legislature's home page, Online Sunshine, at <http://www.leg.state.fl.us>. Chief sponsors of the bills are in parentheses next to the bill numbers.

SB 92 (Meek, D-Miami)

Legislature/open meetings – Proposed constitutional amendment to apply the Legislature's open meeting rules to meetings between the governor and the Senate's president-designate and/or the House's speaker-designate.

SB 692 (Clary, R-Destin)

Physician records of adverse incidents – Would create an exemption for the reports of adverse incidents in physicians' and osteopathic physicians' offices.

HB 3 (Ball, R-Titusville)

SB 714 (Sebesta, R-Petersburg)

Citizens' Right to Honest Government Act – A portion of this larger bill would make it a second-degree felony for a public servant to falsify, conceal, cover up, destroy, mutilate or alter a public record.

It also makes it a third-degree felony for a public servant to disclose information from an active investigation when that information is not public record and a second-degree felony to disclose information about a closed bid process.

SB 514 (Burt, R-Ormond Beach)

Use of public record information – Would make it a first-degree misdemeanor to use a public record or information from a public record to commit a misdemeanor and would make it a third-degree felony to use public records to commit a felony.

SB 524 (Burt, R-Ormond Beach)

Criminal use of personal information – Would increase the penalties for crimes involving personal-identification information if a public record was used in collecting the personal information.

HB 365 (Hogan, R-Jacksonville)

SB 840 (Saunders, R-Cape Coral)

Public records/health/financial records – Would create a public records exemption for financial information given to the Department of Health. The records could be released with written consent, in a medical emergency or under a court order.

SB 270 (Silver, D-North Miami)

DNA testing and analysis – Would create an exemption for the results of DNA tests. The results of tests on accused felons would only be given to law enforcement, criminal justice officials and defendants' attorneys. All results of DNA testing will be destroyed if the person is not convicted of a crime.

SB 772 (Sanderson, R-Fort Lauderdale)

Public records/child support services – Would create an exemption for the names and identifying information of people who apply for or receive child-support services from non-Title IV-D county child-support enforcement agencies.

CS/HB 275 (Ross, R-Lakeland;

Goodlette, R-Naples)

Campaign treasurers' reports – Would create a public records exemption for personal identification numbers and computer algorithms used by campaign treasurers to maintain records security. Would only go into effect if the legislature passes HB 273, a bill that would create an Internet electronic filing system for campaign finance data.

HB 203 (Ryan, D-Dania Beach)

HB 219 (Rubio, R-Miami)

SB 144 (Geller, D-Hallandale Beach)

Internet/child pornography – Would make it a third-degree felony to transmit child pornography or send an image "harmful to minors" to a minor on the Internet via e-mail. Services that send e-mail to a list of subscribers would not be prosecuted.

SB 774 (Dawson, D-Fort Lauderdale)

Arrest record expunction – Would require the Department of Law

Enforcement to expunge the arrest records of people charged under a law that is later declared unconstitutional.

HB 261 (Jordan, R-Jacksonville)

SB 252 (King, R-Jacksonville)

Law enforcement background investigations – Would require employers to release information to law enforcement officials conducting a background check on applicants for law enforcement officer, correctional officer or probation officer positions. Applications, evaluations, attendance records, disciplinary matters and termination information are among the documents employers would be required to release.

SB 242 (Brown-Waite, R-Brooksville)

Recording devices in nursing homes – Would allow nursing home residents or residents' families to install audio and video recording devices in their rooms.

The following exemptions to the state Public Records/Open Meetings Laws are subject to the review and re-enactment during the 2001 legislative session under the Open Government Sunset Review Act. These exemptions were passed during the 1996 legislative session. Without re-enactment, these exemptions would expire on Oct. 2.

HB 389 (Brunner, R-Apopka)

SB 484 (Senate Committee on Commerce and Economic Opportunities)

Economic Development Agencies – Re-enacts and would extend an exemption (Florida Statutes, Section 288.075(2)) for information regarding a private entity's plans to locate, relocate or expand its business activities. The private entity must request the confidentiality in writing, and the confidentiality extends 24 months from the date of the request. SB 484 would extend the definition of "economic development agency" to include any public economic development agency of a county or municipality. It also would allow agencies to extend the period of confidentiality for an additional 12 months at the request of the private entity and would allow for a 10-year

extension of confidentiality for trade secrets. Under the current statute, public officials cannot enter into binding agreements with a private business that has requested confidentiality until the confidential information has been made public for 90 days.

The Senate bill would allow public officials to enter binding agreements at their discretion without the confidential information being public for 90 days.

HB 391 (Brummer, R-Apopka)

SB 486 (Senate Committee on Commerce and Economic Opportunities)

Qualified defense contractor tax refund program – Re-enacts and would extend an exemption (Florida Statutes, Section 288.1066) for information contained on refund applications under the qualified defense contractor and qualified target industry tax refund program, including federal employer numbers, tax information and trade secrets. SB 486 extends the exemption to records of insurance premiums and excise tax payments, information on tax refund requests and data on the wages paid and number of jobs created by the qualified applicant.

HB 405 (Brummer, R-Apopka)

Insurance records – Re-enacts and would expand an exemption (Florida Statutes, Section 626.921(8)) for insurance records such as names and addresses, coverage types, amounts and costs, effective dates and deductibles. Currently, records that reveal a trade secret submitted by the Florida Surplus Lines Service Office to the Department of Insurance are exempt from the Public Records Law, but the same records submitted by insurance agents to the Florida Surplus Lines Services Office are not exempt. The bill would extend the exemption to records submitted to the Surplus Lines Services Office and would apply to information that would reveal “information specific to a particular policy or policyholder” rather than information that would reveal a trade secret.

HB 407 (Brummer, R-Apopka)

SB 418 (Senate Committee on Education)

University health service support organizations – Re-enacts an exemption (Florida Statutes, Section 240.2996(2)(3)(4)) for certain records and meetings of university health support organizations, including meetings and records concerning contracts, marketing plans and employee reviews.

SB 418 also repeals Section 240.2995(6), which required that meetings of the governing board of a university health services support organization be open to the public except for specified exemptions.

HB 383 (Brummer, R-Apopka)

SB 632 (Senate Committee on Governmental Oversight and Productivity)

Payment information – Re-enacts an exemption (Florida Statutes, Section 119.07(3)(z)) for bank account numbers and debit card, charge card and credit card numbers given to state agencies for payments of fees or debts.

HB 385 (Brummer, R-Apopka)

SB 382 (Senate Committee on Comprehensive Planning, Local and Military Affairs)

Agency sealed bids – Re-enacts an exemption (Florida Statutes, Sections 119.07(3)(aa)) for documents used directly or solely by a municipally-owned utility to prepare and submit bids.

HB 387 (Brummer, R-Apopka)

SB 454 (Senate Committee on Commerce and Economic Opportunities)

Florida Sports Foundation – Re-enacts an exemption (Florida Statutes, Section 288.12295) for the identities of donors to the Florida Sports Foundation, a direct-support organization that promotes the sports industry and amateur athletics. The donors must request anonymity.

HB 399 (Brummer, R-Apopka)

SB 384 (Senate Committee on Comprehensive Planning, Local and Military Affairs)

Emergency 911 records – Re-enacts an exemption (Florida Statutes, Section 365.171(15)) for the name, address, telephone number and identifying information of people requesting emergency service or

reporting an emergency.

HB 393 (Brummer, R-Apopka)

SB 456 (Senate Committee on Commerce and Economic Opportunities)

Florida Tourism Industry Marketing Corp. – Re-enacts an exemption (Florida Statutes, Section 288.1226(8)) for the identity of people who respond to marketing and advertising research projects conducted by the Florida Tourism Industry Marketing Corp. and for trade secrets obtained in connection to the research.

HB 395 (Brummer, R-Apopka)

Airports and airport employees – Re-enacts an exemption (Florida Statutes, Section 331.22) for security plans, photographs, maps, blueprints, drawings, and other materials that show airport-operating facilities.

HB 397 (Brummer, R-Apopka; House Committee on State Administration)

Payment of tolls – Re-enacts an exemption (Florida Statutes, Section 338.155(6)) for personal information, including bank account numbers, checks, and debit card, charge card and credit card numbers, gathered by government agencies in collecting tolls or fees.

HB 401 (Brummer, R-Apopka)

SB 414 (Senate Committee on Health, Aging and Long-Term Care)

Health care information – Re-enacts an exemption (Florida Statutes, Section 408.185) for information submitted to the Attorney General by health care organizations as part of an antitrust reviews, including preferred provider and health maintenance organization contracts, trade secrets, marketing plans and business data.

HB 403 (Brummer, R-Apopka)

SB 804 (Senate Committee on Criminal Justice)

Pawnbroker transactions – Re-enacts an exemption (Florida Statutes, Section 539.003) for pawnbroker transaction records given to law enforcement officials, including the name, address and thumbprint of the seller, a description of the goods, the amount paid for the goods and the date and time of the transaction.

Letter prompts investigation

ST. PETE BEACH – A letter critical of a developer has prompted an investigation of the members of a City Hall Advisory Committee for potential Sunshine Law violations.

The advisory committee, which is monitoring the building of a new city hall, circulated and initialed a memo critical of developer Paul Skipper without holding a public meeting. Jack Ohlhaber, the committee's chairman, said he drafted the letter then called committee members individually and asked them to come to his home to read and initial the memo.

The Pinellas-Pasco State Attorney's Office is conducting the investigation and interviewing the committee at the request of the police chief and the city manager.

The controversy surrounding the committee prompted member Charles Keator to resign in late December. (12/7/00 – 12/31/00)

Judge rules against motorcycle club

JACKSONVILLE – A federal judge granted summary judgment for Twentieth Century Fox in a defamation and privacy lawsuit brought by members of the Outlaws Motorcycle Club.

The bikers sued the company over an episode of "America's Most Wanted," which profiled the club's president. The three-minute segment showed 15 seconds of footage taken outside of the Daytona Beach Outlaws' clubhouse during the city's Bike Week.

The Daytona club members shown sued for defamation, unauthorized publication of name or likeness, invasion of privacy and negligence.

Judge Ralph Nimmons Jr., U.S. District Court for the Middle District of Florida, ruled against the bikers, writing in his order that they hadn't proven that the contested statements in the report concerned them. Nimmons also wrote that the videotape was taken from the street while the club members were in public view so it wasn't an invasion of privacy. (*Miller v. Twentieth Century Fox International Corp.*, 29 Media Law Reporter 1087, Jan. 16, 2001)

LIBEL

Advertising lawsuit allowed to proceed

OCALA – A circuit court judge in Marion County in January refused to dismiss a *St. Petersburg Times*' lawsuit that claims Citrus County violated the Open Meetings Law and state bidding guidelines in awarding an advertising contract.

The *St. Petersburg Times* and the *Citrus County Chronicle* both submitted proposals to compete for the county's legal advertising contract. Interim County Administrator Richard Wesch talked with the *Chronicle* about

Tennis star's hearing ruled open to public

MIAMI – Tennis star Boris Becker and wife, Barbara Feltus Becker, settled issues in their divorce and custody battle after a judge refused to bar the public from hearings in the case. Becker requested that hearings scheduled for Miami-Dade family court be closed to the public, saying that revealing financial

the sealed bids and later recommended to the commission that the contract go to the *Chronicle*.

Times Publishing, owner of the *Times*, sued the commission, saying that the process violated state law. Judge Carven Angel, 5th Judicial Circuit, dismissed the *Times*' first lawsuit, filed in September, but allowed the company to refile. (*Brechner Report*, Dec. 2000)

He ruled in January that the newspaper's second effort could proceed. (12/2/00 – 1/18/01)

and personal information would put his children at risk from kidnapping.

Judge Maynard "Skip" Gross, 11th Judicial Circuit, ruled on Jan. 4 that the public could attend the hearings but said some financial documents could be sealed. The Beckers settled in late January. (1/4/01 – 1/27/01)

Town to pay official's fees in Sunshine dispute

GOLDEN BEACH – The Town Council voted to pay more than \$15,000 in legal fees for three town officials, including more than \$7,000 for a councilman accused of a Sunshine Law violation.

The vice mayor and two council members involved in three separate cases. One of the council members, Al Paruas, was involved in an Open

Meetings Law case after he ejected a resident from a November 1999 meeting to select a town manager and town clerk.

Paruas, who had been in office for 10 months at the time of the incident, should have known the meeting was public, say investigators with the state attorney's office, who are still investigating the case. Paruas' current legal fees add up to \$7,125.15. (12/31/00)

Newspaper granted summary judgment

FORT MYERS – A circuit court judge in Lee County has granted summary judgment in favor of the *News-Press* of Fort Myers in a libel case.

Robert Conidaris and Grace Conidaris, owner of the Lani Kai Resort Hotel, sued the newspaper and columnist Sam Cook for statements made in a March 30, 1998, editorial titled, "Look out for falling people at Lani Kai."

Judge Isaac Anderson Jr., 20th Judicial Circuit, granted summary judgment for the newspaper.

He ruled that statements made in the article were "substantially true" and part of an opinion piece that deserved the "highest level" of protection against libel claims. (29 Media Law Reporter 1030, Jan. 2, 2001)

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Mediation program keeps disputes out of court

The strength of a free society is derived from the people's ability to participate in the democratic process. If Floridians are unable to review public records or attend public meetings, they are deprived of the opportunity to exercise basic rights secured for them under state law and the Constitution.

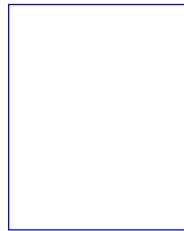
The Back Page

By Pat Gleason

The open government mediation program was established to provide a forum for resolving disputes over public records and meetings. Since the program's inception nearly 10 years ago, hundreds of public access controversies have been resolved through mediation. Last year, more than 100 new cases opened. Private citizens, businesses, and the news media were among those who turned to mediation after their requests for records or access to meetings were ignored, delayed, or outright denied. Government agencies at the state, county and municipal levels chose to participate in mediation in order to avoid unnecessary litigation.

In one case, for example, a television station asked for mediation assistance after a local sheriff banned the station from attending press conferences conducted by his office. The station was also told that it would not receive any notice of future press conferences. The sheriff's attorneys, who were out of town, were located and advised of the situation by the mediation program. The ban was promptly rescinded and a costly legal battle avoided. Both the government (meaning the taxpayers) and the requesting citizen benefit when a public access problem can be solved without litigation.

While most mediation conflicts are resolved quickly by a telephone call or simple letter, in some cases the nature of the dispute requires a more time-consuming formal solution. For example, a reporter contacted the Attorney General's Office when a state agency told him that he could not have letters on file at the agency containing information about potential lawsuits against medical professionals. The agency said that even though no statute expressly exempted the letters from disclosure, it could not release them because of statutory restrictions barring disclosure of disciplinary complaints. After mediation was initiated, both the agency and the reporter agreed that the agency should ask for a formal Attorney General's



Pat Gleason

opinion regarding its responsibilities under the pertinent statutes. The opinion concluded that the letters should be released, and the agency complied.

Many mediation disputes involve disagreements over access to electronically stored records. The problem usually does not stem from a denial of access to computer records, as most public agencies now know that the Public Records Law encompasses records stored in a computer, although a few public

officials forget that this includes e-mail. However, a reporter seeking computer records is sometimes told that it will cost hundreds or even thousands of dollars to get the records because of programming and other costs that must be passed along to the person making the request. Several reporters and private citizens turned to mediation to attempt to resolve such disputes. In one case, a law enforcement agency told a reporter that it would cost more than \$11,000 to obtain crime information, even though other agencies had provided similar information at a lower cost. After discussions among the newspaper's lawyer, the sheriff's lawyer, and the software company, it was agreed that the agency could reduce the cost significantly by using a different computer program.

Although many mediation cases are initiated by citizens who have been denied access, this is not always the case. On one occasion, a mayor contacted the office to complain that the city manager had ignored his public records requests. After mediation was initiated, the city attorney instructed the manager to provide the records and the dispute was resolved.

The mediation process succeeds when the government and the citizen share the common goal of ensuring that the public records and meetings laws are fully complied with. An increasing number of public agencies are realizing that mediation can be an effective way to avoid expensive litigation. When this occurs, the program has reached its objective. Ideally, the number of cases should decrease as educational efforts to ensure full compliance with the open government laws reach government at all levels, making disputes a thing of the past. Until that time, the program will continue to be an option for resolving controversies outside the courtroom.

Pat Gleason, general counsel in the Office of Attorney General, has conducted the mediation program since 1991.