THE BRECHNER REPORT

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Judges maintain secret manual of court policies

COURTS

MIAMI – Federal judges in the U.S. District Court for the Southern District of Florida are following a set of procedures outlined in a secret policy manual that provides directives for case assignment.

These non-public rules are maintained in addition to the court's published Local Rules, which are used by judges and attorneys in the southern district.

The policy manual came to light after it was referred to in orders written by Chief Judge William J. Zloch and U.S. District Judge K. Michael Moore. Both orders took actions that sidestepped the Local Rules for the random assignment of cases to judges.

The orders transferred 21 criminal cases from Senior U.S. District Judge James Lawrence King to Judge Moore in early May. The unexplained transfer occurred outside the court's usual system.

Neither federal prosecutors or public defenders were aware of the policy manual before it came to light. However, Clerk of Court Clarence Maddox confirmed the policy manual's existence for *Miami Daily Business Review* reporter Dan Christensen.

Resident, city official trade complaints

ACCESS MEETINGS

PORT RICHEY – City police officers found nothing illegal after investigating a complaint by Port Richey resident John King, who accused Vice Mayor Bill Bennett and other city officials of violating the state's Sunshine Laws during a gathering held at a local Steak 'n Shake after a city council meeting.

The complaint asserted that Bennett, councilman Fred Miller and former Mayor Eloise Taylor were all present and discussed government business in violation of the state's Sunshine Law.

The Sunshine Law prohibits government officials from meeting privately to discuss public business, but it does allow social gatherings.

Investigators determined that the three officials talked about numerous subjects, including the weather and baseball.

However, the investigation concluded that no city business was discussed at the dinner gathering, and therefore, the officials were not in violation of the Sunshine Law.

Former mayor sues city officials over Sunshine Law violations

LAKE WORTH – Former mayor Ron Exline filed a lawsuit against city officials claiming they violated the Sunshine Law while selling city properties.

Exline asked a judge to void the transactions, in which the city sold a building and a parking lot. If the transactions were nullified, city residents would vote on whether to allow the city to re-sell the properties.

The suit alleges that City Manager Paul Boyer held a meeting in his office to draft an order requiring city officials to negotiate a sale of the building after city commissioners had earlier decided not to sell the property.

Florida's Sunshine Law requires that meetings between two or more elected or appointed officials be open to the public. Minutes also must be taken.

Federal officials argue against disclosing hurricane records

ACCESS RECORDS

FORT MYERS – Attorneys for the federal government are arguing that records maintained by the Federal Emergency Management Agency are not of interest to members of the public.

This comes in response to a lawsuit by three Gannett newspapers, *The Fort Myers News-Press, Florida Today* and the *Pensacola News-Journal*, seeking access to the records.

The newspapers argued that the records contain information related to disaster assistance given in response to the 2004 hurricanes.

The federal government has filed a motion for summary judgment, requesting that U.S. District Court Judge John. E. Steele rule in its favor.

Such a ruling would allow the hurricane records to remain undisclosed.

The newspapers have argued the information is of public interest and citizens have a right to learn how the government is spending its money. Additionally, they believe the files should be released in accordance with the federal Freedom of Information Act.

ACCESS RECORDS CONTINUED

NYC officials release documents detailing Sept. 11

NEW YORK CITY – City officials have released thousands of documents maintained by the fire department regarding the September 11th terrorist attacks after a three-year court battle.

The New York Times filed the lawsuit, which was supported by the relatives of fallen firefighters.

The documents include about 15 hours of audio recordings and more than 12,000 pages of transcribed firefighter testimony taken after the event.

The newspaper sued under the federal Freedom of Information Act after the city refused to disclose the records it maintained as a part of its investigation.

Earlier this year, the state's highest court ruled that some, but not all, of the records should be made public.

Records released previously suggest that some of the more than 340 firefighter casualties could have been prevented with better communication among emergency services groups.

SECRECY

Report concludes costs of secrecy skyrocketing

WASHINGTON – The federal government classified more than 15.5 million documents during the last year, according to a report issued by the federal Information Security Oversight Office.

The increasing secrecy, driven by fears of terrorism after the September 2001 attacks, cost taxpayers an estimated $7.2 billion last year.

Some of the increase in cost can likely be attributed to the ability of federal agency heads to classify information under vague labels such as "sensitive security information."

"I've seen information that was classified that I've also seen published in third-grade textbooks," said J. William Leonard, who heads the Information Security Oversight Office.

The report attributes part of the increase in secrecy classifications to the increased number of officials who have the power to classify documents.

Since the 2001 terrorist attacks, President George W. Bush has given classification power to the heads of the Environmental Protection Agency, the Department of Agriculture and the Department of Health and Human Services.

BROADCASTING

Legislation would reinstate Fairness Doctrine

WASHINGTON – U.S. Rep. Maurice Hinchey (D-N.Y.) introduced a bill that would require broadcasters to devote air time to all sides of controversial issues.

The legislation, which would restore the Fairness Doctrine as it was once called, is pending in the House of Representatives.

Hinchey's bill, called the Media Ownership Reform Act of 2005, mandates that broadcast licensees provide reasonable time to allow for conflicting perspectives to discuss issues of public importance.

In 1987, the Federal Communications Commission repealed the Fairness Doctrine, which was initially intended to promote the broadcasting of diverse views. Opponents of the policy argued that it restricted freedom of expression and led to less discussion of public issues.

Another provision in the bill seeks to limit the number of stations that a media entity can own in a single market.

Hinchey sponsored similar legislation in 2004, but that bill never made it out of committee.

CENSORSHIP

Judge rules Florida high school's distribution policy unconstitutional

FORT MYERS – A Lee County high school student plans to appeal a federal court decision denying her claim that the Lee County School Board violated her First Amendment rights by refusing to allow her to distribute anti-abortion literature.

The court ruled against Michelle Heinkel, who was denied permission in April 2003 to circulate the pamphlets in her middle school.

However, the federal court noted in its opinion that the school board policy used to prevent her pamphleteering was unconstitutional because of a requirement that "no advertisement shall include political, religious or organizational symbols."

Because the court found that the nature of the literature could cause disruption, it ruled against Heinkel's First Amendment claim.

Her attorney plans to appeal to the U.S. Court of Appeals for the Eleventh Circuit.

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.

FREEDOM OF INFORMATION

Gonzales agrees to re-examine Ashcroft memorandum policy

WASHINGTON – Attorney General Alberto Gonzales has announced that he will reconsider the Department of Justice's position on the release of documents under the federal Freedom of Information Act.

Gonzales, who took office under a policy established by former Attorney General John Ashcroft, promised the *Associated Press* that he would "go back and look at it."

Under the policy established by Ashcroft, government record-keepers are encouraged to err on the side of withholding information instead of releasing records.

This is contrary to the previous policy, which had been established by Clinton Administration Attorney General Janet Reno.

The Reno policy was to release any records not subject to mandatory FOIA exemptions unless there was a specific and substantial harm that would result from their release.

The policy serves to guide government records custodians as they make decisions about whether to disclose information being requested by the public under the FOIA.

NEWSGATHERING

Prosecutors interrogate fired columnist over telephone call

MIAMI – Prosecutors are investigating the conduct of a former *Miami Herald* columnist who was fired after he recorded a telephone conversation with a local politician who shot himself in the newspaper's lobby.

An attorney for the Miami-Dade State Attorney's Office and another law enforcement official were allowed to listen to the tape, which was made by columnist Jim DeFede shortly before Arthur Teele died.

Initially, *Miami Herald* Publisher Jesus Diaz Jr. said he would not relinquish the recording and had said he will go to court to fight a subpoena for the tape.

However, Diaz eventually released the tape because he said DeFede had already turned his notes over to investigators.

DeFede made the tape without Teele's permission, which may be a violation of the state's criminal laws. He was fired after he told his editor of the recording.

AP uses records for story about birth control

WASHINGTON – The *Associated Press* relied on the federal Freedom of Information Act to request more than 16,000 complaints of women who reported symptoms in connections with the use of Ortho Evra.

The federal law mandates that records kept by many of the federal goverment agencies be open to inspection by the public if they are not subject to one of the FOIA exemptions.

The news organization filed a public records request with the Food and Drug Administration to obtain federal drug safety reports about the birth control patch.

The reports indicated at least 23 deaths that the news organization had reviewed by medical practitioners and believed may be related to the birth control patch.

The *AP* also used the records to report that women who were using the patch were three times more likely to suffer strokes and blood clots than those women who took birth control pills.

As a result of the investigation, the families of several deceased women have filed suits against patch manufacturer Ortho McNeil, claiming the drug maker knew of the possible symptoms before the patch went on the market.

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To a board of trustees that thinks it is being voluntarily open to the public, it follows logically that it will also think it has the discretion to be closed, when it thinks that is what is best for the public. Similarly, if board members think they are voluntarily opening their meetings, it would never occur to them that they are prohibited by law from talking privately on the telephone or over breakfast about the agenda items before the meeting begins. Nobody would naturally comply with the full requirements of the Sunshine Law unless they were being advised clearly that it would be a crime for them to violate the law.

Case in point: *The Palm Beach Post* quoted Rick Schuster, executive director of the Palm Beach Community College Foundation, as saying the Sunshine Law "could have a chilling effect on our work and on the willingness of people to serve. ... Where do you draw the line on this? If I cannot have lunch with two of my board members without giving public notice, yes, I have a problem. That totally disrupts the flow of business."

Not to cast aspersions on the fine people who volunteer to serve on DSOs, but someone ought to explain their legal obligations to them. It's only fair.

School foundations to begin year in sunshine

The Back Page

By Robert Rivas

A funny thing happened when the *Northwest Florida Daily News* started looking into its local community college foundation.

The newspaper unexpectedly opened up a can of sunshine.

At Okaloosa-Walton College, the trustees told the *Daily News* they went "full fledge" in the direction of openness. Nonetheless, they maintained, their board of trustees was not actually covered by the Government-in-the-Sunshine Law, Section 286.011 of Florida Statutes. Not technically.

Robert Rivas

The *Daily News* kept pressing the "technical" legal question until local State Rep. Ray Sansom lodged a request for an Attorney General's Opinion ("AGO") on whether the boards of trustees of community college foundations are, in fact, required to follow the Sunshine Law.

The answer: Yes. Technically.

Published on April 20, 2005, Attorney General Charlie Crist's opinion held that community college "direct support organizations" are within the coverage of the Sunshine Law. These DSOs are chartered as non-profit corporations, just as other, truly private foundations are, but they are required by law to solicit, invest and spend money to support their respective community colleges. Every aspect of their operations is dictated by the statute.

The AGO clearly implies that all state DSOs are equally covered by the Sunshine Law. Not only is there at least one DSO for each community college and university, but DSOs have been sprouting all over state government, soliciting private contributions to support crime victims, the moviemaking industry, local public schools and the Public Guardianship Program, to name but a few. The "booster clubs" of university athletic programs are also DSOs. (There is even a DSO for the state prison system, but it does not seem likely a "major donor" would want the prison library named after him.)

Naturally solicitous of public goodwill, these organizations are quick to be quoted as saying they are open. Yet over the years, they have universally claimed that their openness is a voluntary gesture, not one compelled by the requirements of the Sunshine Law. The AGO blows away this smokescreen, holding that an organization that is created by the government and totally controlled by the government to accomplish the government's purposes is not a private organization at all. An entity under the "dominion and control" of the Legislature is governed by the Sunshine Law unless the Legislature declares that the DSOs are exempt from the Sunshine Law.

The community college DSOs argued that the Legislature did in fact create an exemption for them. There is an exemption from the Public Records Law that allows the DSOs to keep confidential any documents revealing their donors' identities. This, they argued, implied an exemption from the Sunshine Law's requirement of open meetings. Debunking this argument, the AGO noted that the Public Records Law itself states that an exemption from disclosure of documents under the Public Records Law does not imply an exemption from open meetings under the Sunshine Law. These two laws are distinct.

By now the devil's advocate is asking, if the DSOs are really as open as they say they are, will the AGO make a difference? Yes. Realistically, there is a big difference between a DSO that is holding itself out as voluntarily open to promote public goodwill, and a DSO that recognizes that it is required to abide by the Sunshine Law, subject to sanctions. A decision made in violation of the Sunshine Law can be declared void.

In the wake of the AGO, countless DSO decisions are now subject to challenge. And public officials who knowingly violate the Sunshine Law can be criminally prosecuted.

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Robert Rivas currently serves as a contract partner for Sachs Sax Klein in Tallahassee and practices First Amendment law. He has worked as an editor for The Palm Beach Post.