
THE BRECHNER REPORT

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Open Government Act establishes new FOIA services

WASHINGTON, D.C. – President Bush signed the Honest Leadership and Open Government Act of 2007, which is aimed at giving the public and the media greater access to information about government activities, specifically lobbying efforts.

“The essence of successful ethics reform is not laws and restrictions, but full disclosure. The legislation includes minimal improvements in the area of disclosure, both for lobbying and earmarks. But there is still more to be done – and I will work with the Congress to improve upon this legislation,”

President Bush said in a press release.

The new law reinforces the 40-year-old Freedom of Information Act and represents the first significant updates to FOIA in over a decade.

The Act sets timelines for responses to requests, establishes a tracking system with penalties if agencies do not respond, and creates an Office of Open Government Services. It also establishes a hot line for all federal agencies to deal with public records issues and an ombudsperson as an alternative to litigation in disclosure disputes.

The law is seen as a congressional

rejection of the Bush Administration’s movement to greater secrecy since the terrorist attacks of 2001, according to *The Associated Press*.

The legislation reversed an order by former Attorney General John Ashcroft, who, after the 9/11 attacks, instructed agencies to resist releasing information if there was uncertainty about the effect that information might have on national security.

The new law reinforces the presumption that government agencies must release requested information unless there is a finding that disclosure could do harm.

Federal government owes newspaper for attorney fees

FORT MYERS – The federal government will pay \$105,000 in attorney fees to *The News-Press* (Fort Myers) following the newspaper’s successful lawsuit against the Department of Homeland Security for the release of public records.

The News-Press and its sister Gannett Co. Inc. newspapers, *The Pensacola News Journal* and *Florida Today*, sued the agency after it refused to release information about the 1.1 million recipients of \$1.2 billion in disaster aid

after the 2004 Florida hurricane season.

The Federal Emergency Management Agency, a branch of Homeland Security, distributed the disaster aid but refused to release recipients’ names and addresses.

Under FOIA, winning a release of the records allowed the plaintiffs to return to court to request attorney fees from the government agency.

“It is gratifying that the government finally recognizes some degree of

culpability in this case. We view this as further evidence that we did the correct thing – fight for the public’s right to know,” said Kate Marymont, executive editor of *The News-Press*.

“This is an outstanding result for the newspaper. After years of withholding records, the government has agreed to pay six figures. The amount speaks for itself. It’s a victory for the First Amendment,” said lead attorney Charles Tobin of the firm Holland and Knight, according to *The News-Press*.

ACCESS
RECORDS

Judge rules online used-book purchases confidential

MADISON, WIS. – Newly unsealed court records show federal prosecutors withdrew a subpoena that sought the identities of thousands of people who bought used books through online retailer Amazon.com Inc.

Federal prosecutors issued the subpoena in 2006 as part of a grand jury investigation into former Madison official, Robert D’Angelo, who was a frequent seller of used books on Amazon.com. Prosecutors hoped to find potential witnesses in the Amazon records, according to *The Associated Press*.

FIRST
AMENDMENT

U.S. Magistrate Judge Stephen Crocker ruled the customers have a First Amendment right to keep their reading habits from the government.

“The [subpoena’s] chilling effect on expressive e-commerce would frost keyboards across America. Well-founded or not, rumors of an Orwellian federal criminal investigation into the reading habits of Amazon’s customers could frighten countless potential customers into canceling planned online

book purchases,” Crocker wrote in his ruling.

Although Crocker said he believed prosecutors were seeking the information for a legitimate purpose, he opened the court documents against their requests to keep the records sealed. The First Amendment concerns were justified and outweighed the subpoena’s law enforcement purpose, Crocker said.

D’Angelo was indicted in October 2007 on fraud, money laundering and tax evasion charges in connection with a book business he ran out of his city office.

Councilman charged in e-mail case Farm bill drops penalty, passes

MARCO ISLAND – Marco Island City Councilman Chuck Kiester has been accused of violating the Florida Public Records Law, which prohibits the deletion of e-mails related to government business.

Kiester was charged with failing to maintain, preserve or allow inspection of public records that were generated between the time he took office in March 2006 until March 2007, according to *The Naples Daily News*.

The charges arose from a complaint made by a Marco resident in March 2007 after Kiester failed to respond to a public

records request for e-mails relating to city business and acknowledged that he regularly deleted e-mails about city business from his home e-mail account.

“Based on our review we feel this is the appropriate charge based on the facts and the law,” local State Attorney’s Office spokeswoman Samantha Syoen told *The Naples Daily News*.

The charges against Kiester are for a noncriminal violation of the public records law. He could face a maximum \$500 fine as a result of the charges but not suspension or removal from office.

WASHINGTON, D.C. – Opposition from media helped to thwart efforts in the U.S. Senate to pass a version of the 2007 Farm Bill that included penalties for disclosure of information about contaminated meat products in the U.S. food supply.

The original language of the bill exempted disclosure of information from the National Animal Identification Service (NAIS), a move that would violate the Open Government Act, according to the Society of Professional Journalists.

“It’s essential that citizens be made aware of dangers in their own communities, including livestock that can cause serious illness and death. To criminalize the disclosure of cow directory information is shameful. It’s essential that the public is able to trust its government, and it’s essential we can trust what we eat,” said David Cuillier, chairman of the SPJ Freedom of Information committee, in an SPJ news release.

If the original bill had passed, it would have allowed the U.S. Secretary of Agriculture to decide if and when to disclose NAIS information and to whom, including foreign governments, but it would have forbidden the Secretary from disclosing information to the general public.

Committee reviews plan to give foster children access to personal records

KISSIMMEE – The Department of Children & Families proposed a plan to the Commission on Open Government advocating more access for foster children to their personal histories.

The plan would allow foster children to more easily access information from their foster histories, including previous home addresses, birth and health records.

Currently, such records are difficult to access by foster parents and children.

Records requests are often denied in order to protect children from painful personal histories and public records laws that are murky, said Andrea Moore, executive director of the non-profit

advocacy group Florida’s Children First, according to the *Vero Beach Press Journal*.

But these obstacles may discourage potential foster parents.

“[I]t will not only help out the kids, which is primarily where our mission is, but it will also help us attract and not discourage people from becoming foster parents,” DCF Secretary Bob Butterworth told the *Press Journal*.

The Commission on Open Government will review the proposal and send its recommendations to the governor and the Florida Legislature for consideration.

Governor establishes Bill of Rights and Web initiatives

TALLAHASSEE – Gov. Charlie Crist established two new initiatives to improve public access to government records.

The governor established an Open Government Bill of Rights in an executive order, directing state agencies to treat citizens with courtesy and respect when responding to records requests.

Following a recommendation from the Commission on Open Government, the executive order also directs agencies to improve the public’s access to important information online, including the request-making process, organizational charts, budget data and contracts with vendors and service providers.

The order also bars agencies from demanding that record requests be in writing.

“These initiatives are just one more way we are working to create a more open government for the people of Florida, our boss. By creating a culture that fosters

public trust and confidence, we become a government truly in the sunshine,” Gov. Crist said in a press release.

The Open Government Bill of Rights also requires officials to respond to records requests promptly and bars them from charging more than the law allows for copies.

The Internet initiative offers direct links from agency home pages to a Web site that provides information on open government laws and how to make records requests. State agency open government links are available at http://www.flgov.com/og_agency_ogpages.

In addition to the Open Government Bill of Rights, Gov. Crist also established a new partnership between the state of Florida and Google Inc., enabling citizens to use search engines such as Google to locate government programs and services.

“This public-private partnership is an innovative way to improve the accessibility

of state information for all Floridians. By empowering Floridians with the tools they need for easier access to state agency Web sites, we are allowing them to truly take ownership of state government,” said Gov. Crist in a press release.

Florida joins five other states in its partnership with Google to improve accessibility of its online services. The Web site improvements will be implemented at no cost to Floridians.

“Every day, millions of people turn to search engines to find the authoritative and trustworthy information provided by their government, and it is our mission to help them connect with this content,” said Elliot Schrage, vice president of global communications and public affairs at Google.

Information on how a government agency can make it easier to search for hard-to-find public information is available at <http://www.google.com/publicsector>.

Judge rules White House logs public

WASHINGTON, D.C. – A federal judge ruled that White House visitor logs are public records, rejecting the Bush Administration’s efforts to avoid release of records that show visits by prominent religious conservatives, according to *The Associated Press*.

The Secret Service, which is subject to the Freedom of Information Act, is responsible for generating the logs that record who visits the White House. But the Bush Administration ordered that it would maintain custody of the logs, treating them as presidential records, which are not public.

White House and Justice Department spokesmen said lawyers were reviewing the decision. The Bush Administration is expected to appeal the ruling.

In a separate but related case, a watchdog group sought to declare illegal the Bush Administration’s policy under which the Secret Service destroys its own copies of the visitor logs once the original records are turned over to the White House.

The Bush Administration sought to have this case moved to a judge appointed by President Bush. But the lawsuit, which will be consolidated with a similar case, will be reviewed by Judge Lamberth, who ordered the White House logs public.

Representative charged for records violation, pending investigation

PUNTA GORDA – Rep. Paige Kreegel, R-Punta Gorda, was accused of violating state election and open records laws in a formal complaint filed with House Speaker Marco Rubio.

The complaint against Kreegel was filed by Lehigh resident Robert J. Anderson.

Kreegel was accused of violating the law by instructing his staff to spread negative information about his opponent, as well as abusing his public position in violation of House rules, according to the *St. Petersburg Times*.

The accusations stem from actions of Barry Millman, a Kreegel aide who resigned in November 2007 after an internal investigation found that he had violated the state’s Public Records Law, lied to a constituent and used state computers to research the background of Kreegel’s 2008 GOP opponent Keith Richter.

House Rules Committee Chairman David Rivera, R-Miami, will review the complaint and determine whether to forward it to a special panel of members for a full investigation.

Judge orders gag in murder trial

MIAMI-DADE COUNTY – A gag order will prohibit the four men accused of killing Washington Redskins safety Sean Taylor from speaking to the media about specifics in the case or their statements to police.

Circuit Judge Dennis Murphy also ordered the attorneys for the defendants, prosecutors, police, Taylor’s family and his former attorney, Richard Sharpstein, not to talk to the media.

Murphy said he issued the order out of concern that publicity would jeopardize the defendants’ right to a fair trial, according to *The Miami Herald*.

The judge referred specifically to a *Herald* story, in which counsel for one of the defendants discussed where the murder

weapon had been allegedly discarded.

“And it’s not just Dade County. My mother sent me a clip about this case from a little paper in North Carolina,” Murphy said, according to *The Herald*.

Although the prosecutors, defense attorneys, defendants’ families, and Sharpstein all agreed to the gag order, *The Herald*, CNN and WPLG/Channel 10 opposed the order.

“It’s a big step for the court to tell people they can’t speak to anyone about a case. It’s a pretty drastic step,” said attorney Scott Ponce, who represented *The Herald* and CNN.

Attorneys for the media specifically opposed redactions from testimony beyond what was allowed by law.

COURTS

Judge rules school district must release retirement program records

WEST PALM BEACH – The names of Palm Beach County School Board employees enrolled in the deferred retirement option program (DROP) are public records, according to a circuit judge.

In a suit filed by *The Palm Beach Post* against the Palm Beach County School Board, *The Post* alleged that the district illegally withheld a wide variety of information, including the names of DROP participants, retirement-age workers who are allowed to continue working for up to five years.

Circuit Judge Elizabeth Maass ruled in favor of *The Post*, rejecting the school district’s argument that school board

employees who have enrolled in DROP are retired even though they continue to work for the school district.

The names of retired school board employees enrolled in the program are confidential.

Following the judge’s ruling, district officials have agreed to provide many of the requested records, but other issues raised in the suit remain unresolved.

A hearing is pending to review the district’s interpretation of a 10-day notice requirement for reporters who want to review employees’ personnel files and whether special service fees that have reached into the tens of thousands of dollars have been unreasonable.

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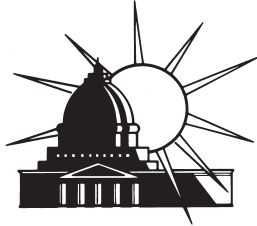
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Committee on Access to Court Records seeks input

Privacy is under attack in a world where the most sensitive information is maintained on electronic databases. The issue of privacy is particularly acute in the context of court records, where citizens are compelled to include confidential information about their personal lives, health, finances and families. A certain “practical obscurity” may have hidden this information when court records were only available at the courthouse. However, with the move towards e-filing of court documents, and the creation of electronic archives, citizens and courts are confronted with the question of how to balance the right to privacy with the right of access to public records.

Florida is famous for its Sunshine Law, requiring public access to all official meetings and all public records. Since

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By Timothy McLendon

1992, this policy of openness has been enshrined in the Florida Constitution, affirming its importance. However, the Constitution also allows the Legislature to create limited

exemptions to the public records requirement. By court rule, these exemptions also apply to court records.

Aware of the problem, the Florida Supreme Court has created a series of advisory committees to explore the issue. The first, the Committee on Privacy and Court Records, which made its report in 2005, found that the Florida Constitution probably does not require electronic access to court records, but recommended that most court records ultimately be made available online. To facilitate this goal, the Supreme Court established a successor in 2006, the Committee on Access to Court Records. This committee, which will make its final report to the Court in June 2008, is currently considering the following items:

1) **Manatee County Pilot Project.** Acting on a recommendation by the Committee on Privacy and Court Records, a pilot project was established in Manatee County to make court records available online. Working with the clerk of the court and the Florida Courts Technology Commission, the pilot project is demonstrating technological devices to redact sensitive information from court records. The goal of the second year will be to make access to Manatee County court files available online.

2) **Amendment to Court Rules.** To facilitate future electronic



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access, there will need to be amendments to rules of court. A working group of the Committee has proposed amendments to the rules of judicial administration that will allow initial screening of documents by the clerks to identify certain key exemptions from public records. Making use of an inventory of the 1000-odd exemptions compiled by a UF College of Law team, the Committee has identified certain records which are especially sensitive and also readily identifiable by reviewing clerks. However, filers will be required to identify most confidential or exempt information contained in documents they submit

to a court. The proposed amendment offers a mechanism for parties or third persons to challenge confidentiality requests using expedited court review. Importantly, the dockets describing cases and the documents filed will remain open to the public.

3) **Education of Court Users and Elimination of Unnecessary Filings.** Often the sensitive information contained in court records is extraneous to the matter at hand, or is submitted before it is required. A working group is exploring ways to reduce unnecessary filing of sensitive information. This project involved an analysis of all existing court rules. One way to reduce the amount of confidential data contained in court filings is by creation of a special form to contain most sensitive information such as social security numbers, financial data, etc. Official forms will also need to be changed, both to allow users to identify whether the filing contains confidential information, and to remove unnecessary requests for this data.

The Florida Supreme Court has embraced the concept of electronic filing of, and thus electronic access to, court records. This poses a challenge to the court system in how to balance the privacy concerns of those involved in the court system with the right of access to public records. The Committee, and ultimately the Supreme Court, seeks the involvement and input of all Floridians interested in this issue, whether they be clerks of court, members of the bar, the judiciary, or the general public on whose behalf the court system is supposed to work.

Timothy McLendon, a staff attorney at the Center for Governmental Responsibility at the University of Florida Levin College of Law, is a member of the Committee on Access to Court Records. Information is available online at http://www.flcourts.org/gen_public/stratplan/privacy.shtml.