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# THE BRECHNER REPORT

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## Appeals court: No right to speak at open meetings

TALLAHASSEE – The 1st District Court of Appeal has ruled Florida’s Open Meetings Law does not give citizens the right to speak at meetings. The Court handed down its decision in *Keesler v. Community Maritime Park Associates, Inc.* (1D09-1659), a case out of Escambia County, on March 10, less than a month after it heard oral arguments.

Byron Keesler and LeRoy Boyd sued Community

Maritime Park Associates, Inc., seeking to nullify the board’s actions. CMPA is in charge of developing a \$40 million maritime museum and waterfront park. So far, Pensacola has spent \$2.9 million on designs, permits and site preparation,

according to the *Pensacola News Journal*.

A unanimous three-judge panel found that Florida case law did not lend itself to the interpretation that an “open” meeting is one which the public has a right to speak.

“[T]he remedy Appellants are seeking in this case is more appropriately left to the legislative process or the local public officials to whom the CMPA board

members are accountable,” the court wrote.

Keesler and Boyd alleged that by failing to let the public speak at open meetings, CMPA violated the Sunshine Law. At the trial level, Escambia Circuit

Judge Frank Bell dismissed the suit in March 2009, finding that law does not require public participation.

CMPA created a public comment period before board discussion, but Keesler and Boyd’s attorney, Sharon Barnett, said that was not enough.

“That forum does not allow any meaningful participation,” Barnett said. “It isn’t really open to them. It’s something they can watch on TV or on their computer screens.”

CMPA attorney Ed Fleming, however, argued that the board would have difficulty recruiting and retaining members if meetings dragged on for hours due to public participation.

*Source: Pensacola News Journal*

**ACCESS  
MEETINGS**

## Outcry prompts lawmakers to drop 911 exemption

TALLAHASSEE – A bill that would have exempted recordings of 911 emergency calls from Florida’s Public Records Law has been abandoned after a backlash by the press and crime victims. The Florida House Governmental Affairs Policy Committee approved the bill March 10 but House Speaker Larry Cretul announced a few days later that he would not push further, citing the controversy surrounding the bill.

The proposed law allowed for transcripts of the recordings to be made available 60 days after the call. However, personal identifying information would

be redacted from the transcript and the requester would be required to pay for the cost of transcript.

Opponents of PCB GAP 10-03 contended that if approved, the bill would cripple public oversight of public safety personnel and incidents of public interest. In addition, the costs of transcription could be a barrier to public access.

Florida’s annual “Sunshine Sunday” open government awareness day occurred March 14, the day before Cretul announced he would back down

on the bill. Cretul was also criticized after revealing that the legislation was sponsored on behalf of Florida Farm

Bureau President John Hoblick, whose son died in 2009.

The bill itself cited concerns for “invasion of privacy that could result in trauma, sorrow, humiliation, or emotional injury” to 911 callers or family members. It also pointed to the possibility of third parties arriving on scene and potential harassment as reasons for the exemption.

*Source: First Amendment Foundation, www.myflsunshine.com*

**ACCESS  
RECORDS**

## AGO opinion addresses student records in meetings

TALLAHASSEE – A Florida Attorney General opinion requested by the Leon County School Board may shed light on how the Open Meetings Law and federal student privacy laws conflict.

The opinion, AGO 2010-04, addresses whether the statutory right of privacy students have in educational records creates an exemption to the Sunshine Law.

The privacy provision stems from the federal Family Educational Rights and Privacy Act (FERPA), incorporated into Florida law. Attorney General Bill McCollum’s opinion found that despite the provision, no exemption to the Sunshine Law exists.

Next, McCollum addressed whether the school board could employ procedures to protect student records being discussed in

open meetings. McCollum specifically declined to address specific procedures of the board due to a lack of statutory authority for such procedures.

However, his office “strongly” suggested the Legislature revisit the issue of whether an Open Meetings Law exemption is warranted to protect student privacy.

*Source: www.myfloridalegal.com*

## Proposal bans talks between PSC aides, utilities

TALLAHASSEE – State lawmakers are considering a law that would prohibit private conversations between staff members of the Public Service Commission and utility companies.

In 2009, PSC staffers and Florida Power & Light officials drew criticism for exchanging BlackBerry messages during FPL's request for a \$1.3 billion rate increase. FPL also invited a PSC lobbyist

to a Kentucky Derby party at the home of its vice president and encouraged its own lobbyists to call PSC staffers' cell phones, according to *The Miami Herald*.

The scandal resulted in the termination or resignation of some PSC staffers. FPL received a \$75 million rate increase.

"There's no question that FPL went beyond ethical limits," said Sen. Mike Fasano (R-New Port Richey), a sponsor

of the bill. "The way it promoted its rate case, you'd think they were running a candidate in a political campaign."

Existing law prohibits private communications between PSC commissioners and utilities.

The proposed law would include staff members who work directly for commissioners.

Source: *The Miami Herald*

## Former city attorney sues Jacksonville for records

JACKSONVILLE – A former city attorney is suing the Jacksonville Transportation Authority (JTA) over an October public records request he contends was not filled.

Tracey Arpen's suit stems from a request for records related to the

JTA's lobbying of the Jacksonville City Council to amend the city's law banning billboards.

JTA sought to build more bus shelters and the new sign law will allow it to sell advertising space on the shelters.

Arpen, an advocate of the existing

sign law, argues that the entire law could be challenged by a sign company who doesn't win a contract with JTA. City attorneys dispute that assertion.

JTA had no comment on the suit, according to the *Florida Times-Union*.

Source: *Florida Times-Union*

## Tampa airport struggles with Sunshine law

TAMPA – The Hillsborough Aviation Authority has had to redo two meetings in order to comply with the Sunshine Law. The meetings, originally behind closed doors, involved almost \$20 million in public funds.

A bid selection committee meeting, held for the second time on Feb. 26, was described by an authority attorney as an "open independent staff evaluation meeting" where the "public is not allowed to participate," but may observe, according to WTSP-TV/10connects.com. At the first version

of that meeting, the committee selected its top choice for an \$11.6 million program.

The second do-over meeting concerned an \$8.1 million project. 10 Connects, a CBS affiliate in Tampa, has filed a public records request to determine if any other meetings were held privately.

Source: *WTSP (10connects.com)*

## ACCESS MEETINGS

## Online physician records lag months, years behind arrests

TALLAHASSEE – Florida doctors could be sitting in federal prison but still have a profile showing a "clear and active" medical license on the Department of Health Web site, according to *The Miami Herald*.

The newspaper cited one example of a physician who is in prison after pleading guilty to health fraud in 2008 but is currently listed as having a clear license on the DOH site.

The mismatch is the result of DOH policy not to post information about arrests or convictions until the professional licensing board takes action. Administrative action can occur months or even years after a conviction.

The DOH cited due process concerns and time constraints in response to questioning about its policy, according to *The Herald*.

Source: *The Miami Herald*

## FIRST AMENDMENT

## Florida jails face backlash after limiting inmate mail to postcards

TAMPA – Some Florida counties are adopting new policies that restrict incoming inmate mail to postcards, according to the *Tampa Tribune*. The policy has already taken effect in Lee, Manatee and Pasco county jails.

The concept originated in Arizona, where Maricopa County Sheriff Joe Arpaio, known for his tough inmate policies such as requiring inmates to wear pink underwear, instituted a postcard policy.

Hillsborough County is currently considering the postcard restrictions.

"From a security standpoint, from an economic standpoint, it would actually make sense," said Col. Jim Previterra of the Hillsborough Sheriff's Office. Reduced manpower and less contraband are predicted results of the restriction.

Several inmates in Manatee County have filed a First Amendment lawsuit in federal court based on the postcard policy, citing the free speech rights of not only the inmates but their families as well. Attorneys have been appointed for the inmates.

Source: *Tampa Tribune*

## Review spurs use of forms to seal civil cases

LAKELAND – A review of sealed civil cases by *The Ledger (Lakeland)* reveals that many cases are sealed without citing justification, despite 2007 Florida Supreme Court rules to the contrary. As a result, judges in the 10th Judicial Circuit (consisting of Hardee, Highlands and Polk counties) have chosen to use standardized forms to ensure proper sealing of records.

Polk County Clerk of Court Richard Weiss raised concerns about sealing procedures last year. For example, a *Ledger* review of cases found that between April 2007, when new rules were instituted, and October 2009, more than half of cases sealed items that were likely already confidential under Florida law. Orders in 19 cases did not cite reasons for sealing.

The new forms are designed to ensure that reasons for sealing are clearly stated.

The 2007 change in rules only applied to civil cases. The Florida Supreme Court is still considering sealing rules for criminal and appellate cases.

Source: *The Ledger*; Reporters Committee for Freedom of the Press

## National litigation fund gives first awards to Florida FOI activists

SEBRING – The first awards of a \$400 million grant from the Knight Foundation Freedom for Information Fund will go toward open government litigation in Florida.

In Sebring, citizen watchdog Capt. Preston H. Colby received a \$3,000 grant to assist with filing fees, deposition costs and other expenses related to his suit against the Highlands County Commission.

Colby, who represents himself in the suit, seeks handwritten notes used by the county administrator and a county commissioner in a public meeting. No judgment has been issued in Colby's suit, which was recently tried.

The county argues that the notes are not public records because they were never transcribed and it was not the intent of county officials that the notes would be public records, according to the National Freedom of Information

Coalition (NFOIC). NFOIC administers the grants.

"I am very pleased to be the first pro se litigator getting the grant," Colby told *The News Sun* (Sebring). "There needs to be a lot more of it. It does help me bring this case and others before a court."

The other award will help two citizens groups defray costs in their legal challenge against Sarasota County and the City of Sarasota in connection with negotiations for a spring training deal with the Baltimore Orioles.

That suit centers on e-mail correspondence allegedly in violation of Florida's open government laws.

NFOIC member coalitions like the First Amendment Foundation submit grant applications to the NFOIC.

Source: *The News Sun* (Sebring), *National Freedom of Information Coalition*

## FIRST AMENDMENT CONTINUED

## Man challenges law prohibiting publication of officer information

TALLAHASSEE – A Tallahassee man is challenging a 40-year-old law prohibiting malicious publication of a law enforcement officer's home address or telephone number. Robert Brayshaw was arrested in 2008 after he posted the home address and telephone number of a Tallahassee police officer on the Web site Ratemycop.com.

Brayshaw found officer Annette Garrett's information on the Internet and posted it, along with critical comments. He was arrested and prosecuted under Florida Statute Section 843.17, which prohibits publishing officer information. The case was dismissed on other procedural grounds, according to the *Tallahassee Democrat*.

The law has never been challenged, according to ACLU of Florida legal director Randall Marshall. The ACLU of Florida is representing Brayshaw.

Defendants in the suit are the City

of Tallahassee and State Attorney Willie Meggs.

Brayshaw seeks to have the law declared unconstitutional and in violation of his free speech rights.

The state argues that while Brayshaw is permitted to criticize Garrett, the publication of her contact information is not core political speech. Florida Attorney General Special Counsel George Waas, who represents the defendants, also argued that the law is aimed at preventing intimidation of officers and further, that such contact information is not newsworthy.

Brayshaw's attorneys argue that the existing threat of prosecution chills his free speech rights and amounts to viewpoint discrimination. They also contend that newsworthiness is not the test for constitutionality and that Brayshaw's posting was not threatening.

Source: *Tallahassee Democrat*

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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.brechner.org>  
e-mail: [brechnerreport@jou.ufl.edu](mailto:brechnerreport@jou.ufl.edu)

Sandra F. Chance, J.D., Exec. Director/Exec. Editor  
Christina M. Locke, Editor  
Alana Kolifrath, Production Coordinator

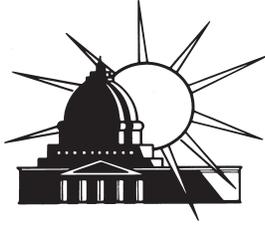
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University of Florida  
Brechner Center for Freedom of Information  
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## Rule change targets falsification of criminal records

Fiction is typically written about Florida's courts, not by them. But for years, some judges and prosecutors quietly fictionalized the official court record to cover up the felony convictions of informants – and they did it with impunity.

Florida makes it a crime for anyone, including a judge, to alter or falsify court records or proceedings. If the law isn't clear enough, the Florida Supreme Court made it explicit on March 18 in a unanimous decision that forbids falsifying criminal court records.

The ruling, part of a sweeping revision of the code that governs public access to state court records, also extended the justices' three-year-old ban on hiding civil court cases on a secret docket to the criminal courts.

"It's a clear victory for the public," said Miami First

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Back Page**

By *Dan Christensen*

Amendment attorney Thomas Julin. "It ensures we're not going to have falsified records in the public court files that are misleading to the public."

Patrick Danner and I were *Miami Herald* reporters in November 2006 when we broke the story that judges and prosecutors in Miami-Dade had altered court dockets and case files to shield police informants from scrutiny.

Miami-Dade State Attorney Katherine Fernandez Rundle's chief assistant, Jose Arrojo, told us that false dockets were routinely used in his county to protect informants.

"This is an established practice in this circuit for many, many years and we are comfortable that the rules of judicial administration allow for this," Arrojo said.

But Florida's most experienced legal minds had no idea it was happening. "I've never heard of such a thing," former Florida Chief Justice Gerald Kogan told me at the time the story was published. Kogan is a former criminal court judge and prosecutor in Miami-Dade.

Those *Miami Herald* stories by Danner and I reported how hundreds of criminal and civil cases, often divorces and lawsuits, were hidden on a secret docket in Broward and elsewhere. The stories led to the court's 2007 prohibition of secret dockets in civil cases.

The high court's new amendments to Florida's rules of judicial



*Dan Christensen*

administration seek to strike a balance between the public's right to access court records with the need to protect certain confidential records. "The amendments also bring our court system closer to providing the public with electronic access to court records," the 32-page decision says.

The new rules identify 19 types of so-called "Type I" information, like adoption records and social security numbers, which clerks must automatically designate as confidential. Lawyers and others are obliged to tell the clerk when such confidential information is in the

papers they file. Those procedures take effect Oct. 1. The rest of the decision takes effect immediately. A judge will decide whether to keep secret sensitive material that's not automatically confidential – "Type II" information.

New rules in civil cases provide for expedited hearings and rulings, as well as sanctions against those who act in "bad-faith" when they seek to hide or seal information. The justices said they set the rules so courts would "narrowly apply" certain restrictive procedures established to decide what should be kept secret. Among other things, the rules allow secrecy "to prevent a serious and imminent threat," protect a compelling government interest, or avoid injury to an innocent.

Hearings on motions requesting confidentiality must be held in open court within 15 days, although judges retain the authority to close "all or part" of a hearing. Judges must rule within 10 days.

The justices also imposed a 120 day time-limit on how long information made secret under can remain hidden. But the court also allowed for multiple 60 day extensions, if justified.

The high court's decision lights the future path to public access in Florida's courts.

Still, the public should beware. It does not fill the gaps and cracks in the public record that have accumulated over the years.

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*Dan Christensen is the first two-time winner of the Brechner Award. He was recognized in 2004 for his series on secrecy in the federal courts and in 2007 for stories on the use of secret and false dockets in Florida's courts. He is the founding editor of BrowardBulldog.org, an independent, not for profit regional news site in South Florida.*