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# THE BRECHNER REPORT

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## Sarasota Sunshine suit also alleges bid favoritism

SARASOTA COUNTY — Two citizen groups suing the city and county of Sarasota over alleged open government violations in connection with a \$31.2 million baseball stadium deal have added a new charge to their suit: that a county official influenced the bidding process. E-mails produced as a result of the open government suit prompted the new allegations.

Citizens for Sunshine and Sarasota Citizens for Responsible Government allege that the Chicago-based firm International Facilities Group (IFG) helped draft the bid specifications for

a stadium renovation project before the competitive bidding process started.

The e-mails were obtained after a fight for access to the computer of sports consultant Dan Barrett, hired to help bring the Baltimore Orioles to Sarasota. Barrett initially said many e-mails related to the project were lost due to computer problems, but an analysis of the damaged computer revealed e-mails from both Barrett and County Director of Community Services Larry Arnold to IFG.

IFG eventually won the \$500,000 contract. Arnold, who served on the committee that awarded the contract,

allegedly has a personal tie to IFG. The e-mails include one from Barrett to IFG asking if it had “any specific language or requirements that could be included in an RFP that would differentiate you guys from others,” according to the *Sarasota Herald-Tribune*.

Assistant County Administrator Dave Bullock told the *Herald-Tribune* that the bid specifications were drawn from similar contracts used in other states.

The president of the firm whose bid came in just behind IFG, Rick Fawley of Fawley Bryant Architects, said his business spent \$40,000 to bid on the job.

Source: *Sarasota Herald-Tribune*

### ETHICS

## Survey: Agencies don't have e-mail storage policies

NAPLES — More than a dozen sheriff's offices surveyed about their e-mail storage policies don't have one, according to the *Naples Daily News*.

The survey of 64 sheriff's offices and one police department also revealed problems with those who do have storage policies.

Difficulties of storage and sorting through thousands of e-mails were among the problems voiced by the sheriff's offices. There also seemed to be confusion about whether servers are storing e-mails and how long they must be stored.

The Lee Sheriff's Office, for example, did not have an e-mail retention system until January 2010, something the current sheriff said had been an issue for many years prior to his arrival. The agency used forfeiture funds to purchase an archive system, which cost \$129,000.

Central archiving systems that store incoming and outgoing e-mails across an agency start at around \$70,000, Bill Tolson, author of the book *Email Archiving for Dummies*, told the *Daily News*.

“E-mail has really gone from being a

novelty to being, in most cases, in most organizations as well as government, probably the most important piece of infrastructure they have in their computer systems,” Tolson said.

Many agencies contacted by the *Daily News* complained that there was not enough funding to implement storage funds.

Tolson said judges are not usually sympathetic to agencies who use cost as an excuse not to comply with public records laws.

Source: *Naples Daily News*

### ACCESS RECORDS

## Board members' break comments draw criticism

SARASOTA — A discussion between two Civil Service Board members during a break from a public meeting landed both in hot water with the city.

A city employee allegedly overheard volunteer board members Dan Major and Frederic Bigio discussing the fired police officer whose appeal was being heard by the board.

City officials accused the pair of violating the Sunshine Law and moved

to recuse them from the board during the meeting. The city employee who overheard them then testified at the civil service board hearing, saying that Bigio said he “would have done the same thing.”

Former police officer Christopher Childers was fired from the Sarasota Police Department after surveillance video showed him kicking a handcuffed man to the ground. Childers had appealed his

termination to the board.

The board declined to recuse Bigio. It did however, recuse Major, based on his comment “I think we've seen enough to go ahead and decide this case,” made during the hearing. Major denied any bias.

“We did not think we were violating anything by sitting there in open chambers,” Major said of his chat with Bigio.

Source: *Sarasota Herald-Tribune*

### ACCESS MEETINGS

## City's FOIA suit draws Sunshine accusations

VALPARAISO — The city of Valparaiso signed a resolution that it hopes will put an end to allegations that it violated the Sunshine Law when it filed suit against the Air Force, according to the *Northwest Florida Daily News* (Fort Walton Beach). Valparaiso sued the Air Force under the Freedom of Information Act (FOIA) due to its concerns about noise from new jets coming to Eglin Air Force Base. It also filed suit challenging the Air Force's decision to beddown the F-35 Joint Strike Fighter at Eglin.

Valparaiso resident Anthony Bradley

sued the city, alleging that the decisions to sue the Air Force were not made at public meetings. Okaloosa County (wherein Valparaiso is located) filed a similar Sunshine suit against the city.

Valparaiso has settled the FOIA lawsuit, the beddown suit and the Okaloosa County Sunshine Suit. Bradley's suit remains pending, and the city's resolution unanimously ratifies its previous decisions related to the lawsuits against the Air Force.

Bradley's attorney, Mike Chesser, told the *Daily News* that while he understands

the effort, the violations still occurred and his client's lawsuit can proceed.

"To allow this sort of action—a resolution by the commission absolving the commission of any violation of law—would be to render the Sunshine law and public records law. . . absolutely meaningless," First Amendment Foundation President Barbara Petersen told the *Daily News*.

Okaloosa County denied a request for attorney's fees of \$61,000 from Valparaiso related to defending the Sunshine suit.

Source: *Northwest Florida Daily News*

## Newspaper questions hospital meeting ID policy

MIAMI — A hospital board's requirement of identification prior to attending a public meeting is under fire. Jackson Health System in Miami is governed by the Public Health Trust, which oversees the \$1.9 billion per year operation. The Public Health Trust holds all of its meetings inside its hospitals. Jackson requires all who enter its facilities to show a driver's license. Visitors then receive IDs to place on their clothing.

Further, in addition to presenting a

driver's license, a *Miami Herald* reporter was escorted to recent meetings by security, according to the newspaper. *The Herald* has a pending records request with Jackson to determine if security is called to escort all journalists.

Adam Taylor, spokesperson for Jackson Health System, said that it was protocol for all journalists to be escorted inside the hospital to ensure patient privacy. Former Trust Chairman Michael Kosnitzky told *The Herald* that there are

legitimate concerns about security and patient privacy and that if the meetings were moved outside the hospitals, costs would increase substantially.

Florida's Sunshine Law does not require identification prior to entering a public meeting. A 2005 Attorney General Opinion stated that a city could not require attendees of public meetings to present ID even if the meeting facilities housed "sensitive documents."

Source: *The Miami Herald*

## ACCESS RECORDS CONTINUED

## Residents sue to keep e-mail addresses private

MIAMI LAKES — Two residents of Miami Lakes have filed a lawsuit asking a judge to keep their e-mail addresses private. Lynn Matos and Jack McCall submitted their e-mail addresses to Miami Lakes Mayor Michael Pizzi in order to receive updates on community activities.

Matos and McCall allege that they did not consent to disclosure of their e-mail addresses and feared the potential

for harassment or identity theft if the addresses were made public. They contend that even if the content of the e-mail itself is a public record, the blind carbon copy list is not, according to *The Miami Herald*.

A citizen activist and town council member have requested the e-mail addresses but have been denied. Town attorney Gonzalo Dorta has said there

are conflicting legal opinions and advised against disclosure, according to *The Herald*.

A 2007 opinion by the Florida Attorney General (2007-14) noted that "[t]he fact that the e-mail was sent to an undisclosed or blind recipient does not remove the email or the e-mail addresses contained therein from the public records law."

Source: *The Miami Herald*

## City commissioner's computer focus of hearing

ANNA MARIA ISLAND — A city commissioner in Anna Maria Island is at the center of both a recall petition and a lawsuit seeking his e-mail communications. Commissioner Harry Stoltzfus has already turned over thousands of pages of e-mails to the city clerk, according to the *Bradenton Herald*.

But Michael Barfield and his attorney recently asked a circuit judge to grant their request to capture images of the hard drives of Stoltzfus' computer and other

electronic devices. Circuit Judge Stephen L. Dakin, citing time constraints and an initial misunderstanding of the request, suggested Barfield request a hearing from the judge assigned to the case, according to *The Anna Maria Island Sun*.

"When you delete a file, it doesn't go away," Barfield's attorney, Valerie Fernandez, told Judge Dakin. "It's still there on your hard drive somewhere, but the more you use the computer, the more likely that the file will be over-written and

then lost forever."

Stoltzfus' attorney, Richard Harrison, noted that the city requires that e-mail sent or received on private devices to be copied to the city clerk.

In a separate move, resident Bob Carter announced that he would seek a recall petition to remove Stoltzfus from office based on alleged violations of open government laws.

Source: *The Anna Maria Island Sun*, *Bradenton Herald*

## High court rejects defamation damages appeal

TALLAHASSEE — The Florida Supreme Court has denied review in a defamation case where the jury awarded \$5 million in punitive damages but found no compensatory damages. Dr. Samuel H. Sadow sued Lawnwood Medical Center, Inc. for breach of contract and slander.

At trial, the jury awarded Sadow \$1.5 million for breach of contract after Sadow assisted Lawnwood for years to open a heart surgery center in St. Lucie County

but was denied privileges at the hospital.

Sadow also received a \$5 million award for his slander claim. One hospital official said Sadow was “not qualified to perform surgery on a dog.”

The jury found zero compensatory or nominal damages but found that the slanders were intentional and malicious and therefore awarded punitive damages.

The 4<sup>th</sup> District Court of Appeal upheld the jury awards but certified a question

of great public importance to the Florida Supreme Court: “Are punitive damages of \$5,000,000 arbitrary or excessive under the Federal Constitution where the jury awarded no compensation beyond presumed nominal damages but found that defendant intentionally and maliciously harmed plaintiff by slanders per se?”

Two weeks later, the Florida Supreme Court declined to review the case.

Source: *Lawnwood v. Sadow*

## School board chair objects to image on YouTube

CAPE CORAL — A YouTube video about a town forum on education issues, posted by a candidate for the Lee County School Board, drew a strong reaction from the Board Chairman.

Don Armstrong is running for the Board, and he included in his YouTube advertisement a photo of Chairman Steve Teuber, noting that Teuber was invited to the forum. Teuber, an attorney, objected to the use of his name and photo without permission. In a letter to Armstrong, Teuber demanded that his

name and photo be removed from the YouTube video and a related e-mail.

Teuber argued that the use of his name and likeness violated Florida law

### PRIVACY

because it was a commercial exploitation of his identity

for “trade, commercial, or advertising purposes.” Teuber also demanded a retraction notice.

“All I ask is that he runs his campaign and not use me in it,” Teuber told the *Cape*

*Coral Daily Breeze*. “Don’t try to include me or imply to people that I am going to attend any of his functions.”

Armstrong told the *Daily Breeze* that he would not be taking the video down, and as of April 30 it was still on YouTube, with 198 views. Media attorney Deanna Shullman, whose firm litigated the case cited by Teuber, told the *Daily Breeze* that the holding only extended to promotions of products or services, not political advertising.

Source: *Cape Coral Daily Breeze*

## Florida suit receives Knight FOI litigation grant

BRADENTON – The Knight FOI Fund has awarded a \$15,000 grant to defray costs in an open government suit against a Bradenton mobile home community. Two sisters filed suit against the Trailer Estates Park and Recreation District, a mobile home park converted into a “Special

District” form of government.

The suit alleges Public Records and Sunshine Law violations by the district and its elected, nine-member Board of Trustees. Among the violations alleged include meetings without notice, minutes or public participation; meetings held at

private homes; secret voting; and failure to produce documents.

The suit was filed in November 2008. Extensive documents are available on the Trailer Estates website, [www.trailerestates.org](http://www.trailerestates.org).

Source: *NFOIC*

## Sites shine light on state actions

TALLAHASSEE — Access to state information online is made a little easier by several initiatives, according to a recent column by Gannett Editor Paul Flemming, whose top sites include:

**transparencyflorida.gov:** This site was established by the State Senate and features comprehensive budget information, including every line item and how the money is used. The site also tracks the numbers of positions in a particular agency. The State Court System, for example, had an operating budget of \$451,674,436 and 4,325.50 jobs in the 2009-10 fiscal year, though 129.25 positions were vacant. The site launched in January.

**myfloridacfo.com/transparency:** The “Sunshine Spending” site provides

access to how state and local governments in Florida are spending money. One database tracks vendor payments from state agencies, another provides local government expenditures, and others feature statewide budget information.

**dms.myflorida.com:** The “open government” link from the Department of Management Services homepage leads to spreadsheets with logs of state aircraft information. They show who flies where, with whom and at what cost to taxpayers.

**dep.state.fl.us:** The state Department of Environmental Protection has a number of tools available through the “public access” link on its homepage. Visitors can view a map showing waste sites and sign up for e-mail alerts about sites.

Source: *Tallahassee Democrat*

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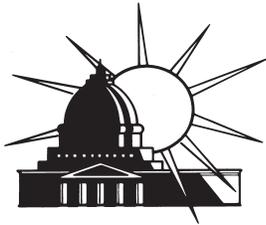
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## Old law has First Amendment flaws in Internet era

In 2007, Robert Brayshaw was investigated by a Tallahassee police officer on a trespass complaint that the State Attorney's office ultimately declined to file charges. In the course of the investigation, Brayshaw found officer Annette Garrett to be rude, abusive and unprofessional. He filed complaints against her with the Tallahassee Police Department ("TPD") but wasn't satisfied with the Department's response.

He then found another forum to voice his opinion – RateMyCop.com, a privately owned company in Los Angeles, California, that "allows registered users to leave written feedback about their interactions with police officers, and rank the officer's service based on three criteria: Professionalism, Fairness and Satisfaction." Over the course of several weeks in March and April, 2008, Brayshaw posted a series of critical

### The Back Page

By *Randall C. Marshall*

comments about Officer Garrett and, in addition to public records regarding the home she owned in Leon County, found her personal website, her Avon website and information about her attempt to adopt a child from Guatemala. Through her own postings, Officer Garrett had identified herself as a police officer with the TPD and provided personal information about herself. Brayshaw found information about Officer Garrett's marital status, home address and estimated value, cell phone number and personal e-mail address.

He posted it on RateMyCop.com. The TPD promptly opened up a criminal investigation, subpoenaed records from RateMyCop.com and Brayshaw's Internet provider, and sought his arrest for violation of a Florida statute enacted in 1972: "Any person who shall maliciously, with intent to obstruct the due execution of the law or with the intent to intimidate, hinder, or interrupt any law enforcement officer in the legal performance of his or her duties, publish or disseminate the residence address or telephone number of any law enforcement officer while designating the officer as such, without authorization of the agency which employs the officer, shall be guilty of a misdemeanor..."



*Randall C. Marshall*

The State Attorney's office prosecuted. In December 2008, after selecting a jury, the State dismissed the charge. It re-filed the charge less than two weeks later. After the State failed to comply with Florida's speedy trial requirements, the charge was dismissed with prejudice in April 2009.

Shaken by the arrest and prosecution for the publication of truthful information, and afraid to do it again, Brayshaw turned to the American Civil Liberties Union of Florida, which took his case to federal court

in September 2009, suing the City of Tallahassee and the State Attorney to have the statute declared unconstitutional and seeking damages for his arrest.

Florida has a long history of enacting laws that seek to punish or prohibit the distribution of truthful information. And they have met with the same fate – a finding that they violated the First Amendment. On April 30, 2010, Northern District of Florida Judge Richard Smoak declared the statute facially unconstitutional and enjoined its enforcement, finding that Brayshaw's postings were protected speech and that "the release of personal information, even with the intent to intimidate, is not per se a true threat" that can be constitutionally prohibited.

This determination is undoubtedly correct and leaves one wondering why the State Attorney's office initiated the prosecution to begin with. Brayshaw's posting of the personal information was unaccompanied by any suggestion that anyone do anything with the information that was already publicly available. In effect, the prosecution of Brayshaw was based upon the mere publication of the name, address and phone number of a police officer.

In this Internet era, substantial amounts of information are available to anyone with access to a computer and the time and interest to conduct exhaustive searches. Penalizing the researcher in an effort to put the genie back in the bottle does little to prevent anyone with similar time and interest from "discovering" the information afresh. Brayshaw's prosecution under this antiquated statute was akin to killing the messenger. Florida's old law, as applied to the Internet, fails a constitutional analysis.

*Randall C. Marshall is Legal Director of the ACLU of Florida.*