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# THE BRECHNER REPORT

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## Chief justice orders access to foreclosure hearings

TALLAHASSEE – Florida Supreme Court Chief Justice Charles Canady has ordered trial judges in the state to keep foreclosure hearings open. The directive comes after media groups and the American Civil Liberties Union wrote a letter to Canady describing closed hearings across the state.

Florida courts hope to clear a backlog of foreclosure hearings, which has

resulted in fast-track hearings being held in less formal settings such as judges' chambers. The Florida Press Association and other groups noted instances across the state where people were denied access to foreclosure

hearings.

In Jacksonville, a legal aid attorney who brought a reporter for *Rolling Stone* to a foreclosure proceeding was later

reprimanded by the presiding judge and threatened with contempt charges.

"The courts of Florida belong to the people of Florida," Canady wrote. "The people of Florida are entitled to know what takes place in the courts of this state. No crisis justifies the administrative suspension of the strong legal presumption that state court proceedings are open to the public."

Source: Florida Press Association

### COURTS

## Fla. plaintiffs take anonymity plea to 11th Circuit

ATLANTA – The 11<sup>th</sup> U.S. Circuit Court of Appeals is considering whether to grant the request of four women suing "Girls Gone Wild" producer Joe Francis to keep their identities secret.

The women were between the ages of 13 and 17 when they allege Francis exploited them by filming them in Panama City. They are now in their 20s and filed a civil lawsuit against Francis in 2008, using only their initials.

Federal trial Judge Richard Smoak rejected the request to file anonymously, prompting an appeal to the 11<sup>th</sup> Circuit. Judge Smoak also rejected the plaintiffs' requests to close the trial during their

testimony and prohibit the media from reporting their names.

Lawyers for the *News-Herald* (Panama City) and the Southern Newspaper Publishers Association argued that granting the women's requests would infringe on First Amendment rights of a free press and access to the courts.

Attorneys for the plaintiffs argued that keeping their names private would protect them from unnecessary embarrassment and discrimination.

"Their names are going to be everywhere" if made public, attorney Rachael Pontikes, who represents the women, said. "Whenever anyone types

any of their names on Google, they will link to these sexualized images."

Members of the three-judge panel at the 11<sup>th</sup> Circuit questioned whether keeping the plaintiffs anonymous would interfere with reporting. Media attorneys argued that reporting and fact-checking would be inhibited if the plaintiffs remained anonymous.

"The editorial process is based on access to openness," SNPA attorney Jeff Nobles told the judges. "And the purpose of fact-checking is obscured and prevented when parties come to court anonymously."

Source: Northwest Florida Daily News

## Court closes Jax police shooting board meetings

JACKSONVILLE – The 1<sup>st</sup> District Court of Appeal has ordered the Jacksonville Sheriff's Office to stop its longstanding practice of opening police shooting review meetings to the public.

The Fraternal Order of Police challenged the openness of the deliberations, citing Florida statutes that provide for confidentiality of

investigations of complaints against officers or when an officer is subject to disciplinary action.

The circuit court ruled that the administrative hearings of the Response to Resistance board were distinct

from written complaints and therefore confidentiality did not apply.

But the 1<sup>st</sup> DCA disagreed, finding no difference between a written complaint and the review panel. The court also noted that because the

officers could be subject to disciplinary action, that the confidentiality provision also applied.

Sheriff John Rutherford and the City of Jacksonville have requested a rehearing of the matter. *The Florida Times-Union* argued in favor of access at the circuit court but did not participate in the appeal.

"Public confidence in the system is always enhanced when any proceeding is open," *Times-Union* attorney George Gabel said.

But the police union argued that the issue was one of officers' rights.

"Justice has prevailed," union President Nelson Cuba said. "There are certain rights that officers have the under the [law enforcement officers'] bill of rights that the sheriff was violating," Cuba added.

Since 2007, 68 people have been shot by Jacksonville police. Of those, 35 were fatal, according *The Times-Union*.

Source: The Florida Times-Union

### ACCESS MEETINGS

## Trailer Estates prevails in open meetings lawsuit

MANATEE – A mobile home park in Manatee County has prevailed in a Sunshine lawsuit brought by two residents of the special taxing district.

Trailer Estates was designated a special taxing district in 1969 by the Florida Legislature and is subject to state open government laws. Sisters and Trailer Estates residents Mary Lou Smith and Sharon Denson alleged the park's board of trustees violated the Public Records Law

by not responding to all requests and the Open Meetings Law by discussing park business outside of public meetings.

Circuit Court Judge Janette Dunnigan, however, ruled in favor of Trailer Estates after a week-long nonjury trial. Smith and Denson filed the lawsuit in 2008.

Judge Dunnigan ruled that although "the evidence clearly shows that there is a need for improvement in the maintenance of its records," Trailer Estates did not

wrongfully deny access to its records.

On the allegation of open meetings violations, Judge Dunnigan agreed that five meetings of an executive committee without notice did in fact violate the law. However, Dunnigan determined that because the specific committee members involved were no longer serving and that the executive committee had been discontinued, the violations were cured.

Source: *Bradenton Herald*

## County nixes closed meeting on budget appeal

PASCO COUNTY – The Pasco County Commission abruptly canceled a private meeting to discuss the sheriff's budget appeal, after the county attorney advised commissioners against the closed meeting.

Commissioners wanted the private meeting to discuss Sheriff Bob White's budget appeal to the Florida governor and

cabinet. The county previously voted to hold White's budget at \$85.5 million; he wants an additional \$4 million to hire new deputies.

When commissioners scheduled a closed meeting to discuss the appeal, White objected. White's letter to commissioners declared that his budget

appeal was an administrative, not judicial, function, and therefore the exemption for attorney-client meetings would not apply.

County Attorney Jeff Steinsnyder advised commissioners to cancel the meeting, but told the *St. Petersburg Times* that they were within their rights to hold it.

Source: *St. Petersburg Times*

## Watchdog seeks exemption

PALM BEACH COUNTY – A local inspector general charged with rooting out corruption in Palm Beach County wants an open government exemption for her work. Sheryl Steckler was hired by the county last June to lead its ethics reform efforts.

Corruption problems have plagued the county, with four county commissioners resigning in as many years in order to face criminal charges related to their offices. Steckler's office audits government contracts and investigates potential wrongdoing within the government.

She wants an exemption that would allow her office's work to remain confidential until finalized by presentation to local government. "You will ruin a case...if information comes out while we are doing an investigation," Steckler said, according to *The Palm Beach Post*.

But Jim Rhea of the Florida First Amendment Foundation noted that there was a risk of information never seeing the light of day if it was never formally reported.

Source: *The Palm Beach Post*

## FOIA request shows body scans

ORLANDO – Technology website Gizmodo has published 100 images of body scans that were improperly saved by officials at a federal courthouse in Orlando.

The body scans were obtained through a Freedom of Information Act request submitted by the Electronic Privacy Information Center (EPIC).

More than 35,000 of the low-resolution images were captured during security screenings at the courthouse. The U.S. Marshals Service saved the images despite previous claims that the technology could not store the scans.

Gizmodo removed identifying features of the individuals depicted in the body scans. Gizmodo wrote that the scans

highlighted "the security limitations of not just this particular machine, but millimeter wave and x-ray backscatter body scanners operated by federal employees in our courthouses and TSA officers in airports across the country. That we can see these images today almost guarantees that others will be seeing similar images in the future."

A spokesman for TSA said that airport body image scanners do not have "the ability to save, transmit or print the images," and that after review the images are immediately deleted.

EPIC disputes the TSA's statement that the images can't be stored, citing documents obtained in another FOIA case.

Source: *USA Today*

## Callaway man challenges bill

CALLAWAY, Fla. – A former candidate for the city commission is suing the City of Callaway over what he alleges is an improper charge to inspect public records. John J. Malone filed suit in the 14<sup>th</sup> Judicial Circuit over a \$98.52 bill for a July 2007 records request.

Malone's suit against the city commission and city manager alleges they violated the Public Records Law and that he never received a response to his request for a written policy on charges for records requiring extensive resources. Florida law permits a special service charge to inspect records if "extensive" resources are required.

City Manager Judy Whitis previously wrote to Malone that the charge was authorized due to extensive clerical or supervisory assistance, according to *The News Herald* (Panama City). Another concern of the city was that Malone had an outstanding balance due for previous records requests.

City attorney Mike Duncan advised the commission that it had legal justification to deny records requests if Malone had an unpaid balance.

Source: *The News Herald*

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# THE BRECHNER CENTER

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## 2010 FREEDOM OF INFORMATION REPORT

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### Court declines case on right to speak at meetings

TALLAHASSEE – The question of whether Florida’s Open Meetings Law gives citizens the right to speak at meetings will not be answered by the Florida Supreme Court, leaving in place the 1<sup>st</sup> District Court of Appeal’s ruling that no right to speak is found in the Sunshine Law.

The Supreme Court declined review in *Keesler v. Community Maritime Park Associates*.

ACCESS  
MEETINGS

The suit was brought by two Pensacola residents who challenged Community Maritime Park Associates (CMPA), which oversees a public park project in the Panhandle, for not allowing citizens to speak at meetings.

A trial court judge dismissed the suit in 2009, ruling that while the law guarantees a right to attend meetings, it does not confer a right to speak. The 1<sup>st</sup> District Court of Appeal agreed. The

decision now stands unless another District Court of Appeal rules differently or the Supreme Court weighs in on the issue.

“For the first time in more than 40 years in Florida, the courts have declined to construe the law broadly in the public’s interest,” attorney Sharon Barnett, who represents the citizens, said. “This is a radical shift in Sunshine Law jurisprudence.”

CMPA now allows public comment.  
*Source: Pensacola News-Journal*

### Wauchula city commissioners reach plea deal

BARTOW – The entire Wauchula City Commission has reached a plea agreement after the seven commissioners were charged with violating the Open Meetings Law. The charges relate to two private meetings on Sept. 14, 2009 and March 1, 2010.

Six of the commissioners, Jerry Conerly, Daniel Graham, Delois

Johnson, Valentine Patarini, David Royal and Yeavone Spieth, each face two misdemeanor counts of intentionally violating the Sunshine Law. Commissioner Clarence Bolin attended one meeting and only faced one count.

Each commissioner pleaded no contest to a single count of violating the Open Meetings Law and was ordered to pay

\$325 for fines and court costs as part of their plea agreement. Royal, the mayor, must also pay \$500 for prosecution costs; the remaining members must each pay \$300 for prosecution costs.

Adjudication of guilt was withheld. Each charge carried a maximum penalty of up to 60 days in jail and a \$500 fine.

*Source: The Ledger (Lakeland)*

### Supreme Court rules no violation in Orioles deal

SARASOTA – The Florida Supreme Court has denied an appeal by citizens groups who claim that Sarasota County officials broke the Open Meetings Law while negotiating a spring training deal with the Baltimore Orioles.

Sarasota Citizens for Responsible Government and Citizens for Sunshine sued the county and city in February, alleging Sunshine Law violations occurred during the process of negotiating the \$31.2 million deal.

As part of the spring training plan, up to \$28 million in bonds were to be issued to pay for renovations to a baseball stadium.

A trial in July resulted in a loss for the citizens groups, who wanted the deal invalidated. Circuit Judge Robert

Bennett Jr. validated the bonds and ruled that county staff who negotiated with the Orioles were not subject to the Sunshine Law.

Bennett found that while some e-mail exchanges between county commissioners may have violated the Sunshine Law, any issues were cured by subsequent open meetings.

The Florida Supreme Court affirmed Bennett’s ruling, validating the bonds and finding that county staffers who negotiated the specifics of the deal were not an advisory committee but “only served an informational role,” according to the opinion.

A related but separate public records lawsuit against Sarasota County Commissioner Joe Barbetta was later

settled for \$5,000 in attorney’s fees and costs. Sarasota Citizens for Responsible Government and Citizens for Sunshine alleged that Barbetta didn’t fully comply with a public records request.

Neither party will have to admit fault, according to the settlement.

The citizens groups filed the suit against Barbetta after they asked to see county-related e-mails from personal and county accounts, claiming he didn’t fully respond.

Barbetta contended that he was not a proper defendant and that the request was given to the county’s public records custodian rather than to him personally.

*Source: Sarasota Herald-Tribune, Florida Supreme Court Case No. SC10-1647*

## Six new open government exemptions passed

TALLAHASSEE – The following is a summary of bills pertaining to public records and open meetings introduced during the 2010 legislative session. Chief sponsors of the bills are indicated in parentheses at the end of the summaries. Copies of the legislation in full are available at the Florida Legislature’s website ([www.leg.state.fl.us](http://www.leg.state.fl.us)).

*SB=Senate Bill; HB=House Bill; CS=Committee Substitute.*

*The following six bills create new exemptions to the state Public Records and Open Meetings laws.*

**CS/SB 312 Home Addresses – Public Defenders:** Creates an exemption to the Public Records Law for home addresses, telephone numbers and photos of current or former public defenders. The exemption also applies to criminal conflict and civil regional counsel. Home addresses, phone numbers and workplaces of spouses and children are also exempted, as are names and locations of schools or daycares attended by their children. (Jones, R-Seminole).

**CS/HB 393 Public Transit Providers:** Creates an exemption to the Public Records Law for personal identifying information held by a public transit provider for the purposes of prepaid fares. (Bovo, R-Hialeah).

**CS/HB 551 County Conduct Complaints:** Expands the exemption for complaints and records relating to investigations by the Ethics Commission to include records held by counties and cities with local investigatory processes. This expansion of Section 112.324, Fla. Stat. applies until a probable cause determination is made, the complaint is dismissed or the accused person requests disclosure. (Eisnaugle, R-Orlando).

**CS/HB 1059 DFS – Examination Techniques & Procedures:** Creates an exemption to the Public Records Law for information revealing examination techniques or procedures utilized by the Office of Financial Regulation, defined as “methods, processes, and guidelines used to evaluate regulatory compliance and to collect and analyze data, records, and testimony for the purpose of documenting” legal or rule violations. (Domino, R-Juno Beach).

**HB 7017 Credit Histories and Credit Scores:** Exempts credit histories and scores of mortgage broker licensees contained in records of the Office of

Financial Regulation. (Workman, R-Melbourne).

**HB 7079 Voter Registration Records:** Renews exemption for the Social Security number, driver’s license number, and Florida identification number of a voter registration applicant or a voter. Prohibits copying voter registration applications and signatures. Expanded to exempt declinations to register, information related to where voter registered or update information. Also creates an exemption for names, addresses and phone numbers of people who reasonably believe they are being stalked and whose names are held by the Florida Attorney General’s Office. (H. Governmental Affairs Policy Committee).

*The following 17 exemptions were reenacted in 2010 under the Open Government Sunset Review Act (OGSR).*

**SB 1678 Moffitt Cancer Center & Research Institute:** Exemption for proprietary confidential business information relating to methods of manufacture or production, potential trade secrets, potentially patentable material or proprietary information received, generated, ascertained or discovered during the course of research by the Center.

**HB 7079 Voter Registration Records:** (see summary above).

**HB 7085 Commission on Ethics and Public Trust:** Exemption for complaints and records relating to preliminary investigation of the Commission on Ethics or Commission on Ethics and Public Trust established by a municipality.

**HB7087 Home Addresses – Guardians ad Litem:** Exemption for addresses, phone numbers, places of employment and photos of current or former guardians ad litem; also applies to information about children and spouses under certain conditions.

**HB 7089 Florida Self-Insurers Guaranty Association:** Exemption for claims files of the Florida Self-Insurer Guaranty Association, stipulating that the records become public upon termination of all litigation and settlement of all claims arising out of the same incident. Exempts those portions of association board meetings during which exempt claims files are discussed, requiring that the closed portions be recorded and

transcribed. Finally, exempts the minutes of all closed meetings until settlement of the claim and termination of all litigation.

**HB 7091 Insurance Claim Data:** Exemption for Department of Revenue information obtained under insurance claim data exchange system where insurer voluntarily provides information about non-custodial parents with a claim against insurer who also owe child support. Information remains exempt until the department determines if a match exists.

**HB 7093 Domestic Security Oversight Council:** Exemption for portions of meetings of the Domestic

Security Oversight Council at which active criminal investigative or intelligence information is heard or discussed if the council chair announces at a public meeting the need to discuss such information and declares the specific need to close the meeting in writing. Stipulates that the entire closed session must be recorded and no portions may be off the record and limits who may attend the closed session. Exemption for audio or video recordings and any minutes or notes generated during closed meetings, until the criminal investigation is no longer active or the security system plan is no longer in use.

**HB 7111 Information Held by Guardians ad Litem:** Exemption for all information relating to the best interest of the child held by the guardian ad litem.

**HB 7113 Child Abuse Death Review Committee:** Exemption for information identifying a deceased child’s surviving siblings, family members or others living in the home of the deceased, in records held by the State Child Abuse Death Review Committee or local committees. Provides a penalty for the knowing or willful disclosure of exempt information. Exempts committee meetings where identifying information is discussed; requires recordings of closed meetings and exempts the recordings.

**HB 7115 Parental Notification Waiver Information:** Exemption for information in records held by a court that could identify a minor seeking a waiver of parental notification of abortion requirements.

– *Continued on p. 3*

LEGISLATIVE  
SESSION REPORT

# 2010 FREEDOM OF INFORMATION REPORT

## Delegation of authority common issue for AGO

TALLAHASSEE – Attorney General Bill McCollum’s office weighed in on several open government issues in 2010, ranging from discussion of student records to local inspectors general. Below are summaries of these Florida Attorney General Advisory Legal Opinions.

**Board meeting discussing student records:** Do statutory privacy protections for student records create an exemption

to the Open Meetings Law? **AGO 2010-**

**04:** No. However, school boards may want “to be mindful of the sensitivity of

the information to be discussed,” and the Legislature may want to consider whether an exemption from the Open Meetings Law is warranted to protect private student information.

**Sunshine Law and special**

**magistrates:** Does the Open Meetings Law apply to special magistrates appointed by property value adjustment boards to conduct hearings? **AGO 2010-15:** Yes. Value adjustment boards are subject to the Open Meetings Law. When boards delegate responsibilities to special magistrates, the Open Meetings Law also applies.

**Sunshine Law and private economic development council:** Are meetings of a private, nonprofit economic development council subject to the Open Meetings

Law? **AGO 2010-30:** Yes, where a government entity (in this case, a county) delegates the accomplishment of goals set out in its strategic plan to a private organization. This delegation, coupled with public funding, supports a conclusion that open government laws apply.

**Law enforcement**

**officer’s home address:** Does the exemption for a law enforcement officer home addresses apply to former home addresses as well? **AGO 2010-37:** No. Construing the Public Records Law to limit the purpose of the exemption to protect the safety of officers and their families in their residences (both primary and vacation), the AGO would not favor application of the exemption to past addresses.

**Local inspectors general and open government laws:** Do the public records and open meetings exemptions for local ethics commissions apply to a

local inspector general? **AGO 2010-39:** Yes, to the extent the inspector general is investigating complaints involving local codes of ethics. However, the exemptions would not generally apply to all investigations of the local inspector general’s office.

**Recordings of child abuse death review committees:** Are audio recordings of the State Child Abuse Death Review Committee required by law? **AGO 2010-42:** Yes, verbatim recordings of all discussion, whether during open or closed meetings, are required. Audio recordings would appear to be the most cost-effective and efficient technology to fulfill that requirement.

**Open Meetings Law and nonprofit corporation:** Are the meetings of the Solar and Energy Loan Fund of St. Lucie County, Inc. subject to the Open Meetings Law? **AGO-2010-44:** Yes. The fund is administering a grant applied for by St. Lucie County. This represents a delegation of authority from the county to the fund. In addition, public funding of the program helps lead to “the conclusion that the fund stands in the shoes of the county for this program and is subject to the open meetings law to the same extent as the county.”

## ATTORNEY GENERAL OPINIONS

## LEGISLATIVE REPORT CONTINUED

**HB 7117 Meetings – Funeral, Cemetery & Consumer Services**

**Board:** Exemption for records and meetings of the Funeral, Cemetery and Consumer Services Board. All closed meetings must be recorded; recordings are exempt from disclosure.

**HB 7119 Hurricane Loss Model:**

Exemption for trade secrets used in design and construction of hurricane loss model. Also exempts portions of meetings where trade secrets are discussed. Recording of a closed meeting must be made but is exempt from the Public Records Law.

**HB 7121 Hurricane Loss –**

**Associated Exposure Data:** Exemption for “reports of hurricane loss data and associated exposure data” specific to a particular insurance company reported to the Office of Insurance Regulation or a state university for the purpose of developing a hurricane loss projection model. Trade secrets and portions of meetings at which trade

secrets are discussed are also exempt. Requires Florida International University (responsible for public hurricane loss model) to publish report summarizing loss and associated exposure data collected from residential property insurers.

**HB 7123 Addresses – Domestic**

**Violence Victims:** Exemption for addresses and phone numbers of domestic violence victims participating in the Attorney General’s Address Confidentiality Program. Same information is also exempt when held by Division of Elections or county supervisor of elections.

**HB 7165 Domestic Violence**

**Fatality Review Team:** Exemption for information in records created by the team that would identify a domestic violence victim or children; also exempts portions of team meetings where exempt information is discussed.

**HB 7167 Commission for**

**Independent Education:** Exemption for all investigatory records held by the

Independent Education Commission in conjunction with investigations into complaints, including minutes and findings of exempt probable cause panel meetings convened in conjunction with such investigations. Stipulates that such information will be exempt for no more than 10 days after the panel makes a determination regarding probable cause. Also creates an exemption for portions of meetings of the probable cause panel at which exempt records are discussed. Now requires closed meetings be required and subject to disclosure 10 days after probable cause determination is made.

**HB 7193 Voluntary**

**Prekindergarten Education Program:** Exemption for individual records of children enrolled in the Voluntary Prekindergarten Education Program.

*Source: Florida First Amendment Foundation: [www.floridafaf.org](http://www.floridafaf.org), [www.flsenate.gov](http://www.flsenate.gov) and [www.myfloridahouse.gov](http://www.myfloridahouse.gov)*

## Court amends online access rules

TALLAHASSEE — After seven years of gathering research and recommendations, the Florida Supreme Court has amended its rules to respond to the push for online access to court records.

Under the new rules, a record is presumed open unless it fits into one of 19 exemptions. Examples of the exemptions include adoption records, grand jury records, Social Security numbers and identification of sexual abuse victims.

“The list of exemptions contained in the rule is pretty short,” media attorney Carol LoCicero told the *St. Petersburg Times*. “When you put that into the context of where we started, that is fabulous.”

While clerks of court will be responsible for independently verifying

information claimed to be exempt, those who file documents will carry most of the burden of establishing confidentiality.

Non-confidential information must be redacted rather than sealing an entire record. If a party, the media or other party challenges the designation of a record as confidential, a hearing must be held within 30 days, according to the Court.

“The goal of the comprehensive amendments is to balance the public’s constitutional right to access court records with the courts’ responsibility to protect from public access court records that are confidential,” the Court wrote in its 50-page opinion on the rule changes.

*Source: St. Petersburg Times, First Amendment Center*

## COURTS

## Judge tosses \$10M libel verdict against St. Petersburg Times

ST. PETERSBURG – A \$10 million libel verdict against the parent company of the *St. Petersburg Times* has been overturned due to a lack of evidence.

The case centered on articles appearing in the newspaper in 2003 concerning Dr. Harold L. Kennedy’s work at the Bay Pines Veterans Affairs Medical Center.

Pinellas-Pasco Circuit Judge Anthony Rondolino wrote in his two-page ruling that the evidence was “insufficient to

cross the threshold required by the First Amendment.”

Paul Tash, chairman and CEO of Times Publishing Co., said the ruling was expected. “Despite the jury’s verdict, we remained confident in the work and expected to eventually reach this result,” Tash said.

Kennedy has filed an appeal with the 2<sup>nd</sup> District Court of Appeal.

*Source: St. Petersburg Times*

## LIBEL

## Fla. Supreme Court gives OK to suit against out-of-state blogger

TALLAHASSEE – The Florida Supreme Court has ruled that non-residents can be sued for defamation if the information is accessible in Florida.

Blogger Tabatha Marshall, of Washington state, was sued by the employment firm Internet Solutions Corp. for defamation in a Florida federal court. The company claims its principal place of business as Orlando, though it is incorporated in Nevada.

Internet Solutions alleged that postings on Marshall’s consumer complaint website accused it of “phishing” for personal information online.

The federal trial court dismissed Internet Solutions’ suit for lack of

jurisdiction over Marshall.

The company appealed, and the U.S. Court of Appeals for the 11<sup>th</sup> Circuit asked the Florida Supreme Court to determine whether the postings constituted “electronic communication into Florida.”

The Court held that because the material was accessible and accessed in Florida, the suit could proceed. The Court has previously ruled that phone calls and e-mails are “electronic communications into Florida” but this is the first decision to include website postings.

The case will return to the 11<sup>th</sup> Circuit for consideration of Marshall’s constitutional arguments.

*Source: The Miami Herald*

## Brechner.org

Visit *The Brechner Center’s* website for more information about media law in Florida. You can find:

- Our Open Government Pledge, which you can pass on to your elected officials.
- How Florida lawmakers voted on open government issues.
- Sample public records request letters.
- The Citizen’s Guide.

## NCAA, FSU ordered to pay \$325K in fees

TALLAHASSEE – The National Collegiate Athletic Association (NCAA) and Florida State University (FSU) will pay a total of \$325,000 in attorney’s fees to media outlets who successfully sued for access to records in a cheating scandal. The fee award is the result of a mediation of the disputed legal fees.

The Florida Supreme Court upheld the 1<sup>st</sup> DCA’s ruling that documents related to the case, including those the NCAA kept on a password-protected website that were viewed by FSU attorneys, were public.

The NCAA eventually vacated several FSU football victories and imposed other sanctions as result of its investigation. The NCAA will pay \$260,000 of the fees, with FSU paying the remaining \$65,000.

“We hope that the attorney’s fee payment here sends a strong message to government agencies – and private entities seeking to impose secrecy,” Carol Jean LoCicero, an attorney for the media in the case, said.

“Don’t mess with public records in Florida. We will fight for open government and hand you the tab,” LoCicero said.

*Source: Orlando Sentinel*

## ACCESS RECORDS

## Judge refuses to seal Anthony jail records

ORLANDO – The judge in Casey Anthony’s capital murder trial has denied her request to keep her jail records from the public. Defense attorneys requested the closure after a South Florida appeals court ruled that personal jail records were not public records.

Judge Belvin Perry denied the defense motion by reading from the Florida constitution and statutes, both

**ACCESS RECORDS** of which establish a right of access to government information.

Anthony’s attorneys argued that phone and visitation logs as well as commissary records should be private.

“If it’s not official business of the jail, it’s not a public record,” attorney Jose Baez said. The *Orlando Sentinel* had filed a motion to block the efforts to seal the records.

Anthony, 24, is accused of murdering her daughter, Caylee. She could face the death penalty if convicted of first-degree murder. The trial is set for May.

Source: *The Palm Beach Post*

## Media wins limited access to trial

JACKSONVILLE – *The Florida Times-Union* was partially successful in its bid for access to the trial of a teen charged with driving without a license in a crash that left four teens dead and four injured. Judge Jeff Morrow initially closed the juvenile trial, keeping out members of the public, press and parties involved in civil litigation related to the crash.

Brandon Hodges, 16, was 15 when he and several friends were traveling on Interstate 295. A tire on the 1997 Ford Explorer separated, rolling the SUV.

Hodges was charged with eight felony counts of driving without a license causing death or serious injury. After a non-jury

trial, the judge found Hodges guilty of eight misdemeanor charges of driving without a license. Sentencing is scheduled for January.

*The Times-Union* was permitted one reporter in the court, to serve as a surrogate for all media outlets and the public. No cameras were permitted in the trial. *The Times-Union* live-blogged from the proceedings.

Judge Morrow initially stated that the closure was necessary “in that the child’s rehabilitation will be hindered by the presence of the public during the proceedings.”

Source: *The Florida Times-Union*

## Duckett family settles CNN suit

OCALA – The family of Melinda Duckett, the mother of a missing toddler who committed suicide shortly after an interview by Nancy Grace, has settled their lawsuit against Grace and CNN.

Duckett’s family issued an apology to CNN absolving it of any responsibility in the death. CNN established a \$200,000 trust to fund efforts to find Trenton Duckett, who still missing since his 2006 disappearance.

Duckett, 21, was interviewed by the cable television host in 2006 regarding the disappearance of her then-2-year-old son. Duckett claimed someone took her son through a bedroom window.

Grace questioned Duckett during the telephone interview, at one point asking her why she was not more forthcoming.

“What is the reason? You refuse to give even the simplest facts of where you were with your son before he went missing. It is Day 12,” Grace said during the interview.

The day after the interview, Duckett shot herself. Hours later, the interview aired. Duckett’s family then filed a wrongful death claim against Grace and CNN. Duckett’s family claimed that Grace’s “veiled accusations” that the young woman was involved in her son’s disappearance played a part in her death.

CNN argued that the lawsuit could have a chilling effect on media efforts to find missing children and that Grace was only engaging in aggressive questioning of Duckett.

Source: *Ocala Star-Banner*

### THE BRECHNER REPORT

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## FREEDOM OF INFORMATION

### High court hears Navy FOIA suit

WASHINGTON – The U.S. Supreme Court heard oral arguments in a case involving a Washington state man’s Freedom of Information Act (FOIA) lawsuit seeking maps from the Navy.

The case, *Milner v. Department of the Navy*, involves the FOIA exemption for “internal personnel rules and practices of an agency.” The government claims the exemption applies to the documents requested by Glen Milner. Milner wants maps that show what the potential damage would be if there were an explosion at the Navy’s primary ammunition dump on the

West Coast.

The ammunition dump is located on Indian Island, near Washington state’s western coast. Milner argues that people who live nearby should know if they are in potential danger.

During oral arguments, Chief Justice Roberts said that the Obama administration was asking the Court “to torture the language in FOIA.” Roberts also lamented the lengthy time it often takes to fulfill FOIA requests.

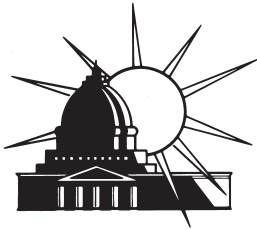
A ruling is expected before the summer.

Source: *The Associated Press*

# THE BRECHNER REPORT

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## Shield laws should turn on function, not credentials

The unprecedented growth in size, scope and popularity of the Internet has transformed the news industry. Mainstream news organizations increasingly rely on their websites to deliver content and attract readers. Nontraditional online outlets provide information about current events of public interest, prompting bloggers, citizen journalists and other Internet publishers to invoke state shield laws or the First Amendment-based reporter's privilege. This shift is forcing courts to struggle with the question of who is covered by the shield. The most recent decisions on the issue vary, indicating that it likely will be a source of debate for some time.

Generally, courts, in a line of cases dating to 1987, have answered the question of who qualifies as a journalist entitled to statutory or common-law protection by looking to the author's intent at the time of his or her information gathering. That is, most courts hold that the privilege applies to all parties engaged in the practice of compiling information for public dissemination, regardless of the type of medium they use to provide their reporting to the public.

The New Hampshire Supreme Court applied this so-called "intent" or "function" test to online publishers in May when it found that the privilege extended to a website providing information about the mortgage industry. The court rejected an argument that the website was ineligible for protection because it was neither an established media entity nor engaged in investigative reporting. Rather, the Supreme Court took note of a lower court finding that the website was a "legitimate publisher of information" and concluded that because the site "serve[d] an informative function and contribute[d] to the flow of information to the public ... [it was] a reporter for purposes of the newsgathering privilege."

Despite this trend of extending protection to online authors who perform an informative function, the New Jersey Appellate Division in April issued a potentially problematic interpretation of the New Jersey shield law, traditionally one of the strongest in the nation. In finding that the defendant, a website operator investigating the online adult entertainment industry, could not invoke the shield in relation to comments she posted on a



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pornography watchdog website, the Appellate Division adopted a series of indicia that present an alarmingly restrictive view of who qualifies as a journalist. The court provides a list of specific qualities that it said are partially necessary to demonstrate before one could qualify for protection under the shield law. This list of 12 characteristics — including a would-be invoker's proof of affiliation with a recognized news entity, proof of a fact-checking scheme, proof that he or she contacted the subjects of the story to "ascertain their version" of it, proof that the material was actually published, and

disclosure of the identities of any writers the would-be invoker hired to work for his or her online publication — makes it more difficult for anyone who is not a member of the traditional print news media to assert the shield law and, more significantly, imposes far more restrictions on journalistic practice than both the state shield law and First Amendment jurisprudence permit. (The New Jersey Supreme Court granted review of this case.)

The New Jersey Appellate Division did get one thing right, however, when it noted that "*new* media should not be confused with *news* media." While some overlap between the two may exist, certainly there are online authors who are not entitled to invoke the shield law. Indeed, the law's protection in New Jersey and elsewhere cannot extend to anyone who speaks but, rather, must be limited to a very specific type of person. Otherwise, the privilege becomes so broad that it loses its meaning.

Yet, the determination of whether a particular person qualifies for the privilege cannot be based on judicially created factors that try to fit into a framework of what the news media traditionally have been. Rather, any set of factors must conform to a definition of the media that is consistent with the constitutionally protected functions they perform, particularly in this modern era of journalism. As such, courts deciding whether a particular person is entitled to shield law protections must focus on the would-be invoker's function and intent, rather than his or her title or credentials.

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