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# THE BRECHNER REPORT

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Volume 35, Number 2 ■ A monthly report of mass media law in Florida  
Published by The Brechner Center for Freedom of Information ■ College of Journalism and Communications ■ University of Florida  
*February 2011*

## Citizens groups ordered to pay up in Sunshine suit

SARASOTA – Citizens groups who sued Sarasota County for allegedly violating open government laws while negotiating a multi-million dollar spring training deal have been ordered to pay almost \$20,000 in litigation costs after losing the suit.

Citizens for Responsible Government and Citizens for Sunshine appealed their case all the way to the

Florida Supreme Court, and while some violations were acknowledged, the county prevailed in the case. It then sought \$38,000 in litigation costs under the Florida law that authorizes recovery for prevailing parties.

The county was awarded almost \$20,000 in costs, a move Citizens for Responsible Government founder Cathy Antunes

disagrees with.

“They got their pound of flesh,” Antunes told the *Sarasota Herald-Tribune*. “It was a punitive action on their part.”

Deputy County Attorney Rick Elbrecht defended the county’s actions as common legal procedure when a party prevails in court, regardless of the nature of the case.

*Source: Sarasota Herald-Tribune*

**ACCESS  
MEETINGS**

## UF ordered to release Student Government records

GAINESVILLE – A University of Florida graduate has prevailed in his public records lawsuit against his alma mater, with a trial court ruling that he is entitled to copies of recordings of Student Government meetings.

Frank Bracco filed suit against UF in August 2009 after being denied access to copies of video and audio recordings of Student Senate meetings. Bracco maintained he was entitled to

copies of the recordings under Florida’s Public Records Law. UF argued that the recordings were protected under the federal law protecting student privacy (the Family Educational Rights and Privacy Act, or “FERPA”).

Eighth Judicial Circuit Judge Victor L. Hulslander granted a motion for summary judgment in favor of Bracco, rejecting the argument that the

recordings were student records under the meaning of FERPA. “Moreover, because the meeting itself was open, it is hardly

logical that a memorialization of it would be confidential,” Hulslander wrote in his ruling.

UF Student Government oversees a budget of approximately \$14 million.

*Source: The Independent Florida Alligator*

**ACCESS  
RECORDS**

## Gov. Scott issues ethics order, keeps Open Government office

TALLAHASSEE – Gov. Rick Scott made open government the target of one his first official acts as Florida governor. Executive Order 11-03 re-establishes the Office of Open Government first set up by then-Gov. Charlie Crist. In the order, Scott also authorized a new Code of Ethics for his office and directed his staff to review a December report of the statewide grand jury on corruption and recommend a plan for implementing the grand jury’s recommendations.

Scott’s goals for the Office of Open Government, in existence since

2007, are to “(1) facilitate Floridians’ right to know and have access to information with which they can hold government accountable, (2) establish and maintain a website providing ready access to accountability information, (3) continue to assure full and expeditious compliance with Florida’s open government and public records laws, and (4) provide training to all executive agencies under my purview on transparency and accountability.”

As of press time, Gov. Scott had not named the new staff of the Office of Open Government.

*Source: Executive Order 11-03*

## Gleason returns to AGO office

TALLAHASSEE – Attorney Pat Gleason will return to the Florida Attorney General’s Office as special counsel for open government. Gleason was formerly Gov. Charlie Crist’s legal adviser on open government and cabinet-affairs director and has been an authority on Florida’s open government laws for decades.

“Pat is a leading authority in our state on open government and public records, and I am honored to have her join my administration,” Attorney General Pam Bondi said. “We have worked together for over a decade, and I have the highest respect for her work ethic, integrity and the transparency she brings to the government process.”

*Source: Tallahassee Democrat*

## City pays fees for failed Sunshine prosecutions

CORAL SPRINGS – The city has agreed to pay \$90,000 in attorney’s fees for two commissioners accused of violating the Open Meetings Law, suspended from office but later reinstated after a judge dismissed the charges during trial.

Coral Springs City Commission members Tom Powers and Vincent Bocard were charged with misdemeanor

counts of violating the Open Meetings Law. Prosecutors alleged the pair secretly met with police union leaders to talk about city business.

After the commissioners were charged, then-Gov. Charlie Crist suspended them.

During the August 2010 trial, Broward County Judge Fred Berman threw out the charges just prior to closing arguments.

Berman cited a lack of evidence.

Crist reinstated Powers and Bocard later that month.

The \$90,000 fee was reached after a compromise between the commissioners’ attorneys, who requested a \$500 per hour rate, and the city’s expert, who recommended \$450 per hour.

*Source: South Florida Sun-Sentinel (Fort Lauderdale)*

## Riviera Beach pays \$85K in legal fees to activist

RIVIERA BEACH – The City of Riviera Beach agreed to pay \$85,000 in legal fees to activist Fane Lozman in an open meetings lawsuit. Lozman sued the city in 2007 for failing to keep written minutes of its agenda review meetings.

Until last year, the city would meet on Mondays to discuss the agenda for Wednesday meetings. Although audiotapes of the agenda review meetings were maintained, written records were not.

A trial court judge and the 4<sup>th</sup> District

Court of Appeal agreed with Lozman’s contention that failure to keep the written minutes violated Florida’s Open Meetings Law. The city unsuccessfully argued that the law did not apply to cities.

*Source: The Palm Beach Post*

## FIRST AMENDMENT

### Student settles Facebook lawsuit

PEMBROKE PINES – A student who was suspended for her Facebook comments about a teacher has reached a settlement in the First Amendment lawsuit against her high school principal.

Katie Evans, now a 20-year-old University of Florida student, was a student at Pembroke Pines Charter High School in 2007 when she made comments on the social networking site describing her English teacher as “the worst teacher I’ve ever met.”

School principal Peter Bayer suspended Evans for three days and placed the honors student in lower-level English courses. Bayer had determined that Evans was

in violation of a school cyberbullying/harassment policy.

Evans sued in federal court, alleging her First Amendment rights were violated. In February 2010, a judge ruled that Evans’ comments were constitutionally protected—they were made off campus and weren’t threatening or vulgar.

In the recent settlement, Evans’ suspension will be removed from her record and documents relating to the suspension destroyed. Evans, who was represented by the American Civil Liberties Union of Florida, will also receive \$15,000 in legal fees.

*Source: South Florida Sun-Sentinel*

### DCA strikes down adjuster ban

TALLAHASSEE – The 1<sup>st</sup> District Court of Appeal has ruled that a Florida law prohibiting public adjusters from soliciting property owners 48 hours after an event such as a hurricane is unconstitutional under the First Amendment. A public adjuster, for a fee, helps people negotiate insurance claims.

In 2008, the Florida Legislature passed a law prohibiting solicitation within the first 48 hours of an event. The law was enacted in response to concerns about unethical behavior by some public adjusters.

Public adjuster Frederick W. Kortum

Jr. sued the state, seeking a declaration that the law was unconstitutional. The 1<sup>st</sup> District Court of Appeal agreed with Kortum, finding that his First Amendment right to engage in commercial speech was violated by the broad sweep of the law.

“The [state] has not demonstrated that prohibiting property owners from receiving any information from public adjusters for a period of 48 hours is justified by the possibility that some public adjuster may unduly pressure traumatized victims or otherwise engage in unethical or unprofessional behavior,” the court wrote.

*Source: Kortum v. Sink (1st DCA)*

### SeaWorld death records sealed

ORLANDO – Video and photographs related to the death of a SeaWorld trainer killed after being attacked by a whale will be permanently sealed from public view.

The family of Dawn Brancheau, who died during a Feb. 24, 2010 show at the Orlando theme park, sued the Orange County Sheriff’s Office and the Medical Examiner to prevent them from releasing photos or videos related to the incident.

The media argued for access to what they contended were public records, and the case was set for mediation last summer. However, after the Sheriff’s Office released a detailed report describing the SeaWorld surveillance video, the media dropped its efforts.

Ninth Judicial Circuit Court Judge Lawrence R. Kirkwood granted the permanent closure of the records in December.

In addition to “the paramount privacy interests at stake, SeaWorld’s property interests in the Death Scene Videos provides a separate and independent basis for restricting disclosure of those videos,” the ruling states. Kirkwood noted SeaWorld’s copyright interests and intellectual property rights to Brancheau’s image.

*Source: 9th Judicial Circuit Order*

**ACCESS RECORDS**

## Newspaper sues for red light names

ST. PETERSBURG – The *St. Petersburg Times* has filed suit against the town of Kenneth City and its red light camera company, seeking access to names of people suspected of running red lights.

Kenneth City hired American Traffic Solutions Inc. to install and monitor red light cameras at three of its five intersections with traffic lights.

Kenneth City Mayor Teresa Zemaitis told the *Times* that she believed the names were public and should be released to the newspaper. Zemaitis said the town had also had difficulty getting information from ATS.

ATS maintains that it would not release the information for fear of violating the federal Drivers Privacy Protection Act. ATS anticipated clarification by the courts, according to an e-mail statement from the company.

Anne Arsenault, attorney for the *Times*, said that the federal privacy law does not apply to lawbreakers and that the names are public under Florida's Public Records Law.

Source: *St. Petersburg Times*

## Report on Adam Walsh murder subject of public records appeal

HOLLYWOOD – A witness in the 1981 murder of 6-year-old Adam Walsh is appealing his public records lawsuit to the 4<sup>th</sup> District Court of Appeal. Willis Morgan is seeking a report prepared by retired detective Joe Matthews.

Morgan contends he saw serial killer Jeffrey Dahmer at the Sears store in Hollywood. Matthews contends, and Hollywood police have agreed, that drifter Ottis Toole, now deceased, committed the kidnapping and murder.

Matthews conducted an independent investigation of the case and has been credited by the Walsh family in helping solve the case. The Hollywood Police Department closed the case in 2008, after

reviewing Matthews' report.

The Hollywood Police Department and the Broward State Attorney's Office, defendants in the suit, claim that although each agency reviewed the report, no copies were retained. Broward State Attorney Michael Satz and Hollywood Police Chief Chadwick Wagner contend that the report was not helpful in their investigations.

In his appeal to the 4<sup>th</sup> District Court of Appeal, Morgan argues that because the report was received by Wagner and Satz in the course of their official duties, it is a public record and should have been retained accordingly. Matthews has refused to produce a copy of the report.

Source: *BrowardBulldog.org*

## In Memoriam: Marion B. Brechner

ORLANDO – The Brechner Center for Freedom of Information mourns the passing of Marion B. Brechner, who died Jan. 6, 2011 at the age of 98.

Mrs. Brechner was a media executive and philanthropist strongly committed to defending Florida's freedom of information laws. She and her husband, the late Joseph L. Brechner, worked together throughout his long career as a broadcaster to ensure access to government information. Mr. and Mrs. Brechner's generosity helped endow the Brechner Eminent Scholar of Freedom of Information Chair and build the current facilities for The Brechner Center.

Since Mr. Brechner's death in 1990, Marion Brechner continued her and Joe's commitment to the First Amendment and freedom of information. She created the Joseph L. and Marion B. Brechner graduate assistantship in 1996 because she saw the importance of extending understanding of Florida's Sunshine laws and other freedom of information issues to the then-new medium of the Internet and the World Wide Web. She endowed the Marion Brechner Citizen Access Project (MBCAP)



Marion Brechner

in 1999 because she believed its mission — to examine open government laws in all 50 states — was vital to the continuance of our democratic society. That project is now the Marion B. Brechner First Amendment Project, dedicated to contemporary free speech issues.

“At 98, Marion Brechner was still a force of nature and a true FOI hero,” Sandra Chance, executive director of the Brechner Center, said. “As an Orlando broadcasting executive, she was a tireless advocate for press freedoms, the First Amendment, and freedom of information. She encouraged, prodded, supported and challenged us right up until the end.”

“Throughout the years, the Brechners' generous gifts have helped educate thousands of students, journalists, citizens and public officials about the value of open government and the First Amendment,” Chance said. “Thanks to their extraordinary generosity and vision, the Center is able to promote government transparency as fundamentally important to our democracy and fight to preserve access to information at the local, state and national level.”

Services were held Monday, Jan. 10, 2011 at Temple Israel Cemetery in Orlando.

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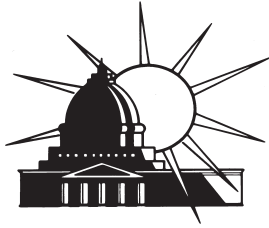
The *Brechner Report* is published 12 times a year under the auspices of the University of Florida Foundation. The *Brechner Report* is a joint effort of The Brechner Center for Freedom of Information, the University of Florida College of Journalism and Communications, the Florida Press Association, the Florida Association of Broadcasters, the Florida Society of Newspaper Editors and the Joseph L. Brechner Endowment.

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Gainesville, FL 32611

Non-Profit Organization  
U.S. POSTAGE  
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Permit No. 94  
Gainesville, FL

February 2011



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## New FOIA office has small staff but big goals

Being part of the start-up of a new government agency is a rare opportunity. Even more rare is for an intern with just one year of law school behind her to get that opportunity. Last summer, as the first law clerk at the U.S. Office of Government Information Services (OGIS), I got to dive in and be a part of a brand-new federal FOIA office, coming in just nine months after the office opened its doors.

Known as the "FOIA Ombudsman," OGIS was created by the 2007 OPEN Government Act. The Act made the first changes to FOIA in more than a decade.

Just 104 words in the OPEN Government Act charge OGIS with three very large mandates: (1) to offer mediation services to help resolve FOIA disputes between requesters and agencies, (2) to review agencies' FOIA policies and procedures, and (3) to make recommendations to Congress and the President to improve the FOIA process.

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Back Page**  
*By Adrianna C. Rodriguez*

OGIS is a FOIA resource for requesters and agencies alike. The office is an advocate for the FOIA process, rather than for agencies or requesters. OGIS works to assist parties in agreeing on a resolution short of litigation. The office can offer mediation services as "a non-exclusive alternative to litigation." This means OGIS can use a variety of Alternative Dispute Resolution techniques to resolve a FOIA dispute, ranging from informal discussions with agency FOIA professionals to arranging for formal mediation between requesters and agencies. Participation in OGIS' services is voluntary. Under the OPEN Government Act, OGIS can also issue advisory opinions when mediation fails to resolve the dispute.

OGIS opened in September 2009 with one staff member, Director Miriam Nisbet, in a small office within the National Archives and Records Administration. In just over a year, the office has grown to seven full-time staff members and has handled hundreds of cases from 40 states, the District of Columbia, and seven countries. Last fiscal year, OGIS handled 391 cases. In the first quarter of fiscal year 2011, the office handled 144 cases.

Requesters contact OGIS seeking help with a variety of FOIA issues. Some contact OGIS for assistance after an agency has



*Adrianna C.  
Rodriguez*

denied their request or appeal for records. Others need help contacting agency FOIA officials and getting answers when responses to requests are delayed. Denials and delays accounted for almost half of OGIS' first-year caseload.

During its first year, OGIS established procedures for working with both agencies and requesters on everything from filing requests and appeals to handling disputes. It held three training courses for FOIA professions on dispute resolution skills and worked with agencies interested in using Alternative Dispute

Resolution techniques with their FOIA process. The office also published a series of Best Practices documents to help both requesters and agencies improve the FOIA process.

Now in its second year, OGIS' work continues. Several agencies, including the Department of Justice and the Department of Veterans Affairs, have begun including language about OGIS and OGIS' services in response and appeals letters. This year OGIS expects to publish its first report to Congress and also make its first recommendations to Congress suggesting improvements to FOIA. It is also looking forward to launching a case management system complete with a Web portal that will allow requesters to easily track their cases' progress, communicate with OGIS and obtain information about FOIA.

OGIS was the perfect place for a first-year law student eager to get involved with FOIA. As a small office with an ever-expanding to-do list, OGIS needed all hands on deck and the office welcomed me onboard just as it was beginning to compile information for its first report and setting office policies and procedures, including for issuing advisory opinions. I contributed to the research for both, and also participated in FOIA training.

The office has a large mandate and a small staff, but the work done in its earliest phases of start-up will help the office grow and meet its goals of improving the FOIA process. I am privileged to have been even a small part of the FOIA Ombudsman's first year.

*Adrianna C. Rodriguez is a University of Florida alumna and a former editor of The Brechtner Report. She is currently a second-year student at Harvard Law School.*