

---

# THE BRECHNER REPORT

---

Volume 35, Number 4 ■ 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

April 2011

## Corporations don't have privacy claim under FOIA

WASHINGTON – The U.S. Supreme Court unanimously ruled that corporations can't claim the personal privacy exemption of the Freedom of Information Act (FOIA). The decision in *FCC v. AT&T* overturned the 3<sup>rd</sup> Circuit Court of Appeal's ruling in favor of AT&T.

The documents at issue were collected during a Federal Communications

Commission investigation of AT&T's involvement in a federal program that assists schools in getting Internet access. AT&T eventually paid \$500,000 to

resolve allegations that it overcharged the government but did not admit any wrongdoing.

AT&T's rivals requested the documents from the FCC, but AT&T argued against release, citing the personal privacy

exemption to FOIA.

"The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations," Chief Justice John Roberts wrote. "We trust that AT&T will not take it personally."

The Brechner Center for Freedom of Information participated in a friend-of-the-court brief in favor of disclosure.

Source: *The Associated Press*

**FREEDOM  
OF INFORMATION**

## Judge overturns hospital merger

DAYTONA BEACH – A circuit judge has overturned an \$80 million hospital merger due to Sunshine violations and an inadequate attempt to cure 21 closed-door meetings. Last summer, the hospital board approved a plan to merge publicly owned Bert Fish Medical Center with the private Adventist Health System.

But the 21 closed meetings over the 16 months prior to the decision, brought to light by the *Daytona Beach News-Journal* and a lawsuit filed by the philanthropic foundation that donated the hospital to the public in the 1960s, prompted a "cure."

Over two months during the fall of 2010, new meetings were held and once again the hospital district board voted to merge with Adventist.

"This attempted cure was not a fresh start," Circuit Judge Richard Graham

wrote in his ruling. "It was to a large extent managed and controlled by some of the very people who caused the problem in the first place and some who had huge personal financial stakes in the outcome."

The ruling came after a five-day civil trial on the Sunshine violations. Jon Kaney, attorney for the philanthropic foundation that sued to nullify the merger, noted the significance of the decision.

"If what they did had worked. . . it would have been the death knell for the Sunshine Law," Kaney said. "The court makes it clear that a cure of a Sunshine Law violation must be independent of the violation."

The parties were given 30 days to submit plans for how to return the hospital to the public domain.

Source: *The Daytona Beach News-Journal*

**ACCESS  
MEETINGS**

## Scott removes official from office

WAUCHULA – Gov. Rick Scott removed a Wauchula city commissioner from office for violating the Sunshine Law by attending secret meetings. Another four members have resigned.

Scott's executive order removing Daniel Graham from office comes after the entire city commission was charged last year with violating the law. The

commissioners pleaded no contest and a formal finding of guilt was withheld.

The remaining four members of the commission, Clarence Bolin, Jerry Conerly, Valentine Patarini and David Royal, have resigned. City officials said a new commission could be appointed or a special election could be held to fill the positions.

Source: *The Ledger (Lakeland)*

## Sunshine suit costs \$288K

STUART – The Martin County Business Development Board spent approximately \$288,000 on an open government suit that resulted in the board agreeing to open its records and meetings to the public.

Treasure Coast area attorney Virginia Sherlock sued the board last year, alleging the business board should be subject to open government laws. Sherlock claimed that because the board is the county's official economic development organization and receives \$625,000 a year from the county, it should be open.

Six months after the suit was filed, the board settled the suit, agreeing to hold public meetings and open its records. The board had maintained that it was a private organization not subject to open government laws.

As part of the settlement, the board paid Sherlock \$61,546.58 in attorney's fees and costs as well as \$500 in nominal damages. It spent \$226,831.56 on its own legal fees defending the case.

Source: *Scripps Treasure Coast Newspapers*

## Judge: Official must turn over personal hard drives

ST. PETERSBURG – A circuit judge has ordered the leader of the St. Petersburg Housing Authority to hand over his personal computer hard drives in connection with a public records dispute.

Darrell Irions, chief executive officer of the city housing authority and former head of the Pinellas County Housing

authority, was given 20 days to turn over his hard drives and the user name and password for his Yahoo e-mail account.

The order is part of a public records lawsuit filed by the county housing authority against the city authority over records from the five years Irions also served as head of the county agency.

The county authority hired a forensic audit company which last year reported that Irions forwarded public e-mails to his Yahoo address and deleted e-mail from the government server. Irions denies deleting records and contends that he fulfilled public records requests.

*Source: St. Petersburg Times*

## Newspaper obtains mayor's cell phone records

MIAMI – After filing a lawsuit for Miami Mayor Tomas Regalado's phone records, *The Miami Herald* and the mayor reached a settlement that will allow access to the records.

The newspaper sought access to the mayor's cell phone records during October 2010 police raids that resulted in seizure

of hundreds of gaming machines and 28 arrests.

Regalado has agreed to provide the records, though his personal calls will be redacted.

*The Herald* can challenge any of the redactions in court if it wishes. Regalado said he was initially willing to turn over

the records but refrained from doing so on the recommendation of the city attorney.

The records were requested after a former city manager and a police official alleged that the mayor interfered with the raid. Regalado denies those accusations.

*Source: The Miami Herald*

## Tax series wins FOI award

GAINESVILLE, Fla. – The *Asbury Park Press* has been named the winner of the 2010 Joseph L. Brechner Freedom of Information Award for exposing questionable use of taxpayer dollars in New Jersey and how that state's property tax system harms the economy. In addition, the *Asbury Park Press* raised awareness of a gap in the public records law that allows cities to delegate duties to private vendors, who in turn charge high fees for public information.

The series was recognized with a \$3,000 prize. The *Asbury Park Press* was a finalist for the 2010 Pulitzer Prize for Public Service for its "Tax Crush" series.

The *Asbury Park Press* sued a municipality in New Jersey based on the series, questioning whether a private vendor's ability to set its own fees for data obtained while performing a public function stifled the public records law.

"What the eight-day series reflects about the Swiss-cheese loopholes in basic public recordkeeping in New Jersey was more than embarrassing and infuriating," one of the judges said. "The resulting litigation may even bring about some much-needed reform. Terrific journalism."

## Miami Herald sues DCF for records in twins' abuse case

MIAMI – *The Miami Herald* has sued the Department of Children and Families for records related to an abuse hotline call made just days before twins were found, one dead and the other covered in chemicals, along Interstate 95 in West Palm Beach.

Jorge Barahona, 53, is being held in the Palm Beach County Jail after being found Feb. 14 passed out in his truck on the side of the road. His 10-year-old adopted son Victor was covered in toxic chemicals and convulsing in the cab while Victor's twin

sister, Nubia was found dead in the back of the truck.

Four days prior, on Feb. 10, a call was made to the DCF abuse hotline. *The Herald* seeks documents related to that call or any subsequent investigation, maintaining that they are public records.

In a statement, DCF said that law enforcement had requested details of the abuse investigation be kept confidential to protect the integrity of the criminal investigation.

*Source: The Miami Herald*

## City revises records policy after investigation reveals violations

FORT PIERCE – The city will change its public records policy after one man's request for salary information was met with a \$3,000 bill. Fort Pierce resident John Bailey filed a complaint related to his request for tax forms for city employees earning annual salaries of \$50,000 or more.

It took the city more than two months to fulfill the request and it initially wanted to charge \$3,000 to create a computer program that would produce the tax forms in a readable format. It later told Bailey if he accepted a five-page list of the employees instead of the actual tax forms, the cost would be \$313.79.

Assistant State Attorney Ryan Butler

investigated the case and found that the city unintentionally violated the Public Records Law. He declined to pursue any fines against city officials.

His investigation found that the city charged for overtime for a salaried technology employee even though she was not eligible for overtime.

City manager David Recor agreed to revise the policy based on Butler's recommendations and findings regarding overtime charges for salaried employees and requests involving programming.

The city refunded Bailey \$114.14 of the \$313.79 charge.

*Source: Scripps Treasure Coast Newspapers*

## Case involving Tiger Woods remains open

ORLANDO – The lawsuit filed by a nurse fired after being accused of accessing Tiger Woods’ hospital records following the golfer’s 2009 crash outside his home will remain open, despite the hospital’s motion to seal court records.

### COURTS

David M. Rothenberg was fired from Health Central after being accused of inappropriately accessing Woods’ records. He is suing for his job back and \$400,000 in damages.

Health Central argued to seal all records in the case. It contended that the issue was whether lab results were inappropriately accessed, regardless of who the results belong to.

Rothenberg argued that the media attention to the case, Woods’ celebrity status and the potential to expose information security issues were all reasons why the case should remain open.

Orange County Circuit Judge A. Thomas Mihok denied the motion to seal documents in the lawsuit.

*Source: Orlando Sentinel*

## FOI Fund helps suits that target CIA’s handling of FOIA requests

ARLINGTON – The public interest group National Security Counselors has filed three lawsuits against the CIA, seeking data about how the agency processes FOIA requests. The suits are funded in part by the Knight FOI Fund, and are the first federal FOI cases to receive a grant from the fund.

National Security Counselors seeks comments from CIA FOIA analysts about pending cases, FOIA training materials and aggregate data about FOIA requesters. It is also challenging the CIA’s practice of refusing to process requests without

notifying requesters and refusal to allow requesters to assign the request to a third party.

“It is our sincere hope that through this litigation, we will be able to go significantly beyond the traditional FOIA remedy of simply obtaining the records we seek,” said Kel McClanahan, executive director of National Security Counselors. “Instead, we seek declaratory and injunctive relief from the court that will find these practices themselves to be unlawful and forbid their future use.”

*Source: NFOIC*

### FIRST AMENDMENT

## Orlando judge bans distribution of jury pamphlets at courthouse

ORLANDO – An Orlando judge has banned activists from handing out pamphlets meant to influence jurors. Chief Judge Belvin Perry, of the Ninth Judicial Circuit, issued the administrative order after a trial found that a jury had been compromised due to leaflets.

Pamphleteers handing out materials with “written or pictorial information tending to influence summoned jurors” are banned from the Orange and Osceola County courthouse complexes.

The Fully Informed Jury Association

(FIJA) has been handing out information aimed at potential jurors, advising them they can vote their conscience and have the right to “hang” a jury if they don’t agree with other jurors.

FIJA contends that the order is a prior restraint and infringes on free speech rights.

In his order, Judge Perry noted that the government had a compelling interest in “protecting the integrity of the jury system.”

*Source: Orlando Sentinel*

## Texas judge: Open meetings law doesn’t violate First Amendment

PECOS, Texas – A federal trial judge has ruled against several public officials who claimed that Texas’s Open Meetings Law violated their First Amendment rights.

A bench trial in the case was held in November 2010. U.S. District Judge Robert Junell found that the meetings law advances the “compelling interest of governmental transparency.”

The current case, *Asgeirsson v. Abbott*, was filed by members of the Alpine City Council and officials from 11 other cities in Texas.

The Alpine City Council previously

challenged the meetings law in a separate federal lawsuit. In that suit, Alpine officials were indicted after e-mail correspondence about a pending water project. Those charges were later dismissed, but the officials sued to declare the law unconstitutional because it infringed on their rights to speak to each other.

That case, *Rangra v. Brown*, was eventually dismissed as moot by an en banc panel of the 5<sup>th</sup> U.S. Circuit Court of Appeals.

*Source: Austin American-Statesmen, The Associated Press*

### THE BRECHNER REPORT

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, J.D., Editor  
Alana Kolifrath, Production Coordinator  
Warren Tillery, Production Assistant

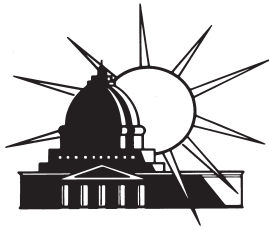
The *Brechner Report* is published 12 times a year under the auspices of the University of Florida Foundation. The *Brechner Report* is a joint effort of The Brechner Center for Freedom of Information, the University of Florida College of Journalism and Communications, the Florida Press Association,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

# THE BRECHNER REPORT

University of Florida  
Brechner Center for Freedom of Information  
3208 Welmer Hall, P.O. Box 118400  
Gainesville, FL 32611

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

April 2011



**UF** UNIVERSITY of  
FLORIDA

## Technology shouldn't be an excuse to avoid the law

Florida Gov. Rick Scott's administration has embraced social media as a way to communicate with the public, posting hundreds of messages on Twitter and holding town forums on both Twitter and Facebook. Scott used Facebook to announce delays in the SunRail project. The resulting comments on the social media site gave Scott's team insight into the public's understanding of the project.

Social media is clearly a key tool for Scott's administration. But while increased dialogue between the public and the government is commendable, other issues must also be considered. Specifically, how are government agencies handling the public records aspect of social media? In 2009, Attorney General Bill McCollum weighed in on the issue, determining that Florida's Public Records Law still applies in the land of Facebook, which means the public records retention schedule should be followed.

### The Back Page

By Christina M. Locke

Scott spokesperson Brian Burgess told the *St. Petersburg Times* that most posts or comments won't be retained; only posts that are deleted for inappropriate content and messages sent through Facebook's e-mail function will be archived. "We don't have the time to record every post on the site," Burgess told the *Times*.

What Scott's team is saying, in essence, is that doesn't have time to comply with the law. Or, even worse, that it can unilaterally interpret Florida's open government laws, ignoring the Attorney General's opinion and the fact that there is no exemption in the Public Records Law for records that might be time consuming to maintain. Either scenario is unacceptable.

Burgess correctly noted that "Sunshine Laws do not anticipate the real-time free-flow of all this information on a constantly public forum." New technology, from social media to smartphones, has raised many questions about how to mesh the practical implications of technology use with the requirements of the law. The answers lie in both how we have dealt with prior innovations—email, for example, was once a source of confusion in the public records realm but its records status and requirements



Christina M.  
Locke

are now generally well settled—as well as looking to peers in government and technology for new solutions.

First, as to the allegedly time-consuming task of retaining all those pesky social media comments and postings, there are numerous third-party software solutions available: TwInbox, Tweetake, ArchiveFacebook, SocialSafe, Socialware Sync and others. These programs allow users to archive social media content (including content posted by others).

The City of Bellingham, Washington, features a free "Facebook Fan Archiver" tool on its website ([www.cob.org/data/facebook](http://www.cob.org/data/facebook)) that can retain posts and comments from Facebook fan pages.

One concern raised by using software to retain social media content for public records purposes is that in some cases, saving information about other users might violate the agreement between the government and the social media site. The federal government has negotiated amended terms of service with social media sites. Apps.gov is a central location where federal agencies can download model amendments to standard terms of service that take into account the special obligations of government social media users. For example, the model amendment has provisions specific to public records, software tools ("crawlers") that agencies might use to save records, and what will happen to the data if the agency decides to no longer use the service. State and local governments can easily adapt the terms to their own use.

State and local governments have already made some progress in negotiating special terms for Facebook. The national associations of state CIOs and attorneys general helped establish new provisions regarding indemnity and dispute resolution. Unfortunately, the new terms don't address public records.

New technology and old laws don't have to be incompatible. With a little innovation and collaboration, solutions can be found to bridge the gap. But what is also essential is a commitment to open government and compliance with existing laws. As the state's chief executive, Gov. Scott sets the tone for all Florida agencies. Citizen watchdogs, open government groups and the press must demand nothing less than compliance with the law.

*Christina M. Locke is an attorney and Editor of The Brechner Report. She is currently a doctoral student at UF.*