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# THE BRECHNER REPORT

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## Scott changes policy, charges for public records

TALLAHASSEE – In a departure from the policies under previous administrations, Gov. Rick Scott’s office is charging for all public records requests.

Unlike previous governors—including Charlie Crist and Jeb Bush, who only charged for large requests—Scott will charge the statutory maximum of 15 cents

per page for all requests.

In his first two months in office, Scott received more than 300 public records requests. Some reporters complained in March that records requested in January still had not been produced.

Scott’s office said the governor was committed to open government, and the fee was implemented to curb costs.

“We are dealing with a high volume of public information requests, but we’re happy to do it because we’re complying with the law,” spokesman Brian Hughes said.

Scott had previously directed all department heads in state government to refer public records requests to the governor’s office.

*Source: Orlando Sentinel*

## Media wins access to recordings

TAMPA – A 16-minute video of the shooting deaths of two Tampa police officers was released to the public after attorneys for the media challenged a move to block the footage’s release. The video was captured by a dashboard camera in Officer David Curtis’ cruiser.

Curtis and Officer Jeffrey Kocab were killed during a June 29, 2010, traffic stop. Dontae Morris, 23, is accused of shooting the officers. The video depicts Morris shooting the officers and stumbling over their bodies.

Curtis and Kocab were taken to the hospital but died within hours of the shooting. Morris was captured after a four-day manhunt. Morris is also charged

with murder in the separate deaths of three men last summer.

Morris’ attorneys asked the court to block the release of the video, but attorneys for *The Tampa Tribune* and WFLA, News Channel 8, objected to the closure as too broad. Hillsborough Circuit Judge Daniel H. Sleet ordered the video be made available.

The release of the video prompted state lawmakers to propose legislation that would make audio or video recordings of the killing of a person exempt from the Public Records Law. The bill passed the Senate and the House in late April and will go to Gov. Scott’s office.

*Source: The Tampa Tribune*

## Two removed from search panel

LAKELAND – Two members of a search committee in charge of vetting candidates for the chief academic officer position at University of South Florida Polytechnic were removed from the group for possibly violating the Sunshine Law.

The allegation stems from a Nov. 30 email from Richard Plank, director of USF Polytechnic’s division of innovation, to William Armitage, director of the information technology division.

In the email, Plank discussed the strength of candidates and the reference

checking process. The email continued, “OK, so now I broke the law, anyway erase this when you get it. I will do the same, but we do need to contact the three references we did not call and at least give them an answer.”

The conversation drew concern from the committee chair. “This is of great concern and we take this type of allegation very seriously,” Karen White, who is chairing the panel, said.

The remaining committee members will continue with the search process and provide input on the finalists.

*Source: The Ledger (Lakeland)*

**ACCESS  
RECORDS**

**ACCESS  
MEETINGS**

## Records audit shows some improvement

MIAMI – Local governments in Florida fared much better in a statewide public records audit this year, with most of them complying with the Public Records Law.

The test, conducted as part of Sunshine Week, requested salary information from sheriffs, school superintendents and county administrators in each of Florida’s 67 counties.

Of those agencies that responded, 86.5 percent complied with the law. The audit was conducted anonymously via email, with a “Florida taxpayer” requesting the information. Previous audits have been anonymous but made by volunteers in person at government offices.

Seventy-one of the 148 agencies who responded provided records promptly and free of charge. Several agencies requested payment, ranging from 50 cents to \$240.

Sunshine Week is a national effort to highlight the public’s right to know. It was founded by the Florida Society of Newspaper Editors.

*Source: Associated Press*

## Hospital board won't appeal Sunshine Law ruling

NEW SMYRNA BEACH – The hospital board whose merger with a private health system was overturned by a circuit judge due to Sunshine Law violations has decided not to appeal the judge's decision. Last summer, the Southeast Volusia Hospital District 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.

However, the second merger decision was overturned due to a failure to

adequately address the concerns raised by the closed meetings. The board recently voted to refrain from appealing the decision.

The hospital district has spent almost \$1 million in legal fees defending the merger and is expected to be ordered to pay the plaintiff's legal fees in the Sunshine Law lawsuit.

Source: *The Daytona Beach News-Journal*

## City turns off cameras during public comment

RIVIERA BEACH – City council members concerned that the public comment portion of council meetings were being used for city candidates to campaign have decided not to televise that portion of council meetings.

The meetings are aired on Riviera Beach's television station, RBTB Channel 18.

During public comment, speakers

can use three minutes to make general comments. Those comments will no longer be televised.

"Nobody should be campaigning on the taxpayers' dollar," Councilwoman Judy Davis said. "People come just to talk with the people in TV land. That should not be."

But city council candidate Lynne Hubbard disagreed. "We're turning

Riviera Beach into a dictatorship," Hubbard said. "We get three minutes to tell people what the deal is. They want to stifle the information we're getting out to the public."

City attorney Pamala Ryan suggested the council implement a "campaign-free zone" for council meetings prior to the 2012 elections.

Source: *The Palm Beach Post*

## 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.
- Florida lawmakers' voting records on open government issues.
- Sample public records request letters.
- The Citizen's Guide downloadable PDF and video.
- Details on open government prosecutions in Florida dating back to 1977.
- The latest news on the Brechner Center for Freedom of Information's open government advocacy efforts.

## Citizens challenge shade meetings

ST. PETE BEACH – At least two lawsuits against the City of St. Pete Beach allege that the city commission violated the Sunshine Law during meetings with its attorneys.

In the first suit, resident Bruce Kadoura sued the city, claiming that a settlement offer was rejected and a counter offer made during a private meeting. A trial judge later found that "most" of the meetings involved litigation strategies and discussions of potential strategies.

Kadoura has appealed that decision to the 2<sup>nd</sup> District Court of Appeal. The Florida First Amendment Foundation filed an amicus brief on Kadoura's behalf.

"When a commission makes an unconditional offer which, if accepted, would finally settle a case without further action at a public hearing, the commission has violated the Sunshine law by deciding to settle a case during a shade meeting without public input or discussion," the First Amendment Foundation brief stated.

A separate lawsuit centers on subsequent meetings not included in Kadoura's suit. In that case, resident Jim Anderson seeks a similar ruling that the city violated the Sunshine Law during shade meetings. The city maintains that it did not violate the Sunshine Law.

Source: *Neighborhood Times*

## Council denies taping rights

CAPE CORAL – A proposal that would have required organizations holding public meetings on property rented from the city to allow anyone to film the meeting won't proceed, after a 4-4 vote on the issue.

The motion stems from a meeting of a private organization, the Cape Coral Civic Association. The organization rented property from the city to hold its meeting. It allowed television stations to film the meeting, but not a private videographer who films events and posts them on the

Internet.

The videographer complained to the city council. Councilman Bill Deile wanted the civic association to issue an apology and agree to let future meetings be filmed.

Civic association President Lyndia Bradley said they denied the videographer permission to film because it wouldn't have an opportunity to refute what might be done with the video.

Source: *News-Press (Fort Myers)*

## Former council member faces records charges

MOUNT DORA – A former member of the Mount Dora City Council faces two non-criminal infractions for allegedly violating the Public Records Law.

James Homich, who was recently recognized by his fellow council members with a plaque for eight years of service on the council, is accused of taking an unreasonable amount of time to fulfill a public

records request and attempting to charge an unreasonable amount.

The charges stem from a request for all of Homich's city-related emails.

Homich estimated it would take hours to fulfill the request, which was for hard copies of the emails, and would cost \$100.

Homich called the accusations "ludicrous."

If he is found in violation of the Public Records Law, he could face fines of up to \$500.

Source: *Orlando Sentinel*

**ACCESS  
RECORDS**

records request and attempting to charge

## Supreme Court rejects Navy's stance on FOIA exemption

WASHINGTON – The U.S. Supreme Court rejected the Navy's claim that a Freedom of Information Act (FOIA) exemption applies to maps sought by a Washington man.

The case, *Milner v. Department of the Navy*, involves the FOIA exemption for "internal personnel rules and practices of an agency." The government claimed the exemption applies to the documents requested by Glen Milner. Milner wanted maps that show what the damage would be if there were an explosion at the Navy's primary West Coast ammunition dump.

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

The Court, 8-1, rejected the application of the exemption to the maps. Justice Elena Kagan, writing for the Court, said that if the Navy was concerned about releasing the maps, it could take other measures, such as classifying the information or relying on another exemption.

Source: *Associated Press*

## Survey: Obama halfway there

WASHINGTON – A new study of how the Obama administration is living up to its promises of transparency found that it is about halfway there.

The Knight Open Government Survey, conducted by the National Security Archive, found that 49 of 90 federal agencies made notable changes in their FOIA procedures. Last year, only 13 agencies had complied with Obama's directive.

"The Obama administration told us last year that one year was too short a time to show real change," Tom Blanton, director of the National Security Archive, said. "This year's Knight Survey reveals

a glass half full of open government, and some persisting deep problems including FOIA requests marooned for years in never-ending referrals among agencies."

Obama issued a memo to all federal agencies on his first day in office, instructing them to "usher in a new era of open government."

Sunshine Week organizers recently gave Obama a transparency award, which he accepted at a secret meeting. Open government advocates attended the meeting, but it was not listed on Obama's calendar and the press was not allowed in.

Source: *National Security Archive, The Washington Post*

## Cities pass ordinances promoting right to speak at public meetings

SANFORD – In light of an appellate court ruling that the Sunshine Law doesn't give the public a right to participate at public meetings, two Central Florida cities have passed measures expressing commitment to public participation.

The cities of Lake Helen and Sanford each passed an ordinance that noted each city's "firm commitment to ensure that the rights of those who speak or otherwise publish their views as citizens or members of the press are honored and protected." Each ordinance also pledges "to ensure that the public may fully participate in" meetings and government operations.

The Sanford ordinance was prompted in part by a public meeting on a police department issue that prohibited public comment. The city is also considering allowing public comment prior to the adoption of items on the consent agenda.

Speakers would be allotted up to three minutes to comment on consent-agenda items.

Sanford city attorney Lonnie Groot urged the city commission to be flexible with the time constraints. "Some people struggle to speak and some have more to say than others," Groot said.

Source: *West Volusia Beacon, Sanford Herald*

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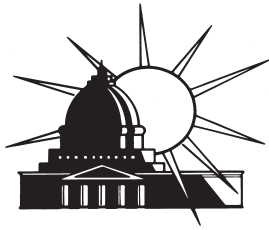
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**FIRST  
AMENDMENT**

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## Metadata ruled records under FOIA – is Fla. next?

In a recent Southern District of New York case, *National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency*, a federal court held that metadata connected to electronic public records must be produced pursuant to the Freedom of Information Act (FOIA). Metadata is data about data. This opinion held that key metadata fields are integral to public records.

The plaintiff submitted FOIA requests to several government agencies. The government agencies produced five unsearchable PDF files. All of the metadata had been stripped from the PDF files. Despite the confusion surrounding the form of document production, the court found that the government only had a “lame excuse” for failing to produce the records in a usable format. The court held that “certain metadata is an integral or intrinsic part of an electronic

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By Catherine Losey

record.” Thus, “such metadata is ‘readily reproducible’ in the FOIA context.” Notably, a determination regarding what metadata must be produced ultimately depends on the type of electronic public record at issue (e.g., Word documents, email, Excel spreadsheets) and how the government agency maintains the record. The court held that “[m]etadata maintained by the agency as a part of an electronic record is presumptively producible under FOIA...”

The court created guidelines for “the minimum fields of metadata that should accompany any production of a significant collection of ESI [electronically stored information].” The minimum required metadata fields that must be provided for email messages include: to, from, CC, BCC, date sent, time sent, subject, date received, time received and attachments.

Similar issues have been addressed by state courts, including New York, Washington and Arizona. These courts uniformly held that metadata is a part of public records and must be disclosed.

In the *O’Neill v. City of Shoreline* case from Washington, the “to” and “from” lines of a forwarded email became an issue in the case, and the court concluded that the embedded metadata of an electronic public record was subject to disclosure under the state’s public records act. Similarly, the metadata of an electronic



Catherine Losey

public record was at issue in the Arizona case of *Lake v. City of Phoenix*. In that case, the plaintiff requested metadata attached to the electronically stored notes of his supervisor because he suspected that the supervisor had been backdating the notes. The court held that the public had a right to access metadata.

The Southern District of New York, in its recent opinion, stated that *all* forms of electronically stored information, including Word documents and Excel spreadsheets, should include these metadata fields:

1. **Identifier:** A unique production identifier of the item.
2. **File Name:** The original name of the item or file when collected from the source custodian or system.
3. **Custodian:** The name of the custodian or source system from which the item was collected.
4. **Source Device:** The device from which the item was collected.
5. **Source Path:** The file path from the location from which the item was collected.
6. **Production Path:** The file path to the item.
7. **Modified Date:** The last modified date of the item.
8. **Modified Time:** The last modified time of the item.
9. **Time Offset Value:** The universal time offset of the item’s modified date and time based on the source system’s time zone and daylight savings time settings.

To date there are no opinions from Florida similar to the ones from New York, Washington and Arizona. Nonetheless, a Florida court would likely adhere to the general trend towards requiring the production of metadata of electronic public records. The *O’Neill* court expressed the need for this requirement quite clearly when it said that the public records law “exists to ensure that the public maintains control over their government, and we will not deny our citizenry access to a whole class of possibly important government information.” Similarly, Florida citizens would likely be given access to metadata when making a public records request. Florida government agencies should consider exploring how they would comply with a request for the metadata attached to electronic public records.

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