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# THE BRECHNER REPORT

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Volume 40, Number 6 ■ 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  
June/July 2016

## Media sues Orlando over Pulse shooting 911 calls

ORLANDO – Following the largest mass shooting in the nation’s history at a nightclub in Orlando, the media and the City of Orlando are battling over access to the 911 phone records from that tragic evening, the Orlando Sentinel reported.

### ACCESS RECORDS

25 news outlets filed a complaint against the City in the Orange County Circuit Court, seeking access to 603 emergency call records from the shooting, including a 28-minute conversation between the shooter and Orlando Police crisis negotiators, the paper reported. That

same day, the City filed a declaratory action in the same court, asking the court to determine whether the records should be public, according to the paper.

The news media argue in their complaint that the records should be released because there is “a strong public interest in fully evaluating how first responders and police reacted during the most critical phases of this incredible tragedy,” the paper reported. The City argues, however, that the FBI has instructed the agency to withhold records from the public, according to the paper.

The case has been at a standstill since the two consolidated cases were moved

to federal court after the City named the Department of Justice as a defendant, the paper reported.

The news media has asked the federal court to return the case to state court because the issue in question is solely a state issue, according to the paper.

Carol LoCicero, one of the attorneys representing the news media, fears that adding the DOJ as a party to remove the case to federal court was a tactical move by the City to “delay, delay, delay,” the paper reported.

As of this writing, it is unclear when the next hearing on the matter will be.

*Source: Orlando Sentinel*

## President Obama signs FOIA reform bill to law

WASHINGTON – President Obama signed a Senate bill aimed to reform the Freedom of Information Act, which celebrated its 50th birthday since its signing by President Lyndon Johnson in July, Politico reported.

The bill, called the FOIA Improvement Act, codifies a restriction on an agency’s ability to arbitrarily withhold records while implementing a presumption of disclosure, according to the website.

Under the new law, agencies will not be able to withhold records unless another

law prohibits the disclosure of information or the information falls within one of the FOIA exemptions, the Electronic Frontier Foundation reported. The law also includes a provision that puts a 25-year limit for withholding records under the deliberative process privilege, which allows agencies to keep internal decision-making records secret, EFF reported.

The federal government will also need to

create an online portal for FOIA requests, according to EFF.

One of the bill’s sponsors, Sen. Patrick Leahy, D-Vermont, applauded the signing of the bill, saying “the FOIA Improvement Act brings FOIA into the digital age and ensures that sunshine, not secrecy, is the default setting of our government,” Politico reported.

*Source: Politico, Electronic Frontier Foundation*

### FREEDOM OF INFORMATION

## Federal court upholds net neutrality rules in full

WASHINGTON – The U.S. Court of Appeals for the D.C. Circuit fully upheld the FCC’s Open Internet rules, which promote net neutrality.

Judges Sri Srinivasan and David S. Tatel, writing for the Court, explained that net

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neutrality is “the principle that broadband providers must treat all internet traffic the same regardless of source.”

The cable and wireless industry association, along with AT&T and other services providers, fought against the rules and the way the FCC reclassified

broadband Internet as a more heavily regulated telecommunications service, according to National Public Radio. The service providers claim they didn’t have an issue with the rules themselves, but rejected the FCC’s expanding authority over the Internet, NPR reported.

The Court, however, affirmed the FCC’s authority under Title II of the Telecommunications Act.

Peter Karanjia, a lawyer at Davis Wright Tremaine, says that the decision means there will be new federal oversight

of how Internet providers handle the traffic on their networks, according to NPR. The former FCC lawyer explained that this includes new conduct rules that allows the FCC to field complaints against Internet providers, NPR reported.

The telecom industry is expected to appeal the decision, according to NPR. “We have always expected this issue to be decided by the Supreme Court, and we look forward to participating in that appeal,” AT&T General Counsel David McAtee said in a statement.

*Source: U.S. Telecom Assoc. v. FCC, No. 15-1063, npr.org*

## Uber records are trade secrets, court rules in Broward County

BROWARD COUNTY – A Broward County circuit judge ruled the county did not violate the Public Records Law when it withheld records that show how much business Uber does at the port and airport, the South Florida Sun-Sentinel reported.

Uber's competitor Yellow Cab filed the lawsuit after requesting Uber's monthly reports and receiving documents that had redacted information about pickups, drop-offs and fees, the paper reported. Yellow Cab's attorney, Mark Stempler, argued that this same information about Yellow Cab has been considered public record for a long time, according to the paper.

Judge Sandra Perlman dismissed the case and said Uber's monthly reports

are trade secrets, which are exempt from disclosure, the paper reported.

Perlman wrote that Uber's South Florida general manager, Kasra Moshkani, testified at length in regards to the data that the company gathers about ridership, according to the paper. "Teams of highly skilled individuals with backgrounds in economics, statistics, mathematics and analytics take this data, and through statistical and mathematical modeling, draw conclusions based on that data, for purpose of making strategic business decisions," Perlman said. This information could be used by competitors "to better compete," she added.

*Source: South Florida Sun-Sentinel*

## Commissioner sues county over public records lawsuit and fees

MANATEE COUNTY – Manatee County Commissioner Robin DiSabatino sued the county and the chief assistant county attorney, Robert Eschenfelder, after fellow commissioners refused to defend her in a public records lawsuit, the Sarasota Herald-Tribune reported.

Commissioners denied DiSabatino's request to reimburse her for more than \$30,000 in legal fees she spent to defend herself and ultimately settle the public records dispute, the paper reported.

County attorneys declined to defend DiSabatino in the lawsuit filed by Michael Barfield when they learned that the documents Barfield sought were on the commissioner's home computer, according to the paper. DiSabatino later settled the case by paying Barfield's \$6,500 legal tab and by agreeing to take an annual course

on the state's Public Records Law, the paper reported.

County Attorney Mickey Palmer said that the commissioners refused to pick up the legal bill because DiSabatino did not "prevail" in the lawsuit, and is therefore not entitled to reimbursement, according to the paper.

However, DiSabatino's attorney argues that the settlement meant that she did prevail because the commissioner admitted no wrongdoing, while simultaneously putting a close on the litigation, the paper reported.

Manatee County has hired outside counsel to defend itself against DiSabatino, the Bradenton Herald reported.

*Source: Sarasota Herald-Tribune, Bradenton Herald*

## Court rejects public records RICO case

TALLAHASSEE – The U.S. 11th Circuit Court of Appeals rejected a class-action lawsuit filed by the town of Gulf Stream, who alleged the defendants inundated the town with public records requests as a racketeering effort.

The town and a contractor, Wantman Group, Inc., brought the suit under the federal Racketeer Influenced and Corrupt Organizations Act, known as RICO, claiming the defendants were using Florida's Public Records Law to extort attorney's fees from the government, WJXT (Jacksonville) reported. The town alleged that the defendants submitted more than 2,000 public records request and filed lawsuits over the requests as a way to incite settlements and generate attorney's fees, according to the station.

Judge Charles Wilson, writing for the three-judge panel, upheld a lower court's decision dismissing the case, while expressing some sympathy for the small town.

"The allegations in the plaintiffs' complaint paint a frustrating picture. Accepting those allegations as true, the defendants have engaged in a concerted effort to capitalize on the relatively unfettered access to public records Florida has granted its citizen by bombarding small towns and municipalities with public records requests to which they cannot respond adequately. As distasteful as this conduct may be, the allegations do not support a RICO claim under our precedent," Wilson wrote.

*Source: Town of Gulf Stream v. O'Boyle, No. 15-13433, WJXT (Jacksonville)*

## Private email accounts not exempt from FOIA

WASHINGTON – The U.S. Court of Appeals for the D.C. Circuit ruled that private email accounts are not exempt from the Freedom of Information Act.

Plaintiff Competitive Enterprise Institute sought emails the director of the Office of Science and Technology Policy, John Holdren, sent and received from a nongovernment email account. OSTP withheld the records, arguing the emails

were "outside the possession or control of federal agencies, and thus beyond the scope of FOIA."

Senior Circuit Judge David Sentelle, writing for the court, wrote that the purpose of FOIA wouldn't be served if the government can deprive citizens access to information by maintaining separate private email accounts.

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"An agency always acts through its employees and officials," Sentelle wrote. "If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door."

*Source: Competitive Enterprise Institute v. Office of Science and Technology Policy, No. 15-5128*

## Taxpayers pay for mayor's legal fees

DEERFIELD BEACH – Deerfield Beach's taxpayers will pay \$41,722 for Mayor Jean Robb's attorney's fees arising out of a Sunshine Law suit, the South Florida Sun-Sentinel reported.

Robb was accused of violating the Sunshine Law in 2013 by contacting city commission members about an appointment to the city board outside of a public meeting, the paper reported. The charge was dismissed earlier this year, according to the paper.

\$2,448 of the total bill comes from Robb's own allegation that Commissioner Bill Ganz had violated the Sunshine Law when he whispered in her ear during a commission meeting, the paper reported. However, this complaint never advanced, according to the paper.

Ganz wanted to rescind the city's approval for the attorney's fees because he thought it was unfair to have taxpayers pay for Robb's "personal witch hunt," the paper reported.

The vote to rescind the bill's approval failed 4-1 because the city's legal bill would likely be higher if the items involving Ganz went unpaid, according to the paper.

Source: *South Florida Sun-Sentinel*

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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.

## Agency violated Sunshine Law

WEST PALM BEACH – Palm Beach County Inspector General issued a report, stating the Solid Waste Authority violated Florida's Sunshine Law by discussing grants for a beautification program in private, The Palm Beach Post reported.

According to the report, a committee set up to award \$500,000 in grants for the program, the paper reported. The committee evaluated, ranked, scored, and short-listed the grant applications without holding a public meeting or taking minutes, according to the paper.

Despite finding the violation, the

Inspector General found no willful intent to violate the Sunshine Law, the paper reported. However, it recommended the Authority "take appropriate actions" to make sure the committee adhered to state law, according to the paper.

The Authority argued that the committee fell within fact-finding exemptions to the Sunshine Law, the paper reported. It nonetheless reconvened the committee at a "cure" meeting, where it was required to reenact the entire decision process, according to the paper.

Source: *The Palm Beach Post*

## Court rules prison blogger has no First Amendment rights

NEW YORK – The U.S. 2nd Circuit Court of Appeals held that a blogger serving a prison sentence did not have a First Amendment right to publish an article on the Huffington Post.

Daniel McGowan is an environmental activist who was serving a seven-year term for "eco-terrorism," the Huffington Post reported.

Nearing the end of his sentence, which he spent in a halfway house in Brooklyn, McGowan published the article where he claimed that he had been placed in a highly restrictive prison unit during his prison sentence in retaliation for his political speech.

McGowan was punished for violating the byline rule, which provided that "an inmate currently confined in an institution may not be employed or act as a reporter or publish under a byline." He

spent 22 hours in solitary confinement, later being returned to the halfway house because

another federal court held in 2007 that

the byline rule was unconstitutional.

McGowan asserted his First Amendment rights had been violated, but Judge Robert Katzmann, writing for the court, said McGowan had no "clearly established right" to publish the column.

McGowan has submitted an appeal for a rehearing in front of the entire panel of judges, Courthouse News Service reported.

Source: *McGowan v. United States, No. 15-1786, Huffington Post, Courthouse News Service*

### FIRST AMENDMENT

## JSO hires public records officer

JACKSONVILLE – The Jacksonville Sheriff's Office has hired a public records manager after addressing its inability to store emails as required by the Public Records Law, The Florida Times-Union reported.

Sheriff Mike Williams and Undersheriff Pat Ivey admitted last December to The Florida Times-Union that JSO's system did not save emails for more than 90 days, as required by state law, the paper reported. The issue surfaced after JSO was unable to respond to a reporter's request for a

detective's emails, according to the paper.

Failure to maintain these records could potentially affect some defendants' right to a fair trial, the paper reported.

Public Defender Matt Shirk said this was concerning, but he added "we are pleased with the swift action by Sheriff Williams to implement a procedure to save all emails and thank him for his commitment to justice," the paper reported.

Source: *The Florida Times-Union*

### ACCESS RECORDS

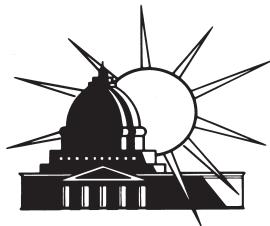


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Permit No. 94  
Gainesville, FL

June/July 2016



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## Interview: Release 911 recordings of Pulse tragedy

Several news outlets, including the Orlando Sentinel, have sued to get access to the audio recordings of hundreds of 911 calls made during the June 12 attack on the Pulse nightclub. The city has released edited transcripts of some calls and other documents, but not the recordings. The FBI has asked law enforcement agencies to reject records requests. We asked one of Florida's top open government advocates, First Amendment Foundation President Barbara Petersen, why the media — and the foundation, also a party to the lawsuit — should pursue their legal effort. Excerpts follow.

Q: What's important about the additional information from a recording, [rather than the transcripts only], as far as the public is concerned?

A: It gives you additional information as to what was going on in the building at the time. ... One of the unanswered questions is why the three-hour delay from the time law enforcement first responded [to Pulse] ... before they came in through the back wall. There could be a lot of information available on those audiotapes that helps explain those three hours. ... There are so many unanswered questions, and these

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**By Orlando Sentinel**

are questions that, frankly, foster fear in many people.

Q: Law enforcement agencies have said the investigation is ongoing. Why

not wait until it's complete?

A: There are a couple of points: First, ... this is an investigation that could go on for years. Years? [Second] we don't want to impede an ongoing criminal investigation, but it's not clear what they're investigating. Generally, when there is a criminal investigation, we're looking at the people who committed the crime. ... Everything I have read ... [says] Omar Mateen was not acting in concert with other people. So there are no other suspects, and the one suspect we have is dead. ... Certainly it's an active investigation, but I don't believe it's an ongoing criminal investigation.

Q: What would you say to critics who argue media outlets are only interested in this to sell papers or hook more viewers?

A: That's unfortunate that people think that way, because the media play a very important role, and an investigatory role. ... The whole purpose of getting access to government information is to allow us the opportunity to oversee our government and hold it accountable for its actions. And there are many, many, many questions about how Omar Mateen was

able to get a gun, a concealed weapons permit, having been on various watch lists. Why didn't the federal government communicate that information to the state government. Why, given the fact that he had complaints purportedly against him as a security guard, why had that not been brought to the attention of people? ... What happened in those three hours when people were in Pulse under the threat of being shot again? So all of those questions, the answers lie in access to public records.

Q: What are your thoughts on the media's lawsuit being transferred from state to federal court?

A: This isn't a question of federal law; it's a question of state law. These are public records under Florida law, and Florida courts should be deciding whether we have a right of access or not. ... The FBI and the [Department of Justice] don't have the authority to say what is and what isn't subject to disclosure under Florida law. ... There is no federal law that would preempt state law in terms of access to those records. In Florida law there is a provision that says a record that is subject to state law will be exempt [from disclosure] under federal law, but only if there is a specific federal exemption. And there is no specific federal exemption.

Q: Does the current impasse over records from the shooting argue for any changes in state law going forward?

A: I don't think so, because our law is quite clear. ... Records that are considered public records under Florida law are subject to our constitutional right of access ... This is a subversion of the process. I think in times of tragedy, it's important that we follow the process. ... We're not going to get answers to the questions that we could had the process been allowed to move forward. ... But now, it's like, nope, sorry, we're taking all of this away from you, and we're going to make the process much more difficult for you to get them, and you won't even get an answer as to whether you have the right of access to these for months and months and months. I think it's a total subversion of the process. It does trouble me that people think that the media is just being salacious, when really what I think the media is trying to do is help people answer the questions and concerns that they have by getting the information ... putting the background and the bones into the story that make people better understand what happened.

*This is an excerpt of an interview that first appeared in the Orlando Sentinel on June 30, 2016.*