
THE BRECHNER REPORT

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1st DCA: Alachua violated records, meetings laws

TALLAHASSEE – An appellate court has ruled that the city of Alachua violated the Public Records and Open Meetings Laws when it refused to allow two citizens to review a canvassing board’s minutes before the City Commission approved them.

Michael Canney and Charles Grapski requested the minutes of the city Canvassing Board following a disputed election. Their records request was denied by the Deputy City Clerk, who told them records would not be available until after they were approved.

City commissioners later approved

the minutes in a May 15, 2006 meeting using a consent agenda. A consent agenda is approved without discussion and in this case there was no notice that the Canvassing Board minutes were going to be up for approval. Months later, the city finally turned over the minutes to Canney and Grapski.

The 1st DCA overturned the trial court’s ruling that because the city eventually provided the records, Canney and Grapski’s claims were moot.

The Court held that “the City’s denial not only breached the duty to provide such records at a reasonable time and

under reasonable conditions, but also contravened the purpose and mandate of our public records law.”

As to the Open Meetings Law claim, the Court held that the city’s failure to allow a timely inspection of the minutes “violated both the language and the purpose of” the Open Meetings Law.

However, the 1st DCA rejected the argument that the failure to list the minutes as an agenda item violated the Open Meetings Law. The Open Meetings Law “does not require that specific items to be considered by a public body be listed in advance of the meeting on an agenda,” the Court wrote.

Source: 1st DCA, *The Gainesville Sun*

**ACCESS
LAWS**

Citizens groups launch two open government lawsuits in Sarasota

SARASOTA – A citizens group that landed a record-setting attorney fee award in Venice currently has two new actions pending in Sarasota County.

Citizens for Sunshine, Inc.’s first challenge in Sarasota stems from negotiations between the county with the Baltimore Orioles regarding spring training and stadium renovations. The Sarasota County Commission voted last year to allocate \$31 million to renovate a stadium in a bid to bring the Orioles’ spring training to Sarasota.

Citizens for Sunshine and Sarasota Citizens for Responsible Government allege that the county violated state open government laws during the negotiations. In a recent effort to settle the lawsuit, the groups suggested the county hold a public referendum on the stadium funding issue. The county commission ruled out that option, opting instead to hold another hearing on the issue.

The other Sarasota open government suit involves the Economic Development Corp. of Sarasota County (EDC).

Citizens for Sunshine requested records from the EDC in July 2009. But the EDC maintains it is not subject to public records requests, according to its president and CEO’s e-mail response to the request.

The EDC seeks to coordinate economic development strategies in Sarasota County and \$1.2 million of its \$1.6 million budget comes from the county.

Recent disputes regarding whether economic development agencies are subject to open government laws have gone both ways. In Santa Rosa County, the State Attorney’s Office determined economic development agency TEAM Santa Rosa was subject to the laws.

But Florida’s Great Northwest, another Panhandle economic agency, is not, according to an informal opinion of State Attorney General Bill McCollum’s office. The AGO opinion noted that the county delegated duties to TEAM Santa Rosa but the same delegation did not occur with Florida’s Great Northwest.

Source: *Sarasota Herald-Tribune*, *Charlotte Sun*

Anti-corruption panel formed

BROWARD COUNTY – High-profile arrests of public officials in South Florida has resulted in a statewide grand jury that will investigate corruption. Gov. Charlie Crist’s request to convene the grand jury was initially denied by the Florida Supreme Court as too vague.

However, in December the Court approved his petition. Grand jury summons

were sent to more than 300 people in the counties of Miami-Dade, Broward, Palm Beach, Charlotte, Collier, Glades, Hendry and Lee. Eighteen people and several alternates will serve on the grand jury.

Florida Attorney General Bill McCollum has established a toll-free hotline for whistleblowers to submit complaints to the grand jury. Tipsters can report public corruption by calling 1-800-646-0444.

Source: *The Miami Herald*

ETHICS

DOT chief cleared in 'pancake' e-mail inquiry

TALLAHASSEE – Florida's Transportation Secretary and her aide were not using code words when corresponding about a high profile rail project using words like "pancake" and "French Toast" in the subject lines, according to a report by Gov. Charlie Crist's chief inspector general.

The e-mails between Stephanie Kopelousos and her aide were sent before state lawmakers passed legislation approving a commuter rail in the Orlando area. Kopelousos claimed the unusual subject lines were used to help her find important e-mails on her Blackberry.

State Sen. Paula Dockery, a Republican gubernatorial candidate and critic of the \$432-million deal with CSX Transportation, Inc., requested e-mails on the rail project from the DOT on Dec. 3. She received 121 e-mails in response to her request.

Dockery complained after she noticed that correspondence she sent to Kopelousos was not included in the e-mails she received. A second search revealed 8,205 e-mails that should have been produced in response to Dockery's request.

A DOT employee had mistakenly

searched the e-mails by the "to/from" field instead of the "content" field in response to Dockery's initial request, according to the report.

Dockery received the e-mails on Dec. 9, the day after the lawmakers approved the rail bill. "I wouldn't have expected a different outcome," Dockery said of the investigation's results. "If it was a running gag, then I guess the joke's on the taxpayers."

Kopelousos said the DOT has since added additional safeguards to records requests.

Source: *The Miami Herald*

'Tweeting' new lingo in instructions

TALLAHASSEE – In light of recent mistrials due to juror use of technology, the Florida Supreme Court is considering new jury instructions that specifically address social media and Internet use.

The new instructions follow a mistrial in Bartow after a juror used

COURTS the Internet to

retrieve a defendant's criminal record and then shared that information with other jurors, according to *The Tampa Tribune*. In Miami, a federal trial was called off after jurors admitted to researching the case online by Googling attorneys and parties and using Wikipedia for definitions.

Current jury instructions warn jurors about talking to others about cases, reading about cases in the newspaper and listening to reports on television or the radio. The proposed instructions would have judges instruct jurors against "tweeting, texting, blogging, e-mailing, posting information on a website or chat room" about the case.

The Florida Supreme Court will accept comments on the proposed instructions until March 17.

Source: *The Tampa Tribune*

Counties tackle texting issue

OSCEOLA COUNTY – The Osceola County Commission has passed a resolution prohibiting text messaging by elected officials and employees who use county-issued phones.

The measure was passed in an effort to comply with the Public Records Law, according to the *Orlando Sentinel*. "We haven't been challenged, but we are taking a pre-emptive strike," Deputy County Manager Beth Knight said, according to the *Sentinel*.

Employees will still be able to receive texts. Osceola is concerned about preserving text messages but cites limited financial ability to upgrade its server in order to save the messages or pay extra to its phone carrier. It is unclear whether the

received messages, which would also be subject to the Public Records Law, would be preserved.

Neighboring Polk County is currently working on a policy to cover text messaging by county employees. Although e-mails are archived by the Polk County information technology (IT) department, text messages go through its phone carrier.

"Our technology doesn't allow us to capture texts; we have to go to the provider," County Manager Mike Herr said, according to *The Ledger (Lakeland)*.

Of Polk's 727 county phones, texting is blocked on 490. Ed Wolfe, Polk IT director, plans to establish a system to capture the text messages.

Source: *Orlando Sentinel, The Ledger*

Attorneys compromise on access to evidence in capital murder trial

PALM BEACH COUNTY – A public defender's request for a blanket ban on the release of evidence in a murder trial and a gag order on all participants will be avoided after attorneys for the media stepped in to encourage a compromise, according to *The Palm Beach Post*.

The defendant in the trial is Paul Merhige, who is accused of murdering four family members and wounding two others in a Thanksgiving Day shooting in Jupiter. He could face the death penalty.

Merhige fled Jupiter and was not arrested until Jan. 2, 2010. The search for Merhige was featured on the television show *America's Most Wanted*. His arrest was later broadcast on television.

The publicity surrounding the case was

the driving force behind Public Defender Carey Haughwout's motion to prohibit public disclosure of the evidence and ban public commentary on the case by attorneys, investigators and witnesses. Evidence generally becomes open to the public after it is provided to the opposing attorney.

The compromise reached by Haughwout and attorneys for *The Post* and other news organizations will allow for disclosure of evidence 10 days after Haughwout reviews the evidence. She would then have the opportunity to object to its release.

Haughwout abandoned her initial request for a gag order.

Source: *The Palm Beach Post*

FOIA suits still strong despite Obama order

WASHINGTON – Despite promises of increased transparency, Freedom of Information Act lawsuits have not decreased under the Obama administration. In fact, *The Washington Post* noted 319 lawsuits filed in Obama's first year in office compared to 298 suits filed during the last year of the Bush administration.

The White House, however, disputes the numbers from the court docket, pointing to Department of Justice figures showing 328 suits filed in 2008 and 306 in 2009.

The White House also heralds the release of White House visitor logs and memos on interrogation methods as indicative of its commitment to transparency.

On his second day in office, President Obama issued an executive memorandum directing agencies to presume openness of records, with some exceptions.

Meredith Fuchs of the National Security Archive said that while the amount of material provided by agencies has improved, the lawsuits have been "more of a mixed bag."

Source: *The Washington Post*

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Crist campaign in copyright snafu

TALLAHASSEE – A Florida State University-based television station is accusing Gov. Charlie Crist of copyright infringement after Crist used a video clip in his U.S. Senate campaign. Crist used the station's footage of campaign rival and former Florida House Speaker

Marco Rubio in a series of Web site ads.

WFSU-TV, a state-funded public television station, alleges that Crist's campaign illegally used its video clip. Crist removed the ads after WFSU demanded the video be taken down.

"That material, in our view, belongs to us, and they did not have permission to use it," WFSU general manager Patrick Keating said, according to the

St. Petersburg Times. WFSU runs the Florida Channel, which covers state government. "I'm just trying to protect our product and live up to the terms of our agreement with the Legislature,"

Keating added.

But Crist's attorney, Ben Ginsberg of

Washington D.C., called WFSU's actions censorship. "This is a nonprofit political campaign engaging in political speech – the highest form of protected speech under the First Amendment," Ginsberg said, according to the *Times*. "The Florida Channel has censored the exchange of information between two political candidates."

Source: *St. Petersburg Times*

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FIRST AMENDMENT

U.S. Supreme Court considers secrecy rights of petition signers

WASHINGTON – The U.S. Supreme Court has agreed to consider whether petition signers have a First Amendment right to keep their names secret.

The case comes out of Washington state, where more than 130,000 signatures were gathered in an effort to overturn a domestic partnership law called the "everything but marriage" act.

The signature collection resulted in placement of the law on a referendum in November 2009.

Prior to the referendum vote, several groups requested the state release the names of the petition signers under the state public records law. But Protect Marriage Washington, a group advocating traditional marriage, sued to block

disclosure.

The U.S. Court of Appeals for the 9th Circuit eventually ruled in favor of releasing the names of the petition signers in light of the fact that the signatures were gathered in public on sheets with room for 20 signatures and with no promise of confidentiality, according to *The New York Times*.

The U.S. Supreme Court stayed the 9th Circuit's ruling and the referendum vote proceeded, though the "everything but marriage law" was not overturned. Now, the Supreme Court will address the merits of the case and whether the 9th Circuit's decision infringed on the First Amendment.

Source: *The New York Times*

Sunshine Week set for March 14-20

Sunshine Week, sponsored by the Knight Foundation and the American Society of Newspaper Editors, will occur March 14-20, 2010.

This year the ASNE will recognize "Local Heroes" in its contest to honor individuals who fought to make government more accessible.

Other events planned for the week include the National FOI Day

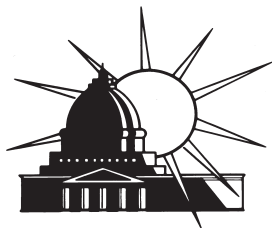
Conference at the First Amendment Center on March 15.

Sunshine Week "is a national initiative to open a dialogue about the importance of open government and freedom of information," according to the ASNE. It began as Sunshine Sunday in Florida in 2002, launched by the Florida Society of Newspaper Editors.

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Individual battles help ensure transparency for all

The media have typically been at the forefront of litigating Florida open government issues, but private individuals and litigants also have pushed for open government, contributing to the evolution of Florida's open records and meetings laws. This was particularly true in 2009 when private individuals waged war on secrecy in the City of Venice, Polk County, the City of Alachua and Walton County. In each case, the plaintiffs were successful and attorneys' fees were recovered. Our primary involvement centered on the access battle in Walton County. That case revealed a host of public records problems there and resulted in an agreed final judgment instituting far-reaching changes.

The Walton County records saga began when a beach condominium association sued Walton County for federal civil rights violations involving an ordinance regulating beach activities. During the litigation, the condominium association president, Suzanne Harris, a Walton County resident, sought from the county electronic records that might relate to the lawsuit. Instead of seeking records broadly "relating to" the lawsuit, however, Harris asked the County to search its records electronically for certain key words. In a second request, Harris also sought paper records. County officials eventually responded by inviting Harris to find the records herself and by asserting they trusted her to redact any exempt information the searches or files retrieved. The county deemed this "come-find-it-yourself" response sufficient and washed its hands of the requests.

When the parties were unable to resolve this standoff, Harris sued. Initially, the lawsuit focused simply on obtaining access to the requested records. During discovery, however, many problems with Walton County recordkeeping – in both electronic and paper form – were revealed. The county's information technology is outsourced to the Walton County Clerk of Court. The county blindly assumed the clerk was fulfilling all of its records responsibilities. The clerk – though acknowledging her office provided the IT infrastructure for the county – flatly denied responsibility for the county's public records obligations. Consequently, no one was in charge of complying with Florida



Carol LoCicero

law.

Compounding this problem was Walton County's highly decentralized recordkeeping practices. Paper records were kept in various district offices by a variety of people. Electronic records – including e-mail during the entire period covered by Harris' requests – were essentially maintained as chosen by any end user who sent or received an e-mail. That was also true of other electronic records – such as Word documents or Excel spreadsheets. Such records were often stored only on a single computer on one individual's hard drive. The fate of public records was left in the hands of many, many untrained users. During the course of the lawsuit, the clerk's office instituted archiving and back-up practices as the discovery process uncovered records retention deficiencies. For these and many other reasons discovered in the lawsuit, the security of Walton County public records was in jeopardy.

Literally hours before trial was to commence, the parties reached a settlement, and Judge David Green entered a final judgment based on that settlement. The final judgment imposes court-ordered obligations intended to safeguard the security of the County's public records and improve compliance going forward, including: annual mandatory training for public officials and key staff; use of only official county e-mail accounts (not personal ones) to conduct county business; a requirement that the County respond to public records requests in good faith, without imposing unlawful conditions upon requesters like those imposed upon Ms. Harris. Perhaps most importantly, the final judgment requires the county and the clerk to enter into a written agreement clarifying the respective obligations of those entities so that public records are safely maintained and available for public inspection. Harris was awarded \$155,000 in attorneys' fees.

There are many battles to be fought on many fronts if this state is to remain at the vanguard of open government. This case serves as a reminder of what one determined individual can do to ensure transparency. Thank you to Suzanne Harris – and to the others who battled relentlessly for open government in 2009.

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