THE
BRECHNER REPORT

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Court declines case on right to speak at meetings

ACCESS MEETINGS

TALLAHASSEE – The question of whether Florida's Open Meetings Law gives citizens the right to speak at meetings will not be answered by the Florida Supreme Court, leaving in place the 1st District Court of Appeal's ruling that no right to speak is found in the Sunshine Law.

The Supreme Court declined review in *Keesler v. Community Maritime Park Associates*. The suit was brought by two Pensacola residents who challenged Community Maritime Park Associates (CMPA), which oversees a public park project in the Panhandle, for not allowing citizens to speak at meetings.

A trial court judge dismissed the suit in 2009, ruling that while the law guarantees a right to attend meetings, it does not confer a right to speak. The 1st District Court of Appeal agreed. The decision now stands unless another District Court of Appeal rules differently or the Supreme Court weighs in on the issue.

"For the first time in more than 40 years in Florida, the courts have declined to construe the law broadly in the public's interest," attorney Sharon Barnett, who represents the citizens, said. "This is a radical shift in Sunshine Law jurisprudence."

CMPA now allows public comment.

Source: Pensacola News-Journal

Supreme Court rules no violation in Orioles deal

SARASOTA – The Florida Supreme Court has denied an appeal by citizens groups who claim that Sarasota County officials broke the Open Meetings Law while negotiating a spring training deal with the Baltimore Orioles.

Sarasota Citizens for Responsible Government and Citizens for Sunshine sued the county and city in February, alleging Sunshine Law violations occurred during the process of negotiating the $31.2 million deal. As part of the spring training plan, up to $28 million in bonds were to be issued to pay for renovations to a baseball stadium.

A trial in July resulted in a loss for the citizens groups, who wanted the deal invalidated. Circuit Judge Robert Bennett Jr. validated the bonds and ruled that county staff who negotiated with the Orioles were not subject to the Sunshine Law. Bennett found that while some e-mail exchanges between county commissioners may have violated the Sunshine Law, any issues were cured by subsequent open meetings.

The Florida Supreme Court affirmed Bennett's ruling, validating the bonds and finding that county staffers who negotiated the specifics of the deal were not an advisory committee but "only served an informational role," according to the opinion.

A related but separate public records lawsuit against Sarasota County Commissioner Joe Barbetta was later settled for $5,000 in attorney's fees and costs. Sarasota Citizens for Responsible Government and Citizens for Sunshine alleged that Barbetta didn't fully comply with a public records request.

Neither party will have to admit fault, according to the settlement.

The citizens groups filed the suit against Barbetta after they asked to see county-related e-mails from personal and county accounts, claiming he didn't fully respond.

Barbetta contended that he was not a proper defendant and that the request was given to the county's public records custodian rather than to him personally.

Source: Sarasota Herald-Tribune, Fla. Supreme Court Case No. SC10-1647

Newspaper sues to keep Anthony jail records open

ACCESS RECORDS

ORLANDO – Lawyers for Casey Anthony, the 24-year-old Orlando woman charged with the first-degree murder of her 2-year-old daughter, have requested that her jail records be sealed.

The defense request comes on the heels of the 4th District Court of Appeal's ruling that jail records of South Florida teens accused of lighting a former friend on fire were not public records. The 4th District Court of Appeal determined in that case that recordings of personal phone calls were personal and did not fall within the definition of a public record.

Anthony's attorneys argue that the release of records such as Anthony's jail visitation log, commissary records and telephone records "serves only to embarrass and invade the privacy of the defendant."

The *Orlando Sentinel* filed a motion to block the effort to seal Anthony's jail records. "Florida's Constitution and Public Records Act contemplates the disclosure of all records made or received by an agency in connection with the transaction of official business," the motion states. "The fact that there is no exemption for the public records at issue means that the legislature never contemplated that the documents would remain secret."

The Orange County State Attorney's Office has also asked the court to deny the request to seal Anthony's jail records.

Source: Orlando Sentinel

Riviera Beach loses appeal on meeting minutes

RIVIERA BEACH – An appellate court ruling in favor of citizen activist Fane Lozman is the latest development in a years-long battle between Lozman and the City of Riviera Beach. The 4th District Court of Appeal affirmed a trial court ruling that the city must maintain minutes of its agenda-review meetings.

The city held meetings on the Monday before its Wednesday city council meetings to go over matters on the agenda. When Lozman requested written minutes of the meetings, as required by the Open Meetings Law, he was instead offered the audiotapes. In 2007, Lozman sued the city over the lack of minutes.

The city argued that the Sunshine Law provision on written minutes did not apply to city governments. Palm Beach County Circuit Judge Jack Cox ruled in Lozman's favor in 2009, finding that the city had violated the Sunshine Law.

"This is another great win for the Sunshine Law and the citizens of Riviera Beach," Lozman said, according to *The Palm Beach Post.*

Lozman will seek attorney's fees from the city, according to one of his attorneys, Ed Mullins.

Source: The Palm Beach Post

Crist hit with records suit by former supporter

TALLAHASSEE – A former U.S. ambassador has filed a public records lawsuit against Gov. Charlie Crist. The suit was filed by John Rood, a Jacksonville businessman and ambassador to the Bahamas from 2004-2007.

ACCESS RECORDS

Rood seeks documents related to Crist's decision to switch from the Republican ticket to a No Party Affiliation candidate for U.S. Senate. Crist lost his bid for Senate to Republican Marco Rubio. Rood also requested records related to Crist's veto of Senate Bill 6, the Florida Legislature's controversial law tying teacher pay to student performance.

Rood's suit comes on the heels of an earlier suit seeking refunds of approximately $7.5 million in Republican campaign donations made to Crist before he switched to NPA.

Crist's spokesperson reiterated the governor's commitment to open government and stated that Crist looked forward to prevailing in court.

Source: Sunshine State News

Cocoa changes records policies

COCOA – In an effort to curb the costs of abandoned public records requests, the Cocoa City Clerk's office will refuse to fulfill public records requests until the requester has picked up and paid for any prior requests.

City Clerk Joan Clark said the new policy, adopted in August, was created in response to numerous records requests that were filled by her office but never retrieved. "We're not trying to punish anybody," Clark told *Florida Today*. "I don't mind getting records for people. If they're not picked up, taxpayers are paying."

In 2008, the 4th District Court of Appeal denied a citizen's claim that the City of Riviera Beach violated the Public Records Law when it refused to fulfill a records request until a prior request was paid for. The reasonableness of the city's fees was not an issue in that case, *Lozman v. City of Riviera Beach* (No. 4D07-4511).

Brevard County, where Cocoa is located, also recently updated its records policy to include step-by-step instructions for responding to requests. The purpose of the change is to assist employees with little knowledge of the law who are called on to fulfill public records requests, according to county records management specialist Shelley Wilson.

Source: Florida Today

Lab raises Sunshine concerns

NAPLES – A proposed research center that could receive $130 million in county funds has some residents concerned about the transparency of the project.

Maine-based Jackson Lab, a nonprofit, is in negotiations with Collier County for a genetics research institute in the area. The project could cost up to $260 million over three years, funded by the state and county.

Attorney Tony Pires has been monitoring the project and is concerned that county officials are applying a public records exemption for proprietary business information too broadly. But County Attorney Jeff Klatzkow told the *Naples News* that he had yet to deny any requests.

In a separate incident, a Collier County resident has filed an Open Meetings suit against the county, alleging a violation of the law occurred when two commissioners traveled to Maine to visit the lab.

Commissioner Jim Coletta denied the allegations, saying that he and fellow commissioner Donna Fiala traveled separately and "didn't attend any meetings together where we conversed back and forth."

Source: Naples News

Records might expose flaws

MIAMI – The American Civil Liberties Union (ACLU) hopes to use public records to determine whether fast-track foreclosures in Florida are violating the constitutional rights of homeowners, especially minorities. The ACLU put in a four-page public records request with the State Courts Administrator's office seeking records related to practices on the management of foreclosures.

The Florida Legislature previously allocated in excess of $9 million to help clear a backlog of almost half a million cases. Reports of errors, possible fraud and fast-track proceedings raised concerns with the ACLU.

Studies show minorities have been disproportionately affected by the nation's housing crisis, according to the ACLU.

"Getting the documents we are requesting will be an important first step toward exposing and addressing any systemic injustices," Muslima Lewis, director of the ACLU of Florida's racial justice project, said.

Source: Miami-Dade Daily Business Review

Layoffs prompt union to file Sunshine suit

PORT ST. LUCIE – The union representing Port St. Lucie police officers claims in a lawsuit that the city council took a secret vote on a budget measure that would eliminate 24 police jobs and three civilian jobs.

The union filed the suit in Circuit Court Sept. 23, saying council members met in August during a nonpublic meeting and voted to eliminate the jobs. The suit asks that layoffs be halted or that the employees be reinstated.

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"The secret vote allowed the city council members to conceal from the public their positions on the layoffs of police officers. This secrecy defeats the entire foundation of the Sunshine Law and the accountability of elected officials," the suit said, according to the TCPalm.com.

Representatives for the council, including the acting mayor, did not comment to the TCPalm.com on the suit.

Source: TCPalm.com

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FOIA agency reflects on first year

WASHINGTON – The federal Office of Government Information Services (OGIS), which opened in September 2009 to offer mediation services for disputes between FOIA requesters and agencies, recently issued a report on its first year progress.

OGIS, which also reviews agency compliance with FOIA, handled more than 380 cases in the past year. There were 600,000 FOIA requests during that time. The office began with one staff member and by summer 2010 had seven staffers.

OGIS is housed in the National Archives and Records Administration, and U.S. Archivist David Ferriero said that the OGIS budget is not proportionate to the broad scope of its duties.

Miriam Nisbet, director of OGIS, hopes that education initiatives for requesters and agencies will enhance the effectiveness of OGIS.

"There are people who still don't know how to take advantage of a law that has been around for 40 years," Nisbet said.

To view the OGIS report on its first year, visit www.archives.gov/ogis.

Source: Reporters Committee for Freedom of the Press

Second high court issues ruling that metadata is public record

SEATTLE – A second state supreme court has ruled that metadata in electronic records is also a public record. The Washington Supreme Court, in *O'Neill v. City of Shoreline*, ruled 5-4 that a citizen was entitled to her request for "to" and "from" data that a deputy mayor deleted in an effort to shield the identity of the person who forwarded her an e-mail.

The deputy mayor, Maggie Fimia, claimed in a public meeting that Shoreline resident Beth O'Neill sent her an e-mail alleging improper conduct by the City Council. O'Neill denied sending the e-mail and made a public records request for it.

Fimia forwarded the e-mail from her city account to her personal account and then deleted the address fields before providing it to O'Neill. O'Neill sued for the metadata.

"Metadata may contain information that relates to the conduct of government and is important for the public to know," Justice Susan Owens wrote in the court's opinion. "It could conceivably include information about whether a document was altered, what time a document was created, or who sent a document to whom."

The Arizona Supreme Court ruled in 2009 that metadata was public, in *Lake v. City of Phoenix.*

Source: The Associated Press

Lawsuit challenges sheriff's policy limiting inmate mail to postcards

SANTA ROSA COUNTY – The American Civil Liberties Union (ACLU) and the Florida Justice Institute have filed suit against the Santa Rosa County Sheriff, alleging that a policy limiting inmate mail to postcards violates the First Amendment.

The class action suit was filed on behalf of the approximately 500 people in the jail.

FIRST AMENDMENT

ACLU of Florida staff attorney Benjamin James Stevenson said that the policy infringes on the First Amendment rights of inmates and their loved ones. Stevenson cited Martin Luther King Jr.'s famous 1963 letter from the Birmingham Jail as an example of the type of speech that could be silenced due to the policy.

Sheriff Wendell Hall said the policy, established July 26, 2010, "was initiated based on two factors: the cost to the taxpayers and the security of the facility."

Several other counties in Florida, including Alachua, Lee, Manatee and Pasco, have also recently instituted postcard-only policies.

Source: Santa Rosa Press Gazette

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New FOIA amendments not living up to the hype

The federal Freedom of Information Act has long struggled to fulfill its mission of open government: the 20-day statutory response time is usually anything but, growing privacy concerns have resulted in increasingly unjustified redactions, and requesters are often forced to litigate simple information requests just to get a reasonable response. However, the saving grace for the exasperated FOIA plaintiff was always the promise that, if they "substantially prevailed," they could be awarded their reasonable attorney fees and litigation costs for their troubles in bringing a lawsuit.

Drew Shenkman

Yet, federal courts built significant barriers to recovery of fees, carving up what it meant to "substantially prevail" in ways that were never contemplated by Congress. Plaintiffs that "substantially prevailed" would still have to demonstrate to the court that they were "entitled" to receive fees, and the Supreme Court overturned the "catalyst theory," where a plaintiff whose lawsuit catalyzed "voluntary" remedial action by the government before reaching a final judgment could receive attorneys fees as a "prevailing party." Thus, with no real threat of monetary sanction, the government had little incentive to take a request seriously until a FOIA requester became a FOIA plaintiff.

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By Drew Shenkman

Finding the fee-shifting provision of FOIA irretrievably broken, Congress stepped in and passed the OPEN Government Act of 2007. Congress strengthened FOIA's fee-shifting provisions by reinstating the catalyst theory by defining what it means to "substantially prevail" as either "a judicial order, or an enforceable written agreement or consent decree" or "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." The act became effective in January 2009.

Good news for FOIA requesters, but the reality has so far trailed behind the high expectations for prevailing FOIA plaintiffs. Courts have once again begun chipping away at the new fee-shifting provisions passed by Congress. In 2009, the D.C. Circuit, the forum in which the vast majority of FOIA litigation takes place, found that the OPEN Government Act could not be retroactively applied. And just this summer, the D.C. Circuit overturned a fee award where the government voluntarily released documents after the complaint was filed (but prior to the effective date of the act), but then settled the case after the act became effective. The court ruled that the plaintiff was not eligible for fees because the act was not effective when the voluntary release was made.

However, more troubling is the courts' continued reliance upon the eligibility/entitlement rubric to determine whether a successful plaintiff is deserving of fees. The courts have developed a two-part test, without congressional origin, where a plaintiff must be "eligible" for fees (i.e., that they "substantially prevailed"), but then also be "entitled" to them. Courts have long applied a four-factor "entitlement" test which weighs (1) the public benefit derived; (2) the commercial benefit to plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) the reasonableness of the agency's withholding. Unfortunately, this gives courts wide latitude to excuse even the most egregious government withholdings. However, Congress certainly did not intend fee-shifting to be for only a select group, but to all prevailing FOIA requesters, as access to information is every citizen's right.

Other courts have found more troubling ways to deny fee awards. FOIA plaintiffs often receive a substantial release of information after filing and serving their lawsuit. What seems to be a slam-dunk fee award has, by some courts, been excused as a "continuation of the administrative process" and not a "voluntary or unilateral change in position by the agency." This trend gives the government little incentive to take a FOIA request or appeal seriously prior to being served with a complaint, and may even forestall a release of documents until a requester can find legal representation, which all too often, they cannot afford.

We see the reality firsthand in our FOIA work for media and non-media requesters alike. Despite the Obama Administration's claimed dedication to transparency, agencies are no more responsive, and courts continue to weaken FOIA in piecemeal fashion. Unfortunately, Congress may have to step in once again to resurrect the intention of FOIA's fee-shifting provision.

Drew Shenkman is an associate attorney in Holland & Knight's Washington D.C. office. He is part of the media team and regularly represents clients on FOIA appeals and litigation.