
THE BRECHNER REPORT

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Emails deleted from Governor's iPad, BlackBerry

TALLAHASSEE – Emails to and from Florida Gov. Rick Scott have been deleted from his iPad and BlackBerry, possible violations of the state's Public Records Law.

Scott's office confirmed that emails on Scott's iPad were deleted after Scott gave his iPad to a staff IT technician.

The emails were erased when the

staffer attempted to load an application onto the iPad to print the emails, the *Orlando Sentinel* reported.

Law enforcement officials turned to his smartphone after attempts to recover the emails from the iPad were unsuccessful.

Officials recovered some emails from Scott's BlackBerry but say there is no way

to know for sure whether all of the emails were recovered, reported *The Miami Herald*.

The report comes about a month after Scott first acknowledged that a private company providing email service erased all email correspondence between Scott and his transition team.

Source: Orlando Sentinel, The Miami Herald

**ACCESS
RECORDS**

Records bill deemed "chilling"

TALLAHASSEE – It would cost \$10,750.13 to produce records relating to a Florida State Board of Administration (SBA) \$125 million pension fund investment, according to a three-page invoice from the agency's officials.

Sen. Mike Fasano (R-New Port Richey) requested records about research conducted leading to the investment in Starboard Value and Opportunity, a hedge fund spin-off of Ramius LLC. The *St. Petersburg Times* made a similar request in July, but was denied.

Rather than pay the fee, Sen. Fasano is pushing to have the agency subpoenaed, stating that the estimated cost of the

records is "chilling to the concept of governmental transparency," according to *The Palm Beach Post*.

A spokesman for SBA also stated that Gov. Rick Scott, Chief Financial Officer Jeff Atwater and Attorney General Pam Bondi, all of whom serve as agency trustees, knew about the invoice before it was sent.

SBA manages \$145 billion in Florida pensions and other public funds for hundreds of cities, counties and school districts, as well as for one million current and former public employees.

Source: St. Petersburg Times, The Palm Beach Post

Judge releases Anthony video

ORLANDO – A Florida judge has released a grainy jailhouse video depicting 25-year-old Casey Anthony reacting to news that her daughter's remains were found.

Orlando County Superior Court Judge Belvin Perry Jr. ordered that the seal, which has been in effect since June 2009, be reversed on grounds that protecting Anthony's right to a fair trial was no longer an issue. In July, Anthony was acquitted on murder charges for the death of her daughter Caylee Anthony in the summer of 2008.

In his ruling, Judge Perry also rejected claims that the video should remain secret under medical privacy laws.

"There is no reasonable expectation of privacy in jail," Perry wrote in his order to release the video. "The fact that she was sitting in a waiting area of the medical facility did not convert the incident into a medical evaluation and the fact that medical personnel had the opportunity to observe her while she watched the news coverage and gave her a sedative does not change this conclusion."

The motion to release the video, which was filed in July by Orlando TV station WKMG-Channel 6, is the latest of the court challenges seeking to unseal public records in the case.

Source: The Associated Press

UF sued over public records

GAINESVILLE – The national environmental organization Sierra Club has filed a lawsuit against the University of Florida's Institute of Food and Agricultural Services (IFAS), accusing IFAS of violating Florida's Public Records Law.

The lawsuit claims that IFAS refused to release records relating to a 2009 IFAS study criticizing counties for passing laws restricting fertilizer use during the summer rainy seasons. The paper said restrictions could lead to unintended consequences, such as increased fertilizer use during other times of the year. The suit also accuses the university of creating a "chilling effect" by charging nearly \$24,000 to produce the requested correspondence.

The Sierra Club originally made its request for records related to the study, including the names of the individuals who reviewed and approved it, in July 2010. The records may help to explain why the study appears to conflict with earlier IFAS recommendations on use of lawn fertilizers, the suit states.

The university contends that the documents sought are not public records due to the public interest in protecting the academic freedom of the researchers.

Source: The Gainesville Sun

Video withheld at OSHA hearing

ORLANDO – A federal judge has denied a motion to enjoin the U.S. Occupational Safety and Health Administration (OSHA) from publicly releasing videos and photographs depicting the death of SeaWorld trainer Dawn Brancheau.

Brancheau died in February 2010 after being drowned by Tilikum, the park's largest killer whale. Brancheau's family filed an injunction to seal the photographs and video recordings depicting Brancheau's death, her body, and the rescue efforts, under the federal Freedom of Information Act (FOIA) and the Privacy Act. They expressed concern that the materials might also be made public during an OSHA hearing that was scheduled for Sept. 19.

U.S. District Judge Gregory A. Presnell denied the motion, ruling that the legal basis for blocking release of the materials under these federal statutes is

“murky, to put it mildly.”

“None of the statutes purportedly relied upon by the Plaintiffs can provide them with the relief they seek,” Presnell wrote in the Sept. 15 order.

The federal statutes under which the plaintiffs filed the motion do not permit the court to block OSHA before the agency has had a chance to decide whether it would release the materials, the order stated.

OSHA has received three requests for the death scene materials it obtained in the course of its investigation. The agency stated that it would process the requests in compliance with FOIA regulations, but it has not issued a decision whether it would release the materials.

The Brancheau family was able to obtain an injunction to prevent OSHA from displaying any part of the death scene materials during the OSHA hearing.

Source: Orlando Sentinel

Names can remain confidential

TALLAHASSEE – Eight companies receiving multimillion-dollar awards from Florida Gov. Rick Scott remain unnamed under a Florida law that allows the names of potential employers to remain confidential for up to one year.

So far, Gov. Scott has awarded \$15 million to 16 companies as a way to lure new business into the state.

The incentives are paid for by Enterprise Florida, the state's economic development partnership, which is funded by taxpayer dollars.

Unlike previous Florida governors, Gov. Scott can award up to \$2 million

from the fund at his discretion.

Confidentiality may be an important part of a company's economic development process, due to trade secrets or business strategies, Enterprise Florida spokesman Stuart Doyle said in an email to the *South Florida Sun-Sentinel*.

But critics say that process should be more open since it involves taxpayer money.

“Allowing the governor to make those kinds of decisions arguably flies in the face of the intent of Sunshine laws,” said Rep. Mark Pafford (D-West Palm Beach).

Source: South Florida Sun-Sentinel

Hospital approves settlement, decides not to record

NEW SMYRNA BEACH – Board members for the Southeast Volusia County Hospital District have declined to pass a motion to record the board's proceedings, citing the cost of maintaining public access to the recordings.

Board members for the second time failed to pass the motion at a meeting last month. The motion to record was first heard in August, where it was rejected 6-1.

The decision not to record is already getting heat from at least one of the board's members, who was told that he could not use his own device to record the board's proceedings, according to the

Daytona Beach News-Journal.

The board member complied but said that he would seek legal counsel to protect his right to record the proceedings. Under Florida's Sunshine Law, citizens have a right to record public meetings.

The board's lawyer, however, said that allowing the board member to record would subject the recording to the same public records maintenance requirements that the board collectively struck down.

The decision not to record comes in the wake of what some have called “the biggest Sunshine Law violation ever

Suit challenges headlight flashing tickets

TALLAHASSEE – A Florida resident has filed a class-action lawsuit in Tallahassee against the Florida Highway Patrol and state traffic enforcement agencies, challenging the issuing of tickets for headlight flashing.

FIRST AMENDMENT

The lawsuit, which seeks an injunction to prohibit police officers from being able to issue tickets to drivers for flashing headlights to warn oncoming drivers of radar patrol, argues that the flashing of lights to communicate with other drivers is a form of protected speech.

“Courts have found that a wide variety of actions—such as honking one's horn or flashing one's headlights—are forms of communication under the First Amendment,” said David Hudson Jr., a scholar at the First Amendment Center.

As many as 2,400 drivers were “wrongfully issued” tickets from 2005 to 2010, under a state law meant to prevent drivers from having strobe lights in their cars or official-looking blue police lights, the suit states.

Source: St. Petersburg Times, Florida Today

litigated,” according to the *News-Journal*.

In 2010, the Bert Fish Foundation sued to stop a merger between public Bert Fish, which has served as the community hospital for Southeast Volusia County, and private nonprofit Adventist Health. The merger was the result of 21 meetings that had been illegally closed to the public on the advice of the board's former attorney, Jim Heekin, the *News-Journal* reported.

The hospital district recently approved a \$1 million settlement fee, which will be paid to the Bert Fish Foundation by the hospital's insurance policy.

Source: Daytona Beach News-Journal

Board rescinds controversial policy

DEERFIELD BEACH – Officials for the Deerfield Beach Housing Authority recently rescinded a policy allowing its officials to deny any public records request made using profane or vulgar language.

The policy was enacted only weeks earlier in response to requests made by “activist” blogger Chaz Stevens, which board members said contained derogatory and abusive language, according to the *South Florida Sun-Sentinel*.

Although board members say the policy was enacted to protect its staff, the housing authority has since rescinded the policy for fear that it would not hold up in court.

State law does not give officials the ability to decide which requests they will or will not honor, said Pat Gleason, special counsel for open government with the Florida Attorney General’s Office.

“There have been cases that have held that local government may not impose conditions above and beyond what the public records law requires,” Gleason said.

Source: South Florida Sun-Sentinel

FDLE investigates recording

TALLAHASSEE – The Florida Department of Law Enforcement (FDLE) is investigating a possible illegal recording within Lt. Gov. Jennifer Carroll’s office.

The recording is of John Konkus, chief of staff for Carroll’s office, who is heard whispering to another staff member, Carletha Cole, about internal issues.

Cole was recently fired after complaining to *The Florida Times-Union* about disputes within the lieutenant governor’s office.

Under Florida law, the recording of a private conversation without consent can carry a felony charge.

Source: St. Petersburg Times

PRIVACY

ACCESS RECORDS CONTINUED

Pinellas agendas kept hidden

PINELLAS – For the last eight years, the Pinellas County Business Technology Services Board, which oversees Pinellas County’s multimillion-dollar computer network and digital records, has kept public meeting agendas hidden on the county website, accessible only by a password given to government workers.

It is alleged that county officials were not aware of the issue until County Commissioner Ken Welch “stumbled

onto the problem” this summer, the *St. Petersburg Times* reported.

Under Florida’s Public Records and Open Meetings laws, governments must publish public meeting agendas so that individuals will have notice as to the topics that will be discussed at the meeting.

The board said that it would make the agendas accessible on its website beginning with its Oct. 27 meeting.

Source: St. Petersburg Times

State investigates Crestview

CRESTVIEW – The State Attorney’s Office has launched an investigation to determine whether the actions of several Crestview City Council members violated Florida’s Public Records Law.

The complaint leading to the investigation was filed by several media organizations, including *Northwest Florida Daily News* and local Crestview radio stations WAAZ/WSJB, after obtaining several emails indicating that

public officials were discussing city issues outside of properly noticed public meetings.

“In particular, discussing personnel matters, vehicle purchases and contracts must occur under the light of public scrutiny,” state Rep. Matt Gaetz said of the emails.

More than 5,000 emails have been submitted to the State Attorney’s Office.

Source: Northwest Florida Daily News

New Port Richey raises fees

NEW PORT RICHEY – The costs of making public records requests will be slightly more expensive in New Port Richey under a new fee schedule unanimously passed by city council officials.

Under the new fee schedule, the city can charge the hourly wage of the worker complying with the requests after the first 15 minutes.

The city can also require requesters to make a minimum deposit of \$25 if the requests will take more than an hour. Records requests in New Port Richey

were previously completed at little to no cost, the *St. Petersburg Times* reported.

Local governments should set fee scales to let the public know the costs up front, but they should be fair, according to Barbara Peterson, president of Tallahassee-based First Amendment Foundation, a nonprofit that advocates for open government.

State law also mandates that citizens be charged the lowest possible hourly rate of an employee that can complete the job, Peterson said.

Source: St. Petersburg Times

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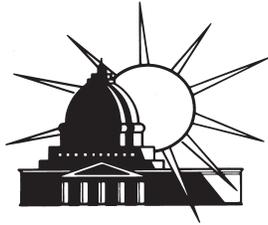
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Redefining access to journalists in a digital age

It's not every day one has the chance to work for a start-up federal agency in Washington, D.C. – much less after only one year of law school. But that was my experience in summer 2011 when I interned for the Office of Government Information Services (OGIS).

Housed within the National Archives and Records Administration and created as part of the OPEN Government Act of 2007, OGIS has a two-pronged mission: a) Review federal agency policies, procedures and compliance with the Freedom of Information Act (FOIA); and b) provide mediation services in FOIA disputes between persons making requests under FOIA and the federal agencies. In its first 24 months, the small-but-mighty staff of seven handled more than 760 disputes, providing a spectrum of mediation services to its customers—FOIA requesters and federal agency personnel.

My experience interning with OGIS taught me a great deal about the role of mediation as a value-added alternative to

The Back Page

By *Kara C. Murrhee*

litigation, while exposing me to a side of the FOIA process not typically known by journalists. During my internship, I assisted in the resolution of several such FOIA disputes, including one involving a blogger who filed a request for OGIS assistance after receiving mixed responses from different federal agencies regarding his fee requester status. While some agencies granted his status as a “representative of the news media” for fee assessment purposes under FOIA, others agencies denied his request, placing him in the “all other” requester category.

Under FOIA, “a representative of the news media” includes “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii). This definition, expanded by the OPEN Government Act, benefits bloggers and non-traditional journalists by making them eligible for reduced processing and duplication fees previously available to mainstream journalists.

However, FOIA and agency policy grants agencies broad discretion in determining whether a requester’s activities qualify him for news media status. It may also be up to the agency to



Kara C. Murrhee

determine on a case-by-case basis when “such fees should be waived or reduced.” 5 U.S.C. § 552(a)(4) (A)(iii). Thus, the fact that one is a journalist does not automatically qualify him for a fee waiver.

Frustration undoubtedly felt by FOIA requesters in response to seemingly inconsistent agency action accentuates a problem long plaguing the journalistic front: In an age when anyone can post links and publish content, who is a journalist? Should bloggers and other non-traditional journalists be granted similar access—such as to court proceedings and public records—as members of the traditional news media?

Experience suggests the answer should not be categorical, especially given the role these journalists play in the newsgathering and reporting process. Yet, consider the practical problems faced by officials for the Ninth Judicial Circuit in Orange County, Fla., during the Casey Anthony trial. A wide range of reporters—including mainstream news media, bloggers and non-traditional journalists—competed for access, but a seating shortage demanded court officials devise a plan for determining who could access the courtroom. Court officials conducted a credentialing process—after initial access was granted to mainstream media—through which other journalists could apply for access if they could demonstrate: 1) establishment of an independent website; 2) publication of original news; 3) website traffic of at least 1,000 hits per day; and 4) prior coverage of the judicial branch.

That court officials felt compelled to develop a system for separating the credentialed from the queue underscores problems caused by applying outdated definitions of journalists in the Internet era. While Orange County court officials should be lauded for their efforts and procedures, similar situations will arise again, posing a challenge to courtroom access and subjecting the decisionmaker’s process to greater scrutiny. The reality is that—like “news”—the definition of journalist is difficult to explicate. When creating policies that promote the greatest levels of access to journalists of all types, it may be beneficial for policymakers to consider input from all stakeholders, including non-traditional journalists—as well as to apply a balanced method that weighs multiple variables in holistic fashion.

Kara C. Murrhee is the editor of The Brechtner Report for the Joseph L. Brechtner Center for Freedom of Information.