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# THE BRECHNER REPORT

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## Scott's office will now follow law

TALLAHASSEE – Gov. Rick Scott's office announced it will comply with Florida's Public Records Law as Scott begins his second term, according to The Miami Herald.

Scott's office will now require former employees who use private email accounts or private cellphones for public business to turn over the records when they leave their position, the paper reported.

Scott's lawyers have previously argued in court that Florida's Public Records Law does not apply to Scott's office because they believed the custodian of records is the employee, not

the state, according to the paper. This argument exposed Scott's administration to a public records lawsuit last term.

Scott's new policy is already codified in the Florida Statutes, the paper reported. The law requires employees who have custody of any public records turn them over at the end of their time in office.

Scott's office would not answer whether the public records from former employees during Scott's first term were turned over or destroyed, according to the paper. Scott's office also said no list of those records existed.

Source: *The Miami Herald*

ACCESS  
RECORDS

## Federal FOIA bill fails to pass

WASHINGTON, D.C. – Congress failed to pass the FOIA Improvement Act at the end of the year, according to The Washington Post.

The House and Senate each approved their own versions of the bill unanimously, the paper reported. The Senate legislation then stalled in the House and did not pass.

The Senate bill would have created a "presumption of openness" in government documents, codifying a 2009 directive from President Obama to federal agencies, according to the paper. The bill would have also restricted an exemption that allows the government to deny FOIA requests in order to protect sensitive information, known as the "foreseeable harm" exemption.

The bill would have also required the government to eliminate FOIA fees when agencies do not meet statutory production deadlines and would have created a central website to process requests, the paper reported.

Several lawmakers in the House were concerned that requestors would use the "foreseeable harm" exemption as the basis for more frequent FOIA lawsuits, according to the paper.

Ultimately, the House adjourned without discussing the FOIA bill, and it failed to pass, the paper reported.

Many FOIA advocates have already discussed plans to push for FOIA reform during the next session, according to the paper. The FOIA Improvement Act had more than 70 groups supporting its passage this year.

"The open-government community remains extremely committed to seeing this move forward," said Amy Bennett, assistant director for OpenTheGovernment.org. "We really just need to open up the lines of communication and see where the champions are on this issue. It makes a lot of sense to revisit it."

Source: *The Washington Post*

FREEDOM  
OF INFORMATION

## Judge allows amendment to lawsuit

TALLAHASSEE – A Tallahassee judge allowed a new complaint in an ongoing public records lawsuit against Gov. Rick Scott, according to the Bradenton Herald.

Circuit Judge Charles Francis ruled that attorney Steven Andrews would be allowed to amend his existing public records lawsuit against Scott to include an allegation that Scott intentionally withheld public records in violation of state law, the paper reported.

Andrews requested to file the charge after Scott turned over 197 pages from his private email account after he and his attorneys previously told the court the records did not exist, according to the paper.

Since the lawsuit began in November 2013, Scott's lawyers claimed they had produced all the records Andrews

requested, the paper reported. Scott also claimed he did not use an iPad to conduct state business and his private email was only for personal communications.

Scott's office recently released documents that showed several emails discussing state business and other sensitive issues using his private email account and iPad, according to the paper.

Francis ruled Andrews will be allowed to accuse the governor of intentionally withholding records based on the new information, the paper reported.

Source: *Bradenton Herald*

ACCESS  
RECORDS

## Bush emails available to public

WASHINGTON, D.C. – Former Gov. Jeb Bush released his emails in an effort to be “totally transparent” as he considers whether he will run for president, according to The Washington Post.

In December, the paper was able to obtain many of the emails, through public records requests, Bush plans to release sometime in early 2015, the paper reported. Bush also plans to release only those emails already available under Florida’s Public Records law.

Bush’s team plans to make the emails available on a searchable website following their release, according to the paper.

The emails indicate that Bush frequently responded directly to citizens who emailed him, the paper reported. The emails also illustrate the challenges

Bush faced with conservatives in his own party.

The emails also provide insight into how Bush sought to improve areas like education, taxes and healthcare during his tenure as Florida’s governor between 1999 and 2007, according to the paper.

Bush’s decision to release the emails reflects a similar pledge he took as governor in 1999, the paper reported. In response to questions of possible Sunshine Law violations, Bush promised to make ethics and openness top priorities and to train his staff on Florida’s Public Records Law.

Access advocates gave Bush mixed reviews, saying he got off to a rough start and delayed or failed to provide records electronically, according to the paper.

*Source: The Washington Post*

## Bills seek to exempt more records

TALLAHASSEE – Florida lawmakers will once again consider several exemptions to the state’s Sunshine laws in the 2015 legislative session, according to The Tampa Tribune.

Legislators have already filed nearly a dozen bills that would create or expand current records and meetings exemptions, the paper reported. Several of the bills have been filed before and failed in previous sessions, including closing searches for public university presidents and exemptions for taxpayer email addresses.

The 2015 version of the bill regarding university presidents would make confidential any information about candidates for president, dean or provost for a state university or college, according to the paper. In addition, this year’s bill would also close interviews and related meetings, but keep open any meeting on how much the position would pay.

Lawmakers began meeting the first week of January. The regular session begins March 3.

*Source: The Tampa Tribune, HB 223, www.leg.state.fl.us*

## Bill would temporarily exempt proposals

MANATEE – A state representative filed a bill that would temporarily exempt unsolicited proposals from Florida’s Sunshine laws, according to the Bradenton Herald.

House Bill 65, sponsored by Rep. Greg Steube, would exempt unsolicited proposals that could be done as part of public-private partnerships with a city or county, the paper reported. Examples of such proposals include public infrastructure or facilities proposals.

The bill allows for a temporary exemption, but eventually all information regarding the proposal would become public record and no portion of the closed meeting may be held “off the record,” according to the paper.

Steube said the bill is meant to encourage free enterprise and is designed to protect sensitive, competitive information from private contractors submitting unsolicited plans, the paper reported.

“Free markets are supposed to work that way. We’re trying to give public entities that support,” said Steube. “Ultimately, it saves the taxpayer money. People won’t submit if they’re concerned about competitors getting information. It just puts people at a competitive disadvantage.”

*Source: Bradenton Herald, HB 65, www.leg.state.fl.us*

## DOC investigates possible forged record

MIAMI –The Florida Department of Corrections has opened an investigation to determine whether a record they provided to The Miami Herald was forged, according to the paper.

The document provided to the Herald by the DOC was a form allegedly filled out by inmate Harold Hempstead withdrawing permission for the paper to access certain records.

Hempstead is a whistle-blower who gave information on the death of inmate Darren Rainey to the Herald, which led

the paper to investigate Rainey’s and other suspicious deaths and possible corruption at the DOC, the paper reported.

As part of the investigation, Hempstead gave the Herald access to his medical records and waived his strict privacy rights, according to the paper.

After Hempstead signed the waiver of those rights, however, a DOC spokesman informed the Herald that Hempstead had withdrawn his permission, the paper reported. The DOC provided the Herald with a document, allegedly not in

Hempstead’s handwriting, withdrawing his consent.

Hempstead told the department investigators in two separate interviews that the document in question is a fraud, according to the paper.

Hempstead kept detailed accounts of Rainey’s death, the suspicious deaths of other inmates and other potential abuses of inmates, the paper reported.

The Miami-Dade State Attorney is investigating the Rainey case, but no charges have been brought, according to the paper.

*Source: The Miami Herald*

**OPEN  
GOVERNMENT**

## NSA admits to improper surveillance

WASHINGTON, D.C. – In December, the National Security Agency released reports on improper surveillance practices, according to Bloomberg News.

The NSA released the heavily redacted reports in response to a FOIA lawsuit filed by the American Civil Liberties Union, Bloomberg reported. The reports contained information from the past decade on intelligence collection that may have violated the law or U.S. policy.

The reports included examples of personal data about Americans being emailed to unauthorized recipients, stored on unsecured computers and retained after the information was supposed to be destroyed, according to Bloomberg.

“The government conducts sweeping surveillance under this authority – surveillance that increasingly puts Americans’ data in the hands of the NSA,” said Patrick Toomey, an attorney with the ACLU’s National Security Project. “Despite that fact, this spying is conducted almost entirely in secret and without legislative or judicial oversight.”

Source: Bloomberg News

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## County EDC to go private

CITRUS COUNTY – The Citrus County Economic Development Council announced that it will transition into a private entity at the end of this year, according to the Citrus County Chronicle.

EDC Executive Director Don Taylor notified the county that the council will no longer request funding from the county at the end of 2015, the paper reported.

“We decided it was time,” said Taylor. “We’ve talked about it for a couple of years. It’s hard to get private investors on board when you are under the Sunshine

Law. It’s best to just go private right now.”

Taylor said the EDC will continue to provide economic development services to the county, but will rely solely on private funding for those services after 2015, according to the paper.

Taylor told the paper the private funding model has been discussed and planned for several years. At the end of the year, the old board will be dissolved and a new board of private investors will step in, the paper reported.

Source: Citrus County Chronicle

## Official cleared in complaint

PENSACOLA – A potential Sunshine Law violation against Escambia County Commissioner Doug Underhill was dismissed by the State Attorney’s Office, according to the Pensacola News Journal.

The complaint against Underhill alleged that he had private conversations with county commissioners concerning discretionary funding, the paper reported.

The State Attorney’s Office found that these conversations did take place, but occurred between the primary election and the general election for county commissioners, according to the paper. Thus, Underhill did not become subject to

Florida’s Sunshine Law until after he won the general election, according to the State Attorney’s written response.

The conversations Underhill had involved having county procedure changed from requiring commission approval for commissioners to spend \$50,000 in tax funds available to them for tourism development, the paper reported.

The State Attorney’s Office found that there was no evidence these conversations occurred following the general election and no further action would be taken in the investigation, according to the paper.

Source: Pensacola News Journal

## County loses public records suit

ORANGE COUNTY – An appellate court sanctioned Orange County in a four-year-old public records lawsuit, according to the court’s opinion.

The 5th District Court of Appeal awarded attorney’s fees to Susan Hewlings for the second time. The county argued on its first appeal that it was not legally obligated to provide attorney’s fees for Hewlings despite the trial court’s ruling that the county must produce the records.

Following the initial appeal, the case was remanded to the trial court. The trial court found that the county “unreasonably delayed” in complying with Hewlings’s requests for records and ordered the county to pay attorney’s fees.

The county then appealed the ruling

again and argued that Florida’s Public Records Law “does not authorize an award of fees absent a ‘refusal’ by the agency” to comply with the law, the opinion stated.

The appellate court found that this second appeal, which raised no new issues, was frivolous. “To say that [the county] has turned a molehill

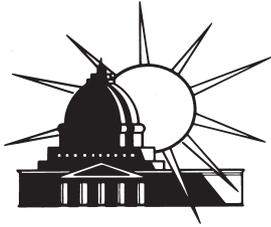
into a mountain is an understatement. This case provides a textbook example of why the legislature authorized an award of fees against obstinate public entities...” the opinion stated.

The court granted attorney’s fees to Hewlings and imposed sanctions for the “frivolous and abusive appeal,” the court ruled.

Source: Orange County v. Hewlings, No. 5D13-3775

ACCESS RECORDS

February 2015



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## We can learn from the death of the FOIA bill

At 40 minutes past nine o'clock on December 11, 2014, Speaker John Boehner announced, "My job tonight is to say thank you, and Merry Christmas," he then gaveled House business to a close, and killed Freedom of Information Act reform, despite unanimous approval in both houses.

During the 113th Session of Congress, Freedom of Information Act bills passed the House with 410 votes and passed the Senate via unanimous consent, only to die.

Even more depressing: FOIA bills dying despite receiving unanimous votes is not an abnormality, it's a trend.

The Senate Judiciary Committee has now passed FOIA reform three times since 2007 without it becoming law. In 2010, the Faster FOIA bill passed the entire Senate by unanimous consent, only to die in the House. In 2011, the Faster FOIA bill again passed out of the Senate by unanimous consent and died an even more ignoble death – Speaker Boehner gutted it and replaced it with the last-minute, secretly drafted "Budget Control Act of 2011."

The death of the 2014 bill stings even worse. It was better crafted than each of the previous three and was drafted over a two-year process in conjunction with both the Senate and the House. Unlike previous FOIA bills, Representatives Daryl Issa (R-CA) and Elijah Cummings (D-MD) acted first and passed the FOIA Oversight and Implementation Act in February with 410 votes and none opposing.

The Senate version, the FOIA Improvement Act, largely mirrored the House bill, but in one key respect was much stronger. The Act made it harder for agencies to apply Exemption Five, an exemption that allows the withholding of "inter-agency or intra-agency memorandums or letters." While this exemption is often used correctly to preserve candid communications between government employees, its broad wording and ease of application has led to extreme (even offensive) overuse, including censoring information on DOJ Nazi hunting (and protecting), a CIA history of the Bay of Pigs invasion, and many more. President Obama's adviser John Podesta has even called it the



*Nate Jones*

"withhold it because you want to" exemption.

Much has correctly been written about the silence by the mainstream media on the bill. Following journalist Alex Howard's lead, The New York Times Public Editor Margaret Sullivan and Kelly O'Brien at the Columbia Journalism Review have written scathing pieces condemning mainstream media's ignorance of this bill. As Sullivan asked, "If the press won't represent itself — and the people — by showing some interest in the free flow of government information, who will?"

Many people – in Congress, in the agencies, in the White House, in the media – proclaim they believe in open government, but don't really. To me, that's the only plausible reason a FOIA bill could garner unanimous approval (thrice in the Senate over the past seven years!) and still die; that's the only plausible reason agencies whisper that instructions about FOIA currently on the books will ruin the federal government as we know it; that's the reason for White House silence on the benefits of the FOIA Ombuds office not being forced to run its reports through the Department of Justice so they can be "rosified;" that's the reason The New York Times wins Pulitzers for its FOIA-based reporting, but doesn't assign a congressional beat reporter to cover the bill's death.

How do we overcome these FOIA Januses? First, we must avoid being stalled out. We should force Speaker Boehner to act on his pledge that he "look[s] forward to working to resolve this issue [FOIA reform] early in the new Congress." Both houses should immediately reintroduce the FOIA bill. More than 440 members who voted for FOIA reform remain in Congress.

Second –as absurd as it sounds– open government advocates must find a way to force our representatives to actually pass the bills they vote for. If the 400-plus remaining members who voted for reform to the Freedom of Information Act truly believe in enhancing the public's access to government information, it should be an easy feat to pass identical, or nearly identical, Freedom of Information Act reform by Sunshine Week, March 2015. If not, we need to force congresspeople to state the reasons why they object to our access to our own information.

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*Nate Jones is the Director of the FOIA Project at the National Security Archive.*