THE BRECHNER REPORT

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Court: Private hospital exempt

DAYTONA BEACH – Florida Hospital DeLand does not need to comply with Florida's open government laws, according to a ruling issued by the 5th District Court of Appeal.

The Daytona Beach News-Journal sought access to the hospital's meetings and records in a Sunshine Law debate that began in 1994, when the corporation created to run the hospital decided to keep information private. In 1999, the Florida Supreme Court held that the leased hospital's meetings should be open.

However, the latest ruling found that the hospital is not subject to open government laws since Memorial Hospital-West Volusia Inc. bought the hospital from the West Volusia Hospital Authority taxing district in 2000.

"Since the sale, Memorial is no longer 'acting on behalf' of the Authority," Chief Judge Robert J. Pleus Jr. wrote. "And therefore is not subject to the Public Records Act and the Sunshine Law."

ACCESS MEETINGS

The News-Journal's attorney, Jon Kaney, said the ruling focuses on the ownership of the hospital rather than its function of serving the public.

The Florida Legislature has since passed a bill allowing corporations that purchase public hospitals to be exempt from open government laws.

"The real issue here is the constitutionality of that exemption and, I'm afraid to say, the viability of the constitutional standard" requiring public necessity to justify exemptions to open government laws, Kaney said before the bill was passed.

"If [the constitutional standard] continues to be watered down and gutted…we may have to send the signature gatherers back into the public parking lots to amend the Constitution," Kaney said.

Ethics complaints dropped against Polk commissioners

BARTOW – Two Polk County commissioners have been cleared of ethics allegations stemming from the release of a memo that was exempt from the Public Records Law.

The state Commission on Ethics found no probable cause to find that Jack Myers and Paul Senft abused their positions by providing the memo to a landowner who sought a zoning change from the commission.

ACCESS RECORDS

The commissioners had reportedly been told by their lawyer that they had the authority to make such confidential documents available to the public.

A former Winter Haven city commissioner, Jim Lear, filed the complaint in May 2005.

The memo concerned a landowner's attempt to change the zoning for 10 acres from residential to industrial. A community group opposed the move.

The memo, written by Polk County Attorney Joseph Jarret, recommended a denial of the zoning request. Because it was in anticipation of litigation, the memo was exempt from the Public Records Law.

Ten board members found guilty

BARTOW – Ten members of the Polk County Opportunity Council were found guilty of violating the Sunshine Law. County Judge Anne Kaylor ordered each board member to pay a $250 fine and $28.60 in court costs.

The non-criminal charges stemmed from a closed September meeting during which the board discussed former executive director Carolyn Speed.

Following the closed meeting, the board returned to the public meeting, where they voted to reprimand Speed for accepting a controversial training trip to Las Vegas. Speed was later forced to resign.

"I don't believe that this violation was done willfully or intentionally with any nefarious scheme to perpetrate any kind of a fraud or secret upon the public," Kaylor said during sentencing.

Kaylor said she would "strongly recommend" Sunshine Law training for the board members.

The PCOC is a nonprofit agency dedicated to helping the area's poor.

Attorneys: Meeting not a violation

TALLAHASSEE – Attorney General Charlie Crist, along with State Attorney Willie Meggs, have concluded that a closed meeting about Leon County voting equipment did not violate the Sunshine Law.

Crist and Meggs wrote letters to the *Tallahassee Democrat* in response to concerns with the March 13 meeting.

Reporters were kept from the meeting between Florida Secretary of State Sue Cobb and Leon election officials. County Commissioner Bob Rackleff was asked to leave the meeting because another commissioner was already there.

Leon County gave notice that the meeting would be open, but Cobb asked the media to leave in order to expedite the meeting.

Crist also commented that reporters "have cause to feel wronged" if threatened with arrest, but he noted that there had been conflicting accounts of whether this threat occurred.

FIRST AMENDMENT

Ormond Beach installs "no-triple-repeat" policy

ORMOND BEACH – Citizens who want to speak their minds to the Ormond Beach City Commission may be choosing their words more carefully.

The commission has adopted a policy that seeks to prevent those who speak during audience remarks from making the same point at three different meetings.

According to the new policy, Mayor Fred Costello can ask speakers to provide new information or switch topics if they attempt to make the same remarks about a subject at a third meeting.

"We're not trying to keep people from expressing their opinions or stifle debate. I just don't want people to invest other people's time in personal issues that don't impact anyone else," Costello said.

Ormond Beach's "repeat" policy applies to the portion of commission meetings when residents are permitted five minutes to talk about any matter not already on the agenda.

Commissioner Troy Kent expressed concern about the policy.

"I want to make sure we're not shutting people down or making them feel they shouldn't bother coming to meetings," Kent said.

ACCESS RECORDS CONTINUED

University president prevails in records lawsuit

GAINESVILLE – University of Florida President Bernie Machen's inadvertent failure to provide some public records was not a violation of the Public Records Law, a circuit judge ruled.

Charles Grapski, a UF doctoral student and instructor, alleged in his lawsuit that Machen failed to provide documents related to UF Homecoming, Florida Blue Key and Gator Growl.

Circuit Judge Robert Roundtree Jr. ruled that Grapski did not prove that records he thought were public existed.

"The mere fact that an e-mail is received by a public agency or official does not make it a public record," Roundtree wrote. He also stated that e-mails to public officials commenting on their performance "may or may not" be public records.

Grapski, 40, contends that Blue Key, the leadership organization that sponsors Gator Growl, should not receive student fees because it is not open to all students, according to *The Gainesville Sun*.

"If this judge's ruling is maintained, there is no Public Records Law in the state of Florida," said Grapski, who is running for a seat in the Florida House.

Grapski will have to pay the university's court costs of approximately $1,300.

In May, Grapski was arrested after Alachua's city manager accused him of illegally taping a meeting. The purpose of the meeting was to discuss Grapski's request for election records.

Newspaper wins records suit to tell story of slain youngster

OCALA – The *Ocala Star-Banner* was successful in its petition to access court documents and Department of Children and Families records related to the beating death of a 5-year-old boy.

Coreyon Graham died Feb. 16, and police have issued an arrest warrant for the boy's father, Richard Crawford. Crawford is wanted on charges of first-degree murder and aggravated child abuse. The Medical Examiner's Office determined that Coreyon's death was a result of blunt force trauma from a beating.

"We want to tell Coreyon's story, and we want the information so that we can do just that," said *Star-Banner* Executive Editor Robyn Tomlin.

Though he had previously been under DCF supervision, Coreyon was not under DCF supervision at the time of his death because the agency had enacted a case plan giving his grandmother custody.

Circuit Judge Stephen Spivey did not immediately grant the *Star-Banner* access to DCF case records involving Coreyon prior to his death. Spivey said he would review DCF's recommended redactions of those records and make a ruling at a later date.

Judge: Cruise line must offer assault data

MIAMI – A Miami judge has ordered Carnival Cruise Lines to disclose its sexual assault records during a three-year period. The records, sought by an abuse victim's lawyer in a civil case, will not immediately be made open to the public.

James Walker represents the family of a girl who alleged she was fondled by a crew member during a 2000 vacation. She was 12 years old at the time of the incident.

The crew member pleaded guilty to criminal charges later that year.

The Miami Herald reported that it would challenge Miami-Dade Circuit Court Judge Gill Freeman's decision to keep the information confidential.

City uses exemption to keep business talks private

FORT PIERCE – The Fort Pierce City Commission has voted to create an economic development agency, a move that will keep talks with prospective employers from public view for up to two years.

Florida law contains a public records exemption for economic development agencies.

The creation of such an agency by neighboring city Port St. Lucie prompted Fort Pierce to create one.

Port St. Lucie did so to keep discussions with a major research institution secret.

Only one Fort Pierce commissioner, R. "Duke" Nelson, voted against the economic development agency measure, citing the need for transparent government.

Airline group stops taping after request

ORLANDO – The Airlines/Airport Affairs Committee, a group of airline executives who have veto power over part of the Orlando International Airport's budget, will no longer record its meetings.

The Sunshine Law does not require the group's meetings to be open to the public.

However, it has traditionally kept recordings of meetings available through the Greater Orlando Aviation Authority.

The *Orlando Sentinel* reported that after the newspaper requested tapes of the meetings, the group decided to stop making the recordings.

An airline spokeswoman defended the privacy of the meetings. "The meetings of the AAAC are private because much of the information discussed is proprietary," said Southwest Airlines spokeswoman Marilee McInnis.

Randy Gillespie, properties manager for Southwest, is chairman of the AAAC.

In addition to airline executives such as Gillespie, the meetings are also attended by senior staff of the Aviation Authority.

These staffers make recommendations to board members of the Authority, according to the *Sentinel*.

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Lehigh planning group asks attendees to leave meeting

LEHIGH – A community planning group asked members of the public and press to leave its meeting, after consulting the Lee County attorney and getting his opinion that the group does not operate under the Sunshine Law.

According to Chairman Bo Turbeville, since the planning group never received money from the county and is not an official advisory board to the county, it does not fall under the Sunshine Law.

The planning group voted to have a closed session to discuss a complaint against a member. Approximately 15 residents who attended the meeting had to leave.

One Lehigh resident, David Adams, felt it was unfair that a non-board member was allowed to attend the executive session to give advice on parliamentary procedure. Turbeville said that Robert Anderson was actually the group's parliamentarian.

At least one county commissioner cautioned against closure.

"You could get into all kinds of legal entanglements," warned Commissioner John Albion.

Synagogue: City met illegally to decide fate of residential site

HOLLYWOOD – A synagogue based in a residential neighborhood has sued city commissioners, alleging they "pre-agreed" on how to shut down the place of worship.

The Chabad Lubavitch claims that an executive session with the commission, city attorney and city manager violated the Sunshine Law.

The reported reason for the closed meeting was to discuss an earlier lawsuit that had been filed by the synagogue.

The Chabad's attorney, Franklin Zemel, contends Hollywood Mayor Mara Giulianti polled commissioners to get a majority to agree on a course of action to shut down the synagogue.

"Let me ask each person, because we don't put it on the agenda for us to decide until we know we have some kind of consensus, otherwise we have an argument until 6:30 in the morning and a whole bunch of people getting up and talking about it," Giulianti said, according to a transcript of the closed meeting.

The Chabad bought two homes in Hollywood Hills in 2001 and converted one into a synagogue.

Prompted by neighbors' complaints about parking, noise and garbage, the Hollywood commission moved to remove the synagogue from the residential area.

Attorney's firing center of probe

MONROE COUNTY – The State Attorney's Office is finishing up its investigation of the February firing of the county attorney. Richard Collins was fired at a Feb. 15 meeting after the action was added to the agenda at the last minute.

Two commissioners objected to the issue, and one, George Neugent, accused three commissioners of discussing the matter before the meeting. Those commissioners denied that allegation.

Commissioner Sonny McCoy, who made the motion to buy out the remainder of Collins' contract, cited concerns about the county attorney's health and job performance.

The Monroe County State Attorney's Office sought the help of the public in the investigation. "The reason for it is we are in the final stages of the investigation…if there is one of your readers who can give us hard facts related to this case, we want to hear those," Matt Helmerich, spokesman for the State Attorney's Office, told *The Florida Keys Keynoter*.

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UNIVERSITY OF FLORIDA

Psuedo-secrets threaten the public's right to know

The formal records classification system in recent years has witnessed unprecedented secrecy, with more classification last year – 15.6 million classification decisions, up from 9 million in 2001 – than in any year since the government began keeping records. But there is also an informal strain of secrecy taking root in the executive branch, largely unseen and unchecked, which potentially poses an even greater threat to the public's right to know and to our security: pseudo-classification.

Kristin Adair

The National Security Archive recently issued a report analyzing this trend. We asked agencies for their policies and procedures on protecting unclassified information that they identify as posing a security threat. The results were alarming.

In examining 37 federal agencies and offices, we found *28 distinct policies* for protecting sensitive unclassified information and little, if any, coordination between agencies – evidenced by the broad range of different designations that agencies use, from For Official Use Only (FOUO) to Sensitive But Unclassified (SBU), Sensitive Security Information (SSI) and many more. As these and other curious acronyms increasingly find their way onto page after page of government documents, agency prescriptions for marking, protection and decontrol of designated sensitive materials are vague and disparate.

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By Kristin Adair

In comparison to the classification system, which is monitored and evaluated annually by a central office, sensitive unclassified information may fall into a black hole – far from the view of the public, Congress, other agencies and state and local first responders who may need the information to keep us safe. Moreover, the diversity of ambiguous policies and the lack of monitoring or oversight mean that neither Congress nor the public can tell whether these policies are working to safeguard our security, or are being abused for convenience or to cover-up embarrassment or wrongdoing.

Among the 28 policies, none provide for monitoring or reporting on the use of the safeguarding procedures, nor do any include a mechanism to challenge the protection of particular documents under these policies.

So what about the effect on FOIA? A number of policies explicitly state that the marking of a document as FOUO or SBU has no bearing on whether it may be withheld from public requesters. But the implications in practice are unclear: sensitive unclassified safeguards may actually be functioning as a "tenth exemption," motivating reviewers to search for justifications to withhold sensitive information when they might not otherwise have done so.

And human nature suggests that FOIA reviewers without specific knowledge of national security matters may look at a brightly-colored cover page, ominously labeled "Sensitive Security Information," and on that basis opt not to approve release. After all, there is no statutory sanction for improper withholding of information, so the unsubstantiated possibility that a document could jeopardize our security or assist a terrorist makes the choice an easy one.

The next step must be to at least get some hard numbers. How many people are marking sensitive information? How many records are affected? How do the markings affect the review of records under FOIA? At two hearings, Congressman Christopher Shays has sought answers to these questions – and the only thing he has determined is that *government officials have no answers*.

Moreover, there must be some government-wide rules about who can apply protective markings and how they can be challenged, and the rules must be enforced by someone other than the individual holding the stamp.

President Bush, in a December 2005 memorandum, directed federal agencies and offices to develop standard policies on SBU information, to "promote appropriate and consistent safeguarding" and to facilitate information sharing of homeland security-related information.

But to date, no proposals have been publicly disseminated. In the meantime, a rash of pseudo-secrets is spreading through the government; and without even knowing the full extent of this epidemic, we are powerless to cure it.

Kristin Adair is a Freedom of Information Associate at the National Security Archive. She recently completed her graduate work at the George Washington University, where she received both her J.D. and her M.A. in International Affairs.