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# THE BRECHNER REPORT

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## Ex-reporter appeals \$5,000 per day contempt order

WASHINGTON – Former *USA Today* reporter Toni Locy appealed a district court judge's contempt order imposing fines of up to \$5,000 per day – from Locy's own pocket – for refusing to reveal confidential sources.

U.S. District Judge Reggie Walton issued the unusual order after Locy refused to disclose the names of sources who identified a former Army infectious disease researcher as a suspect in a federal investigation into terrorist attacks. Walton prohibited Locy from receiving assistance in paying the fines.

The U.S. Court of Appeals in Washington, D.C. issued a stay until it could rule on the order.

Nine months after former Attorney General John Ashcroft publicly revealed that Steven Hatfill was a "person of interest" in the federal probe of anthrax letters sent in September 2001 that caused five deaths, Locy published stories outing Hatfill as a suspect.

Hatfill sued the government for invading his privacy by disclosing information to the press about the probe.

Locy's attorney, Robert Bernius, argued that the appellate court should overturn the contempt order because Locy could not recall the names of the sources and Hatfill could pursue his case without Locy's testimony, according to *USA Today*.

During oral argument, Justice Douglas Ginsburg said the reporter's privilege, which protects journalists who refuse to reveal confidential sources, "is supposed to yield only in the exceptional case," according to *USA Today*.

The panel did not say when it would rule on Locy's appeal.

Source: *USA Today*

### REPORTER'S PRIVILEGE

## University of Florida to examine students' e-mails

GAINESVILLE – The University of Florida will examine student and faculty e-mails to identify the source of confidential information about a controversial medical school admissions decision made by the recently-ousted dean of UF's College of Medicine.

UF's Privacy Office said it will scan the e-mail accounts of the 28 people, including students, identified in its privacy investigation.

While the federal Family Educational Rights and Privacy Act generally protects student records, during an investigation

UF officials said the privacy office is authorized to read through student e-mails.

"We reserve the right to go through anyone's e-mail when there is an appropriate justification to do so, and in this case (there is a) potential violation of federal laws," said UF spokesperson Janine Sikes, according to *The Gainesville Sun*.

### PRIVACY and ACCESS

The investigation stemmed from news reports based on a leak that the medical school admitted an applicant who had never taken the Medical

College Admissions Test, according to reports in *The Sun*.

Although the student did not have the support of the admissions committee, the former dean of the college, Dr. Bruce Kone, said he overruled the decision because the student was "exceptional," according to *The Sun*.

Source: *The Gainesville Sun*

## Jail employee may have leaked sealed murder record

BROWARD COUNTY – A sheriff's detention employee was suspended following allegations that she leaked a sealed arrest report in a murder case to a television station.

Divan Hicks-Badger was named as the source of a confidential affidavit in the murder case of Melissa Britt Lewis, a South Florida attorney who was found dead in a Plantation canal in March.

The affidavit is part of the arrest record for Tony Villegas, who is accused of strangling Lewis.

At the time of the affidavit's release,

authorities had sealed Villegas' arrest records, which under Florida law are public documents. However, the records were later unsealed after the *South Florida Sun-Sentinel* and *The Miami Herald* sued to open those records to the public.

Hicks-Badger is a civilian employee responsible for safeguarding inmates' legal documents.

"We're trying to determine whether [Hicks-Badger] allowed a news reporter to view the closed case file. We need to determine whether this was something that

### ACCESS RECORDS

was allowed to happen or whether it was inadvertent," said Jim Leljedal, spokesman for the Broward County Sheriff's Office, according to the *South Florida Sun-Sentinel*.

Authorities involved in the murder investigation had tried to keep details of the case confidential until a grand jury could decide whether to indict Villegas.

"I just wish that when we have these mechanisms in place, people would honor the confidentiality agreements," said Plantation Police Chief Larry Massey, according to the *Sun-Sentinel*.

Source: *South Florida Sun-Sentinel*

## Court quashes subpoena for reporter's notes

JACKSONVILLE – A 4th Circuit court granted a motion to quash a subpoena that sought a reporter's testimony and notes related to an article about the alleged affair between a local female teacher and her former student.

The court presiding over the divorce case of the teacher, Jennifer Porter, and her husband, Scott Porter, held that a part-time freelance reporter meets the statutory definition of a "professional journalist" under Florida's shield law.

The subpoena commanded Susan Clark Armstrong, the author of the article in *Folio Weekly*, an alternative news weekly in northeast Florida, to appear for a deposition and to bring her notes.

The court rejected Porter's argument that Armstrong's status as a part-time freelance reporter, which earned her a few thousand dollars a year, did not qualify her for protection under the state shield statute.

The court held that Armstrong was a "professional journalist," as defined by the

statute. In making its decision, the court considered the fact that Armstrong had worked as a freelance reporter for *Folio Weekly* for more than a decade, during which time she had written dozens of investigative and feature stories.

The decision appears to be the first written opinion of its kind, according to *Media and Communications*.

Source: *Media and Communications* published by the law firm of Holland and Knight

## DEFAMATION

### Court dismisses principal's defamation suit against station

SARASOTA – The Sarasota Circuit Court dismissed a 2006 defamation suit filed by an elementary school principal against a TV news station after 10 months of inactivity on behalf of the plaintiff in the case.

Palmetto Elementary Principal Eddie Hundley claimed Ric Russo, the assignment manager for WWSB-TV, ABC7 at the time of the suit, and Kay Miller, the station's news director, spread misinformation about Hundley's 2002 arrest for stalking, a charge that had been dropped, according to the *Sarasota Herald-Tribune*.

Although the station never aired a report on Hundley's arrest, his suit against the station claimed Russo recruited other parents to pass out copies of Hundley's arrest report in front of the school but failed to disclose that the charge had been dropped. Russo denied the allegations.

Hundley also alleged that Miller contacted local school officials in 2005 – three years after the original arrest – and told them Hundley was recently arrested for stalking.

Sources: *Sarasota Herald-Tribune* and court records

### Tri-state negotiations with private utilities kept confidential

WASHINGTON – Officials from Alabama, Florida, and Georgia have joined in a confidentiality agreement with two private utilities, prohibiting the parties from disclosing to the public details of the ongoing negotiations over regional water rights.

A Florida seafood industry group asked the Florida Commission on Open Government to review and invalidate the plans, calling them "illegal," said the *Stuart News*.

"If Georgia Power and Alabama Power are in [negotiation meetings] why isn't there a representative from the Florida Seafood industry in there, or from one of the environmental groups?" said Kevin

Begos, executive director of the Franklin County Oyster & Seafood Task Force, according to the *News*.

The decision to keep the negotiations confidential comes amid a record drought in the region.

The two-decade-old water dispute centers on how much water is stored in federal reservoirs near the head of two river basins in north Georgia that flow south into Florida and Alabama.

The agreement was intended to allow the parties to negotiate openly amid a series of related court disputes, according to Sarah Williams, spokesperson for the Florida Department of Environmental Protection.

Source: *Stuart News*

### School bans book with "slur"

TAMPA – An elementary school in Hillsborough County pulled an award-winning book from its shelves because it contained a racial slur.

*The Land* by Mildred Taylor takes place in post-Civil War Georgia and contains use of a racial slur, according to the *St. Petersburg Times*. The book was challenged by Darryl Brown, an African-American parent whose 11-year-old daughter

attends the school. **FIRST AMENDMENT**

A nine-member committee made up of school administrators, parents and teachers discussed the appropriateness of the book, including its use of sexual overtones, violence and racial language, and decided the book was too mature for its elementary school audience.

The vote was not unanimous, however, and some parents expressed disappointment about the school's censorship action. School officials said the book would be donated to a middle school.

Brown said he felt the victory was a step in the right direction but thought the system that allowed the book into the school in the first place needed to be fixed. Kids will get plenty of exposure to offensive language as they get older, he said.

Brown said he will challenge *The Starplace* by Vicki Grove next, again for its use of the racial slur. He also disagrees with *Holly's Secret* by Nancy Garden, which addresses the issue of gay parenting.

Source: *St. Petersburg Times*

## Court rules doctors' disciplinary records public

TALLAHASSEE – Patients have a right to check records on past mistakes made by their doctors and hospitals regardless of when the files were created, the Florida Supreme Court ruled.

In a 4-3 opinion, the justices rejected the hospitals' argument that the right to inspect such records only applied to documents created since November 2004, when voters adopted a "patient's right to know" amendment.

The Court also ruled that parts of a law that restricted access to such records

created prior to the amendment's adoption were unconstitutional.

The unsigned majority opinion concluded the amendment was intended to apply to existing as well as future records because it refers to "any" records and "any" adverse medical incidents.

Florida Justice Association President Frank Petosa said the Court's decision reflected the voters' intent.

"[Medical mistakes] should not be swept under the rug in a cloud of secrecy," Petosa said, according to the

*Charlotte Sun*.

In the dissenting opinion, Justice Charles Wells wrote the majority's view "is contrary to the law and fundamental fairness."

Wells cited another state law that keeps hospital's peer review records secret and prohibits their use in civil cases, an exemption intended to help medical personnel speak in confidence about past errors in order to prevent future mistakes.

*Source: Charlotte Sun*

## Florida House and Senate committees approve bill

TALLAHASSEE – Committees in both the Florida House and Senate passed separate versions of a bill to increase access to records of the Department of Children and Family Services.

Both bills passed without debate and with virtually no questions, according to the *Pensacola News Journal*.

The bills propose making it possible

for children and adults who have been through DCF's child care system to obtain their own records from the agency.

Many DCF records are confidential to the public and often contain sensitive medical histories, but the blanket rule also prohibits people from accessing their own records.

"When I found out people could not

even get their own records from DCF, I couldn't believe it," said Sen. Paula Dockery, R-Lakeland, according to the *Pensacola News Journal*.

Dockery sponsored the Senate Bill, SB 2762, and Rep. Will Weatherford, R-Wesley Chapel, sponsored the House Bill, HB 1467.

*Source: Pensacola News Journal*

## Media group recommends revising appellate rule

TALLAHASSEE – A group of television stations and newspapers submitted recommendations to the Florida Supreme Court on the proposed Rule 9.050 of the Florida Rules of Appellate Procedure.

Media General Operations and NYT Management Services, Inc. recommended the Court adopt a rule that encourages minimization of personal information

unnecessary to a court's determination of the matter prior to entering the documents into the record.

The Court intends to limit the inclusion of certain unnecessary information in court files in the first instance rather than limit access to information contained in court files.

Rule language that adopts a minimalist approach would better meet this intent

and is consistent with the state's open access policies, according to the recommendations.

The proposed rule puts the onus on the filers of documents with the court to redact personally identifying information in order to avoid subsequent denials of record requests because they contain the personal information.

*Source: Thomas & LoCicero, PL*

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## DOT sued for records created in multimillion-dollar deal

HILLSBOROUGH COUNTY – A Tallahassee lawyer filed suit against the Florida Department of Transportation, asking for the release of records made during multimillion-dollar negotiations between the DOT and CSX Transportation.

Under Florida's Sunshine Law, the public has the right to view state and local government records that do not fall under specific exemptions.

CSX asserted that documents outlining its terms and positions contained trade secrets exempt from disclosure under the Sunshine Law and should be kept confidential. The DOT agreed but did not ask to review the documents before making them exempt from public

disclosure.

Attorney Mark E. Walker contends that the DOT should not have agreed to let CSX decide which records contained trade secrets, which are exempt from public disclosure under Florida's Sunshine Law.

"We allowed a private company to pick and choose what will and won't be disclosed," Walker said, according to the *Tampa Tribune*.

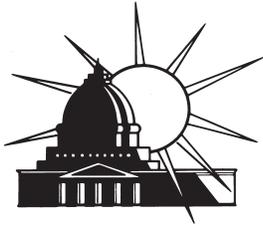
The negotiations were part of a \$649-million project to buy 61 miles of CSX commuter rail tracks in the Orlando area, improve freight rail corridors statewide, and run more trains to a hub the company plans to build in Polk County.

*Source: Tampa Tribune*

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## Citizen Access Project gets online makeover

The Marion Brechner Citizen Access Project (MBCAP), at [www.citizenaccess.org](http://www.citizenaccess.org), has a new look and new ratings for major categories of public records and meetings laws. Funded through an endowment established by Orlando businesswoman Marion Brechner, MBCAP features ratings and comparisons of the laws controlling access to government meetings and records in the 50 states.

In May, the MBCAP staff unveiled a comprehensive redesign, offering more white space and a simpler type style. The Web site's pages are better organized to emphasize key features. They better reveal the staff's continuous updating the laws. In addition, users will find it much easier to find related categories, such as moving from the overall rating for autopsy records for Florida to the law controlling access to autopsy photographs. Comparing laws of multiple states also will be easier. The MBCAP Web site is now accessible through all major browsers.

### The Back Page

By Bill F. Chamberlin

MBCAP also now provides overall ratings for the laws that govern fees for records and the laws that determine which government agencies are subject to the public records laws. We also now offer the ratings for categories such as exceptions to the open meetings laws and access to autopsy records.

The last of the major records categories, except for the exemptions, will be available soon thanks to the MBCAP's FOI911 initiative. In 2006, Mrs. Brechner provided \$50,000 to fund a two-year effort to collect timely background information, legal summaries, and ratings about issues being faced by FOI advocates in state legislatures. The category of Penalties, Appeals, and Remedial Actions is now being researched with the help of FOI911 funding. FOI911 already has funded white papers about the use of electronic technologies to bypass open meetings laws and the nature of government agencies supervising public records access – papers linked to the FOI911 logo on the MBCAP home page. The FOI911 project also has provided ratings for the new category on caucuses, a key issue in current legislative sessions. FOI911 also has funded open meetings research that allows FOI advocates to see what other states do to prevent officials from meeting outside the framework of open



Bill Chamberlin

meetings laws.

The MBCAP ratings are based on the judgments of selected FOI experts who rate statutes, court opinions, and constitutional provisions on a scale of one to seven, from the least open to the most open. The MBCAP advisory board includes lawyers, journalists, professors, citizen activists, and government officials. The state laws are summarized by law students and graduate students with legal research training. The project staff tries to ensure that review board members do not know which state's law they are rating at a given time.

The project's most important accomplishment, other than furnishing the ratings of more than 200 access-related categories, perhaps has been the "mapping" of state laws. Because we develop categories based on what the laws say rather than fit the legal provisions into predetermined categories, we have been able to provide an accurate overview of state access laws in the categories examined and even reveal some provisions that experts had not noticed. The Web site frequently has been used by journalists and by FOI activists fighting for changes in their state's laws. Since the site was created, academic research in the field has increased substantially. The MBCAP Web site also was among the first to provide comprehensive, current and accurate information on articles written about access, access organizations to contact, and links to state laws. Links to audits of state official performances also are available.

Although I am retiring as project director this summer, the College of Journalism and Communications is committed to continuing MBCAP.

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*Bill Chamberlin served as the Joseph L. Brechner Eminent Scholar in Freedom of Information since 1987 and was named the MBCAP director in 1999. He also served as the graduate coordinator of media law in the UF College of Journalism and Communications and an affiliate professor in the Levin College of Law. He co-authored one of the leading textbooks in the field and produced dozens of scholarly and trade journal articles. This year, he was named one of the Heroes of the 50 States by the National Freedom of Information Coalition and received special recognition from the Florida First Amendment Foundation for his efforts over the past 30-plus years as a teacher, mentor and advocate of open government in Florida.*