

---

# THE BRECHNER REPORT

---

Volume 32, Number 8 ■ A monthly report of mass media law in Florida

Published by The Brechner Center for Freedom of Information ■ College of Journalism and Communications ■ University of Florida

August 2008

## Attorneys general support federal shield law

WASHINGTON – Forty-one attorneys general, including Florida Attorney General Bill McCollum, signed a letter urging U.S. senators to support the Free Flow of Information Act, which creates a qualified federal shield law.

The FFIA gives journalists a qualified privilege from disclosing confidential sources to federal prosecutors, defense attorneys, and civil litigants.

The attorneys, led by Attorneys General Douglas Gansler from Maryland and Rob McKenna from Washington, explained in the letter that 49 states and the District of Columbia recognized a qualified privilege under state law. The FFIA would provide

the same protection under federal law.

"By exposing confidences protected under state law to discovery in federal courts, the lack of a corresponding federal reporter's privilege law frustrates the purposes

of the state recognized privileges

### REPORTER'S PRIVILEGE

and undercuts the benefit to the public that the states have sought to bestow through their shield laws," according to the letter.

"It is essential for the public to have access to information pertaining to their government to hold it accountable. Often it is members of the media who provide

that information, and this proposed legislation would protect journalists who are attempting to preserve that freedom," said McCollum in a statement obtained by the *St. Petersburg Times*.

The FFIA is currently stalled in the Senate because it has not been scheduled for a full vote.

The legislation passed the Senate Judiciary Committee by a 15-4 vote last fall. Some of the delay is due to objections by the U.S. Justice Department that the FFIA will interfere with law enforcement.

Sources: *St. Petersburg Times* and *The Reporters Committee for Freedom of the Press*

## County jail workers identified

ORLANDO – Four Orange County Corrections Department officers under investigation for allegedly staging "inmate boxing matches" were identified to the media after Florida Attorney General Bill McCollum ruled that interoffice memoranda on the matter are public.

The officers – Luis Escobales, Erick Mejia, Samuel Cruz, and Mark Caruso – were reassigned to administrative duty apart from inmates. Jail officials initially refused to release documents about the reassignment to the *Orlando Sentinel*, claiming they were part

### ACCESS RECORDS

of the investigation.

McCollum ruled that the documents were public after Orange County Attorney Tom Drage requested a legal opinion.

"The courts and the attorney general have a long history of recognizing that documents tangential to an investigation are not investigative records exempt from disclosure," said *Sentinel* attorney Deanna Shullman, according to the *Sentinel*. "In this case, we were dealing simply with personnel records, and those are not exempt from disclosure."

Source: *Orlando Sentinel*

## Relatives left off Web arrest list

SARASOTA – Although the Sarasota County Sheriff's Office publishes the names of all people arrested online, it leaves off the arrests of law enforcement officers and their relatives.

Sheriff's spokesman Chuck Lesaltato said the records were left off because the office's computer systems were unable to redact protected information from the reports, such as the addresses and photographs of law enforcement officers and their spouses and children.

He said the office could withhold the arrest reports from the website legally because they are not the official record of the arrests.

"I could pull that whole Web site down tomorrow and still be within the guidelines of the law," Lesaltato said, according to the *Sarasota Herald Tribune*.

The records are still available in hard copy at the sheriff's headquarters.

Source: *Sarasota Herald Tribune*

## County settles records suit

SEBRING – Highlands County commissioners settled a lawsuit filed by a watchdog claiming that the county failed to copy a grant application for state funds to refurbish a high school as a hurricane shelter.

County Administrator Carl Cool said the suit lacked merit but feared the county could lose at trial and pay tens of thousands of dollars.

Plaintiff Preston Colby received over \$9,100 in the settlement.

The grant at issue in the suit was never awarded because the county withdrew from the project. Colby claimed the document the county failed to copy "was a document that Carl Cool signed on behalf of the school board that he had no authority to sign," according to *Highlands Today*.

Cool said he signed the application as a person with authority over Lake Placid High school and as the county's representative because in an emergency the school would be a public hurricane shelter under county control.

Source: *Highlands Today*

# ACCESS MEETINGS

## Board membership raises Sunshine concerns

WINTER SPRINGS – The Winter Springs City Attorney ruled that a commissioner could serve on a homeowner's association board without a conflict of interest, but cautioned that association meetings should not be used to circumvent Florida's Sunshine Law.

Anthony Garganese ruled there was nothing "per se" wrong with Commissioner Don Gilmore serving on

the Tuscawilla Homeowner's Association Board.

Garganese warned that there could be Sunshine Law issues because Gilmore is a member of the Board, and Commissioner Rick Brown and Mayor John Bush are THOA members who attend meetings. Garganese said the members should just avoid conversations among each other.

Brown called for Gilmore's

resignation, saying "The THOA board has the potential for being at odds with the City Commission at times, and they represent a large block of high tax-paying citizens. [Gilmore] may not always be able to recuse himself out of the financial interests of the THOA and his obligations to the city," said Brown, according to the *Seminole Chronicle*.

Source: *Seminole Chronicle*

## Officials: No Sunshine violation

MONROE COUNTY – Monroe County officials said no Open Meetings Law violation occurred when the mayor told the vice mayor of his plans to change roles on the County Commission.

Former Mayor Sonny McCoy said he told former Vice Mayor Mario Di Gennaro on a plane ride that he planned to relinquish his post, but indicated Di Gennaro simply nodded in response.

Assistant County Attorney Bob

Shillinger said the conversation was not an "exchange of information" in violation of the Open Meetings Law. "Sunshine violations can be a fine line. There has to be an exchange of information and there has to be dialogue," said Shillinger, according to the *Key West Citizen*.

The Monroe County State Attorney's Office received no complaints about the incident.

Source: *Key West Citizen*

## Sheriff's Office settles lawsuit

SARASOTA COUNTY – The Sarasota County Sheriff's Office settled a lawsuit alleging the office failed to give the public enough notice of disciplinary hearings.

The settlement agreement requires the office to have training on open government laws, amend its internal rules, and pay \$15,613 in attorney fees to the plaintiff. In exchange, Scott Eliason dropped his suit.

Eliason claimed the five-member

Civil Service Board failed to give the public notice of an April 11 hearing about Dan Tutko, who was demoted after investigators said he illegally searched a woman's home.

Tutko appealed the decision to the Board, who reversed the demotion and gave him a paid suspension instead.

Florida law requires public notice of such hearings.

Source: *Sarasota Herald Tribune*

## Law firm bills \$160K for defense

LAKELAND – A Tampa law firm billed almost \$163,000 to defend the Polk County Opportunity Council against claims it violated the Open Meetings Law – even though the violators were only fined \$278 apiece.

Attorney Bill Grob of Tampa-based Ford & Harrison billed the PCOC \$240 per hour for research, briefing, and other routine legal work after *The Ledger* (*Lakeland*) asserted that PCOC officials and lawyers met secretly in late 2005. The State Attorney's Office charged 10 PCOC board members with civil violations for holding a closed-door meeting with then-Executive Director Carolyn Speed and two lawyers during a break in a regular public meeting.

In February 2006, County Judge Anne Kaylor ruled that the board members violated the Open Meetings Law and levied the \$2,780 fine.

Grob unsuccessfully attempted to appeal the ruling three times, which constituted a significant portion of the fees.

The fees seem "to be a lot of time and expense for what was a minor civil infraction," said Rachel Fugate, a lawyer for Tampa-based Thomas & LoCicero, according to *The Ledger*.

*The Ledger* obtained the bills from Grob only after suing for the records in late March and negotiating with him for months.

Source: *The Ledger* (*Lakeland*)

## Property info withheld

TAMPA – Officials used a public records exemption to block the release of information about 14 investment properties owned by a firefighter running for a seat on the County Commission.

Property Appraiser Mike Wells and Tax Collector Mike Olson withheld information about John Nicolette's properties, including location and value, and the taxes he paid.

Florida law allows public officials to ask government agencies to withhold their home addresses, telephone numbers, and photographs. Investment properties are public records.

"Addresses of properties that are not used as homes ... are public record and not exempt from disclosure," wrote James McAdams, the Director of the Florida Property Tax Oversight Program, in a bulletin to property appraisers obtained by the *St. Petersburg Times*.

After the *Times* approached Wells through its legal counsel, he provided the records only because Nicolette listed them on his campaign disclosure form. But he refused to disclose the records of officials requesting the exemption or redact any questionable information.

"I don't want to get into the redacting business. That's not what I do," said Wells, according to the *Times*.

The *Times* also approached Olson, who agreed to provide the records with addresses removed in some cases.

Nicolette agrees the records should be public. "I have absolutely no problem with anybody having any of the information, because I'm running for office," he said, according to the *Times*.

Source: *St. Petersburg Times*

# ACCESS RECORDS CONTINUED

## Officials delete records

SARASOTA COUNTY – Venice public officials admitted to deleting e-mails due to a misunderstanding about Public Records Law requirements.

Some council members deleted e-mails after forwarding them to the clerk's office. They assumed this satisfied their duty to retain documents under the Public Records Law.

Under an agreement approved by the council two years ago, however, the sender – not the city clerk – is the record custodian.

"Remember that as an individual user, you are responsible for maintaining your e-mails in accordance with state laws, specifically retention requirements. The e-mails are not backed up by the (Information Services) department, nor do they stay in the media account," said City Clerk Lori Stelzer in an e-mail to council members obtained by the *Venice Gondolier Sun*.

The clerk's inbox is expunged every two weeks, and e-mails among council members on the publicly-available city e-mail system expire every two months.

Council members agreed to discuss the matter with the city attorney.

*Source: Venice Gondolier Sun*

## THE BRECHNER REPORT

Brechner Center for Freedom of Information  
3208 Weimer Hall, P.O. Box 118400  
College of Journalism and Communications  
University of Florida, Gainesville, FL 32611-8400  
<http://www.brechner.org>  
e-mail: [brechnerreport@jou.ufl.edu](mailto:brechnerreport@jou.ufl.edu)

Sandra F. Chance, J.D., Exec. Director/Exec. Editor  
Kearston Wesner, Editor  
Alana Kolifrath, Production Coordinator

*The Brechner Report* is published 12 times a year under the auspices of the University of Florida Foundation. *The Brechner Report* is a joint effort of The Brechner Center for Freedom of Information, the University of Florida College of Journalism and Communications, the Florida Press Association, the Florida Association of Broadcasters, the Florida Society of Newspaper Editors and the Joseph L. Brechner Endowment.

## Court rules White House e-mails are not subject to FOIA requests

WASHINGTON – A U.S. district judge ruled that the White House's Office of Administration does not have to comply with FOIA and make public internal documents about the disappearance of e-mails.

District Judge Colleen Kollar-Kotelly said the Office of Administration "lacks the type of substantial independent authority" that would bring it under FOIA, and is exempt because it performs mostly administrative functions.

Three months after public-interest group Citizens for Responsibility and Ethics in Washington sued to find out

what happened to White House e-mails, the White House announced it would no longer comply with FOIA – though it had done so for over 20 years.

But Justice Kollar-Kotelly said past compliance is "insufficient by itself" to subject it to FOIA requirements.

"We are disappointed in the ruling and believe the judge reached the wrong legal conclusion," said CREW's executive director Melanie Sloan in a story by *The Washington Post*.

Anne Weismann, chief counsel for CREW, said CREW intends to appeal.

*Source: The Washington Post*

## IRS must disclose audit reports

WASHINGTON – A federal judge ruled that the IRS must produce unredacted copies of audit reports to a Syracuse University professor who requested regular reports over 30 years ago.

Syracuse School of Management Professor Susan B. Long first requested IRS statistics in 1974. She obtained a court order to enforce the request two years later.

In mid-2004, the IRS stopped complying.

Long obtained two more orders in 2006, but the IRS ignored them.

"We'd go in and say, 'Hey, we've got

a consent order,' and the IRS would do nothing," Long said, according to *The Reporters Committee for Freedom of the Press*.

The IRS claimed it was exempt from Long's request under a FOIA exception for documents about the "deliberative process."

Judge Marsha Pechman of the Western District of Washington said the IRS waived that argument three decades ago when it failed to raise it during Long's first request.

*Source: The Reporters Committee for Freedom of the Press*

## Lawyer granted access to officials' e-mails - for \$300,000

DUVAL COUNTY – A circuit judge ruled that a Fernandina Beach lawyer can obtain one million to two million e-mails allegedly revealing illegal campaigning – for \$300,000 upfront. But the burdensome cost likely means the State Attorney's Office will not have to answer the open records request.

Circuit judge Brian Davis ruled attorney Wesley White is entitled to the e-mails, which White claims may show Assistant State Attorney Jay Plotkin and State Attorney Harry Shorstein used their positions in the Duval County Courthouse to campaign or seek contributions.

"The potential cost involved in dealing with the State Attorney's Office

makes it virtually impossible to lift the curtain of Harry Shorstein's political machine," said White, according to the *Florida Times-Union*.

Plotkin, however, said White is on a "fishing expedition," according to the *Times-Union*.

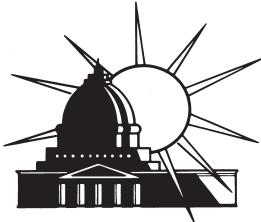
Shorstein previously provided White thousands of pages of material from Plotkin's and his computer for \$4,400.

Davis threw out White's lawsuit against Plotkin, and said Shorstein is responsible for providing the requested records.

White intends now to seek the e-mails of only two deputies, Kathy Weintraub and Bill Hodges.

*Source: Florida Times-Union*

August 2008



## Knowing the psychology of access can yield results

Public records requests involve more than just paper, data, laws and processes. They involve people. Real humans with feelings, fears and motivations.

Record requesters can harness the power of psychology to get information from government officials on deadline when agencies choose to ignore the law. Consider some of these techniques developed from persuasion research in psychology, marketing and advertising, particularly the work of Dr. Robert Cialdini, author of "Weapons of Influence":

### Likeability:

People are more likely to do what you want if they don't hate your guts. So offer sincere compliments, smile, and dress well.

### The **Back Page** By Dave Cuillier

Related to this is outgroup bias, where people will be more hostile toward those they view as outgroups (e.g., the media). Disassociate yourself from yellow journalists, spammers and identity thieves. Find a well-respected person in the agency to introduce you to others to break the ice.

### Authority:

Being a nice person is always good, but being a nice person with authority is even better. For example, in an experiment I conducted earlier this year, I sent letters to all the police agencies and school districts in Arizona requesting records some student journalists were analyzing for stories. A third of the agencies got an "aw, shucks" friendly letter, a third got a neutral letter (the Reporters Committee for Freedom of the Press letter, at [http://www.rcfp.org/foi\\_letter/generate.php](http://www.rcfp.org/foi_letter/generate.php)), and a third got a legalistic threatening letter (Student Press Law Center letter, at <http://www.splc.org/foiletter.asp>).

The threatening letter resulted in 40 percent more compliance than the other two letters. It appears that clerks looked at the threatening letter and forwarded it to the agency attorneys, who then responded as required by law. When they got the friendly letter, they were more likely to blow it off.

Other examples of using authority include having the request letter co-signed by the publisher or attorney, teaming up with other organizations, or getting the state's attorney general to weigh in. Also, emphasize the benefits of disclosure (public good,



Dave Cuillier

appearance of openness, etc.) and the costs of secrecy (public mistrust, lawsuit, or listing agencies that lost in court and the attorney fees and penalties involved).

### Social proof:

People respond to peer pressure. "Boy, all the other towns in the county provide this information. I wonder why it isn't open here?" Compile a list of agencies in your state or in the country that provide the information. Write a story about it to tell the public, interviewing the agencies that comply. Nobody wants to appear deviant.

### Reciprocity:

When you give something to someone, they feel obliged to reciprocate, often beyond what you gave them. That's why businesses offer free samples.

One reciprocity-based technique is the "bombard-then-retreat" tactic. Ask, for a lot and then cut it in half. "Can I see all the e-mails sent by city employees over the past five years, please?" After the clerk gasps and thinks of all the work involved in fulfilling the request, say, "OK, how about just the city manager's e-mails for the past four months?" You are giving up something, so they feel compelled to reciprocate.

### Commitment:

Once people commit to something, they have a difficult time saying "no." Get the official to say "yes," and then you'll likely get commitment for something bigger. This ratcheting or low-balling strategy is the reverse of "bombard-then-retreat." "Can I see what a blank police incident report form looks like? Great. Now can I see what a completed incident report looks like? Super. What does it look like in your computer system? That's neat. How about copies of reports electronically for the past month? Thanks. While you're at it, might as well just copy the past two years!"

We shouldn't have to use psychology to get a public record. If it's public, it's public. But if suing is not an option, and timeliness is important, consider some of these techniques for getting what you need when you need it.

*David Cuillier is an assistant professor of journalism at the University of Arizona and chairman of the Society of Professional Journalists' Freedom of Information Committee. The SPJ FOI FYI blog is at <http://www.spj.org/blog/blogs/foifyi/>.*