

# THE BRECHNER REPORT

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February 2001

## Mediagroups access ballots

MIAMI – Florida’s broad access laws have made it possible for at least two media groups and a political watchdog group to begin counting ballots in all 67 counties in December and January, but not without a hefty price tag.

One media group, led by *The Miami Herald*, is evaluating approximately 60,000 undervotes throughout the state. Undervotes are ballots that voting machines were unable to count. Judicial Watch, a watchdog group, is also counting undervotes.

Another media group, which includes *The New York Times*, *The Washington Post*, CNN and the Associated Press, is counting both the undervotes and 120,000

overvotes, ballots thrown out because more than one name was marked.

*The Miami Herald* and others went to court in early December to gain access to the Miami-Dade undervotes, which were being held by the Leon County Circuit Court.

Because elections officials must handle the ballots, counties are charging the organizations differing amounts to access and inspect the materials. Broward is charging \$300 per hour, which covers the pay of two sheriff’s deputies, an attorney and five election staff members. Palm Beach County said it would charge groups \$1,157 per hour. *The New York Times* estimates its consortium’s efforts will cost more than \$500,000. (12/05/00 – 1/16/01)

ACCESS  
RECORDS

## Judgesaysrecordslawwasviolated

TALLAHASSEE – A Martin County elections supervisor who allowed Republican party members to take absentee ballot applications from her office violated both election and public records laws, a circuit judge in Leon County ruled.

Elections Supervisor Peggy Robbins let Republican Party officials take the forms from her office and fill in missing information. Democrat Ron Taylor of Stuart sued, asking the court to invalidate the

absentee vote.

Judge Terry Lewis, 2nd Judicial Circuit, wrote that giving Republicans the ballots “was contrary” to Section 101.162, Florida Statutes, and the Public Records Act. However, Lewis wrote that he found no “intentional misconduct” by Robbins.

Lewis didn’t throw out the county’s 9,800 absentee ballots or punish Robbins. State Attorney Bruce Colton said no complaints have been filed against Robbins. (12/1/00 – 12/9/00)

## TaskForcewants secrecyinhiring

MIAMI – Members of a state education task force think university presidents should be chosen in secret.

The Education Governance Reorganization Task Force is charged with making recommendations on an overhaul of the state’s educational system and will go before the

ACCESS  
MEETINGS

Legislature in March with proposals.

Members argued in December that the state’s Sunshine Laws, which make the application and hiring process open to the public, make it difficult to find university presidents. Candidates are unwilling to apply if they know their names will be made public, task force members said.

The process only should be opened once a candidate has been chosen by a university board and forwarded to a state board, they said. (12/7/00)

## Electronic Delivery

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## Subpoenaed documents not exempt from disclosure, judge rules

TALLAHASSEE – Documents collected by the Attorney General as part of an investigative subpoena are not exempt from the Public Records Law, a circuit court judge in Leon County ruled.

Homeside Lending Inc. filed a motion asking Judge Terry P. Lewis to prevent

Attorney General Robert Butterworth from disclosing documents collected from the company as part of an investigative subpoena.

Lewis, 2nd Judicial Circuit, denied the motion and authorized Butterworth to allow inspection and copying of the

records.

He wrote that no specific exemption exists for such documents and that the documents could not be considered judicial or court records. (Decisions on file, *Homeside Lending Inc. v. Robert A. Butterworth* )

## Videos ruled obscene but are public record

ORLANDO – Police hidden camera tapes of dancers at men's clubs are obscene but can be released under the state's Public Records Law, a circuit court judge in Orange County ruled.

The 45 hours of tapes, taken at two Rachel's men's clubs, are part of an investigation into allegations that the clubs were fronts for illegal activities. The videotapes show, among other things, dancers having sex with each other in the back of a limousine.

In his ruling, Lawrence Kirkwood, 9th Judicial Circuit, wrote that although some material on the tapes was "offensive, distasteful, disgusting, and demeaning," no exemption to the Public Records Law existed for obscene materials. (10/26/00; *State v. Bee Line Entertainment Partners Ltd.*, 28 Media Law Reporter 2595, Dec. 12, 2000)

## Judge releases records in police probe

JACKSONVILLE – A clerk writing "sealed document" on a docket sheet does not provide the press and public with enough notice to challenge the record's closure, a federal judge ruled.

*The Florida Times-Union* challenged the closure of records in the case of three drug defendants who were cooperating with a probe of the Jacksonville police.

U.S. District Judge Henry Lee

## Documents released in trial of accused spies

MIAMI – More than 1,400 pages of records confiscated by the FBI were released to two Miami news organizations covering the trial of an alleged Cuban spy ring.

*The Miami Herald* and NBC 6 in Miami requested material from nearly 1,000 computer disks seized from the accused spies.

## Open investigation prevents records release

BARTOW – Records related to the shooting of a Frostproof police officer are exempt from the Public Records Law because the investigation remains active, a circuit court judge ruled.

*The Ledger* of Lakeland filed a lawsuit seeking records about 1981 killing of Officer David McCall. The newspaper wrote a story in March 1999 that claimed informants identified a

## Tampa Tribune not held in contempt

TAMPA – A Pasco-Pinellas Circuit Court judge refused to hold *The Tampa Tribune* in contempt of court for publishing a grand jury report critical of two Hillsborough County judges.

Chief Judge Susan Schaeffer, 6th Judicial Circuit, ordered a grand jury presentment regarding the judges sealed and warned officials not to leak the contents to the media.

## Judge rejects motion to seal documents

TALLAHASSEE – Parties in civil lawsuits cannot file sealed documents during the discovery phase of a trial without first following court procedures to seal the records, a judge for the Division of Administrative Hearings ruled.

Administrative Law Judge Florence Snyder Rivas denied a motion in a civil case, *American Honda Motor Co. and*

After the newspaper printed several stories based on a leaked copy of the report, an attorney representing one of the judges filed a motion to hold the newspaper in contempt of court.

Schaeffer denied the motion, ruling that *The Tampa Tribune* had a right to print the grand jury report after it was leaked to the paper. (12/13/00 – 12/20/00)

*Rick Case Cars Inc. v. Page Brothers Associates Inc.*, that would have made discovery materials confidential without providing an opportunity for a public hearing.

Rivas wrote that she cannot give litigants "advance permission" to seal court documents. (Decisions on file, *American Honda Motor Co. v. Page Brothers Associates Inc.*, 12/13/00)

## New rules to protect medical records release

WASHINGTON – Doctors, hospitals and insurance companies face greater restrictions on sharing and releasing patients' medical information as a result of rules issued in December by the Clinton administration.

The rules, which take effect in two

# PRIVACY

years, cover paper and electronic records, and oral communications. Health care providers will have to get patient authorization to disclose any health information. Patients also will have the right to look at, copy and ask for corrections to their medical records. (12/20/00 – 12/21/00)

## DECISIONS ON FILE

*Copies of case opinions, attorney general opinions, or legislation reported in any issue as "on file" may be obtained upon request from the Brechner Center for Freedom of Information, College of Journalism and Communications, 3208 Weimer Hall, University of Florida, Gainesville, FL 32611-8400, (352) 392-2273.*

Adams Jr. of the Middle District of Florida unsealed several documents, rejecting the government's argument that writing "sealed document" on a docket sheet provides enough notice that the documents were being sealed. Adams did order some of the materials to be redacted to protect the continuing investigation and grand jury secrecy. (6/24/00; *U.S. v. Robinson*, 28 Media Law Reporter 2534, Nov. 28, 2000)

U.S. District Judge Joan Lenard ruled that the news organizations could have access to the material that was introduced into evidence, including a three-volume notebook of decrypted computer disk material in Spanish.

Material not yet entered into evidence was not turned over to the press. (12/15/00 – 12/27/00)

suspect in the case in 1988 and that the suspect had died in 1991.

Judge J. Dale Durrance, 10th Judicial Circuit, ruled against the newspaper, saying the investigation remains open.

The Polk County Sheriff's Office, the Frostproof Police Department and the Florida Department of Law Enforcement have countersued to get materials the newspaper used in its article. (11/16/00)

## Commissioners confess violations of Sunshine Law

CHIEFLAND – Levy County commissioners admitted to and apologized for violating the state's Open Meetings Law twice in November.

During the first incident, two commissioners-elect talked with Commissioner Lilly Rooks on Nov. 7

about a proposed board action.

The second violation happened at a citizen's meeting on Nov. 21. The citizens were discussing road paving with Commissioner Don Foley and Commissioner-elect Tony Parker was present. The board members said they

were unaware that the Sunshine Law applies to commissioners-elect and that they didn't intend to violate its provisions. State Attorney Bill Cervone said his office was not investigating the reported violations because no complaints had been filed. (12/7/00)

## Council decides not to file malpractice suit

VERO BEACH – The Vero Beach City Council decided not to pursue a legal-malpractice lawsuit against a Miami law firm involving its million dollar battle with community activist Frank Zorc.

Former City Attorney Robert Sechen was working for Kubicki Draper of Miami and acting as a special counsel for Vero Beach in 1995 when he and then-City Attorney Larry Braisted advised the council to hold four secret meetings. The

meetings were in violation of the Sunshine Law, courts later ruled.

Zorc sued the city twice for violating access laws, and Vero Beach settled the cases for \$575,000 in 1999. (*Brechner Report*, July 1999) The city also paid \$456,000 in legal fees to four law firms, including Kubicki Draper.

In a 5-0 vote, the council decided against a malpractice suit to recover part of the fees. (11/22/00)

## Court hears hospital access arguments

TALLAHASSEE – The Florida Supreme Court heard oral arguments in a case that will determine if an exemption to the state's open meetings and open records laws can be applied retroactively.

In 1998, the legislature passed a law that says that private companies that lease public hospitals are not subject to the Sunshine Law.

Memorial Hospital-West Volusia was leased to a private company in 1994 and said its records and meetings were never open and should remain closed.

Jon Kaney, an attorney from the News-Journal Corp., argued that the law cannot be applied retroactively to pre-1998 records.

The law also faces a constitutional challenge in a case in Volusia County Circuit Court. (12/1/00; a transcript and audio recording of the oral argument is available at <http://wfsu.org/gavel2gavel>)

## INTERNET

### Judge refuses to order release of golf scores

JACKSONVILLE – The parent company of *The Florida Times-Union* was unsuccessful in an attempt to get a preliminary injunction against the PGA Tour in a dispute over the broadcast of real-time golf scores.

The PGA Tour uses a \$26 million system to collect and provide real-time golf scores to the media at tournaments and on its Web site [pgatour.com](http://pgatour.com). Morris Communications Corp. wants access to the scores as they are called into the tour's media center so it can post the scores on its Web sites and sell the scores to other news organizations.

Morris Communications has filed an antitrust lawsuit against the tour over the

scores. The company claims tour rules prevent the company from collecting its own real-time scores. Lawyers for Morris Communications argue that the scores of sporting events are public information and access should not be delayed or limited.

Judge Harvey E. Schlesinger, of the U.S. District Court for the Middle District of Florida, denied a motion for an injunction, ruling the company hadn't met the burden of proof for an injunction.

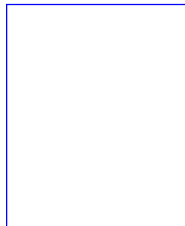
Schlesinger also wrote that it seemed that Morris Communications wanted to capitalize on the PGA Tour's system for collecting the scores, not just the scores themselves. (10/24/00 – 11/01/00; 28 *Media Law Reporter* 2544, Dec. 5, 2000)

## NEWS NOTES

### New editor takes over Brechner Report

GAINESVILLE – S. Camille Broadway, a graduate student specializing in journalism and media law at the University of Florida's College of Journalism and Communications, is the new editor of *The Brechner Report*.

Broadway spent six and a half years at newspapers in East Tennessee and North Georgia before entering the graduate program. During her career, she worked as a reporter,



Camille Broadway

assistant city editor, copy editor and assistant news editor.

Broadway received a bachelor's degree in English literature from the University of Tennessee, Knoxville.

During her first year of graduate school, Broadway served as the Ward Neff Intern for the Society of Professional Journalists.

Broadway succeeds Jane Inouye as editor.

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# Recommendation would limit records access

In the final days of the 1998 legislative session, Rep. Tom Feeney introduced an amendment to a bill, authorizing the state to sell its database of driver license photographs to a small company in New England. This database is exempt from public disclosure under Florida's liberal Public Records Law.

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By *Barbara A. Petersen*

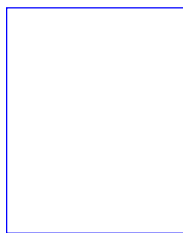
The passage of the Feeney amendment raised all sorts of troubling issues – issues that would have been identified and resolved had the amendment gone through the regular legislative process. In response to intense media scrutiny and overwhelming public outrage, Gov. Jeb Bush rescinded the contract, and Feeney ultimately introduced legislation creating the Task Force on Privacy and Technology.

The Task Force's mission was supported by the Governor's Executive Order Number 00-235, which required study and recommendations on: (1) defining legal parameters for new identity protection and privacy policies; (2) strengthening identity protection policies; and (3) revising and/or strengthening policies relating to the collection, sharing, sale, and release of sensitive personal information by government agencies. At the first meeting, the Bush-appointed Task Force took testimony from prosecutors, victims of identity theft, representatives of data collection companies and software-maker Microsoft. Department of Highway Safety and Motor Vehicles staff provided information to the Task Force on the department's collection and sale of driver history information.

At what was supposed to be its final meeting, the Task Force received a copy of draft recommendations. There was strong and virtually unanimous support for all recommendations regarding the problem of identity theft. (Recommendations are available online at [www.MyFlorida.com](http://www.MyFlorida.com).)

In direct contrast, there was considerable debate, often heated, on the draft recommendations regarding data protection and public access, particularly Recommendation 5, which focuses on public record information "made available to secondary users for unrelated commercial purposes."

Some members of the Task Force were surprised to see a



*Barbara Petersen*

recommendation that would limit access to public records and advised against supporting a recommendation with such little factual basis or testimonial support. Recommendation 5, with some minor modification, was ultimately approved by a majority of the Task Force, over strenuous objections.

Of great concern is the effect the recommendation could have on Florida's long, rich tradition of public access. Under Recommendation 5, a government custodian would be required to determine both the identity of a public records requester and the purpose of the request – an inquiry in direct contradiction to 100 years of public policy. Putting aside the practical issues of how an agency would track secondary use and enforce provisions prohibiting it, a government agent would have alarmingly wide latitude to proscribe use of information obtained from public records for "unrelated commercial purposes." Such a scheme raises serious constitutional concerns under both Article I, section 23, of the Florida Constitution, which grants us the right to be free from governmental intrusion into our private lives, and Article I, section 24, the guarantee of access to public records.

For the past few months, Florida has received national and international recognition for the unparalleled access to the records and meetings of its government provided by our sunshine laws. It is sadly ironic that the Task Force has endorsed a course of action that would not only subvert that right of access but would overturn 100 years of public policy.

Better, less problematic ways exist to balance the interests of public access and data protection, and the Task Force and its staff did an admirable job of identifying and articulating some of the various alternatives. Focusing on the illicit use of information obtained from public records is an appropriate response to the problems reviewed, as is an analysis of government's collection and use of information obtained from its citizens. A recommendation that would restrict secondary use of public record information subverts Florida's rich tradition of public access is not only unwarranted, it is unwise.

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*Barbara A. Petersen, a member of the Task Force on Privacy and Technology, is executive director of the First Amendment Foundation.*