
THE BRECHNER REPORT

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Supreme Court issues opinion on secret cases

TALLAHASSEE – In response to reports of “supersealing” court cases, the Florida Supreme Court issued an opinion on the issue and adopted new rules making it more difficult for civil cases to be sealed.

Chief Justice R. Fred Lewis initiated an inquiry into the practice of sealing cases and excluding them from dockets after reading of the problem in a series of articles by *The Miami Herald*.

Lewis sought advice from clerks of court and the Florida Bar. The Court also held a public hearing

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on the matter.

The new rules require written requests to make cases secret. They also allow judges to impose sanctions on a party who files a motion to seal a case “without a good-faith basis.”

The Court rejected a recommendation by the media to require advance notice to the public of motions to seal civil cases.

In its opinion, the Court praised the media’s contributions to the changes.

“[T]he free press has shown its value to the people of Florida by helping the judiciary identify and quickly correct unintended practices that tended to undermine public trust and confidence in our courts,” the opinion stated.

First Amendment attorney Tom Julin praised the Court’s decision. “This may well be the strongest ruling of its kind in the country,” Julin said.

“I think this is going to stand not only to improve the process here, but as a beacon to others on the value of open government,” Julin said.

Bureau, paper settle records suit

TAMPA – *The Tampa Tribune* received \$28,106 from the Tampa Bay Convention & Visitors Bureau to pay the newspaper’s legal fees in connection with a public records lawsuit against the bureau.

The payment ended the dispute between the newspaper and the visitors bureau over bid preparation documents for the 2008 Republican National Convention. Tampa lost to Minneapolis in its bid to host the event.

The bureau initially refused to release the documents to *The Tribune*. The newspaper then filed suit, claiming that because the city delegated the

governmental function of preparing the bid to the bureau, the documents were public records.

The bureau released the records approximately two weeks after *The Tribune*’s initial request. The documents detailed how millions of taxpayer dollars would be used to host the convention.

The bureau, which did not use public money to pay the attorney fees, said the payment

was not an admission of wrongdoing. *The Tribune*’s Executive Editor, Janet Weaver, said that despite the bureau’s denial of wrongdoing, the newspaper can use the payment as leverage in future disputes.

ACCESS RECORDS

Federal recordings to go online

WASHINGTON, D.C. – In a step toward increasing access to its courts, the federal judiciary is launching a pilot program to offer free audio recordings of court proceedings. The recordings will be available online.

Currently, recording devices are barred in federal court rooms, although the Supreme Court does release audio recordings of oral arguments in some high-profile cases.

The Judicial Conference, the federal judiciary’s policy-making entity, approved

the pilot audio program.

Participation will be voluntary, and judges will still have discretion to stop recording when certain witnesses, such as FBI informants, testify.

However, the program is not designed as a stepping stone toward allowing cameras in federal courts, cautioned Chief Judge Thomas F. Hogan, executive committee chairman of the Judicial Conference.

The program is set to begin sometime this summer.

Hall of Fame nominees sought

In celebration of its 30th anniversary, the Brechner Center is currently seeking nominations for the Florida Freedom of Information Hall of Fame. The deadline for nominations is July 1, 2007.

The Hall of Fame honors individuals who have helped develop and defend Florida’s public records and open meetings laws, and the public access constitutional amendment.

Nominators must describe the

nominees’ contribution to Florida’s freedom of information and government in the sunshine. To submit a nomination, please visit brechner.org. You may submit the nomination online or download a nomination form.

The Brechner Center’s 11-member inaugural class included the late Florida Gov. Lawton Chiles, Ralph Lowenstein, Pete Weitzel, and Joseph L. Brechner, for whom the Center is named.

FREEDOM OF INFORMATION

Audit: Agencies hesitant to release disaster plans

WEST PALM BEACH – A nationwide audit of public officials' compliance with the federal Emergency Planning and Community Right-to-Know Act, a law requiring disclosure of community disaster plans, found that 1 in 3 requests for the plans were denied.

The law has been in effect for the past 20 years, but in light of post-Sept. 11 events, many government workers were

hesitant to release the information.

The informal audit consisted of nearly 400 requests by reporters, students and members of the League of Women Voters.

While some participants were given the information with no problem, others reported being followed by police, told it would take several weeks and \$1,700 to obtain a copy of the report, or being

required to sign an oath.

"[Y]ou don't look like a terrorist," said one South Florida government employee, when asked to supply an emergency plan. Terrorism was a frequently cited reason for not releasing the disaster plans, according to the audit report.

About one-fourth of requests in the South, including Florida, were unsuccessful.

Study finds that Bush's order not helpful to FOIA

CHICAGO – President George W. Bush's December 2005 executive order calling for quicker compliance with the Freedom of Information Act has not reduced the response time for requests, according to a study by the Coalition of Journalists for Open Government.

"Requests remain heavily backlogged," according to the study, due to cutbacks in personnel assigned to FOIA work and increased costs associated with fulfilling requests.

FOIA performance is actually at the lowest point since 1998, the study found. The drop could not be attributed to a significant increase in requests, and requests have actually decreased since they hit a record high in 2000.

Backlogs of requests – as high as 238 percent for the Agency for International Development and 127 percent for Housing and Urban Development – result in increased waiting times for requesters. The oldest request dates back to 1989.

Federal agency Web sites also received low marks in a recent study. The 1996 E-FOIA required agencies to put more public information online in an effort to save money and reduce waiting time. However, the National Security Archive found that only 1 in 5 federal agency Web sites actually post all of the required records, and only 6 percent post instructions on how to request information not appearing on the site. Online submission forms for FOIA requests are only a feature of 1 in 4 of the Web sites.

ACCESS MEETINGS

Attorney General's Office weighs in on PCOC

LAKELAND – Board members of the Polk County Opportunity Council found guilty of violating the Sunshine Law appealed their civil infraction convictions to the 2nd District Court of Appeal, but the Attorney General's Office has asked the court not to hear the case.

The 2nd District requested the advice of the AGO prior to deciding whether to

take the case. The AGO advised that the court should take a case only when there is "an inherent illegality or irregularity, and an abuse of judicial power, or an act of judicial tyranny...resulting in a gross miscarriage of justice."

The PCOC, an agency that assists disadvantaged populations in the Polk County area, was unsuccessful in its first

appeal to a circuit court judge.

The 10 board members convicted and fined \$278.60 each held a closed meeting on Sept. 15, 2005 to discuss disciplining the PCOC executive director. The members then returned to a public meeting already in progress and voted to reprimand the executive director. Members contend the Public Records Law does not apply to them.

ACCESS COURTS

Federal judges unseal records in mining suit

BIRMINGHAM, Ala. – A three-judge panel of the U.S. Court of Appeals for the 11th Circuit ordered the unsealing of records in a lawsuit involving allegations that an Alabama coal company was responsible for the murders of three labor union leaders in Colombia.

The company, Drummond Ltd., operates a mine in Colombia. A Colombian union filed the lawsuit in 2002, accusing Drummond Ltd. of

paying paramilitaries to carry out the 2001 slayings of three union leaders representing Drummond workers. Drummond has denied any role in the killings.

U.S. District Judge Karon Bowdre overstepped her authority and sealed too many documents, according to the 11th Circuit. Bowdre issued \$500 contempt fines for four attorneys she accused of leaking documents to *The Miami Herald*.

These were also overturned.

"The public has a right to access these documents that is more than powerful enough to overcome the negligible interest of Drummond in preventing public access," Circuit Judge William Pryor wrote. "The reasons given for sealing the documents by the district court were conclusory and speculative, and sealing these documents was an exaggerated remedy for the harms the district court identified."

Paper avoids election law violations

TALLAHASSEE – The Florida Elections Commission has changed its stance on a Wakulla County newspaper it once accused of violating state election laws.

The *Wakulla Independent Reporter* mentioned two county political candidates in the newspaper's first issue, prompting the Elections Commission to classify the publication as an "electioneering communication" subject to registration and other requirements under state law. The commission did not fine the *Independent Reporter* at that time but publisher Julia Hanway on notice that future issues could violate the law.

Hanway and the ACLU sued the commission in federal court, alleging it violated the First Amendment guarantees of a free press and free speech. The commission responded to the lawsuit by pledging not to further investigate the publication, which it decided was a newspaper after Hanway identified herself as the publisher in subsequent issues of the paper.

The commission stands behind its original investigation because of Hanway's failure to identify herself as the publisher. Hanway is still seeking an injunction prohibiting the commission from taking further action.

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Police remove secrecy oaths from internal complaint forms

FORT MYERS – The police department removed a provision in its internal affairs inquiries forms that prohibited witnesses from revealing what they told investigators.

The "secrecy oath" uses language from a Florida statute barring witnesses in police misconduct investigations from discussing the case after talking to investigators. The U.S. Court of Appeals for the 11th Circuit has struck

down similar laws in other states.

The language in the Fort Myers Police Department's forms drew attention after police fatally shot a man.

"No one has been prosecuted under [the Florida] statute in recent history," said Fort Myers City Attorney Grant Alley. Alley thanked the ACLU for pointing out the conflict between the "secrecy oath" and the decisions of the federal courts.

State offers new access Web sites

TALLAHASSEE – The state has launched several new Web sites to provide increased access to government records, but one has drawn criticism for its difficulty to navigate.

The online directory of lobbyists and how much they were paid by businesses is up and running at www.leg.state.fl.us, but a *St. Petersburg Times* report found that finding information is difficult because there is no way to match individual lobbyists

with the firms they work for. The site is prepared by the Lobbyist Registration Office.

Barbara Petersen, president of the First Amendment Foundation, told the *Times* the site was "practical obscurity at its very worst." Lawmakers have promised to improve the lobbyist database.

Florida teachers also will be the subject of an Internet database scheduled

to be online by this fall. The Web site, www.myfloridateacher.com, will make it easier for parents to access public records regarding disciplinary actions against teachers. More than 3,000 teachers are referred to the Department of Education each year for possible discipline.

In another effort to promote government transparency, the Office of Open Government has established a Web site with links to contact information for public records officials at each state agency.

The site, www.flgov.com/og_home, allows visitors to e-mail public records requests directly from the site.

In the same order establishing the Office of Open Government, Gov. Charlie Crist also ordered the implementation of an initiative to produce more government documents in "plain language." The Plain Language Web site, www.flgov.com/pl_home, provides guidelines for state agencies in planning ways to simplify bureaucratic language.

ACCESS RECORDS

COURTS CONTINUED

Reporter fined for camera phone

MIAMI – A television reporter for the Uruguayan station Teledoce was fined \$1,000 for using his cell-phone camera to capture federal court proceedings. Martin Sarthou pleaded guilty to contempt of court charges and is banned from entering federal courthouses in the Southern District for the next year.

Cameras are prohibited in federal courthouses. Most people are not allowed to bring cell phones to court, but Sarthou managed to get his past courthouse

security.

Sarthou used the camera on his cell phone to photograph the October 2006 extradition proceedings of Juan Peirana Basso. Basso is accused in Uruguay of participating in an \$800 million South American banking scandal.

Images from Sarthou's phone were broadcast on Teledoce. Uruguay's request to extradite Periana from the United States, where he was arrested a year ago, was not resolved at the hearing.

A decade later, agencies still not in line with E-FOIA

In 1996, Congress recognized the potential of the Internet and new technology to bring the plodding, backlogged, inefficient FOIA system into the technological present and passed the Electronic Freedom of Information Act Amendments (E-FOIA). The hope was that by requiring agencies to make most government documents available online, the public would have instant access to important government records without having to file a FOIA request.

E-FOIA called for agencies to post on their Web sites three traditional categories of reading room records: opinions and orders, policy statements, and staff manuals. And, in what is perhaps the most forward-looking provision of the bill, it created a fourth category of records that agencies are required

The Back Page

By Catherine Nielsen

to post—frequently requested records, defined as documents that have been or are likely to be subject to multiple FOIA requests. The amendments also envisioned reducing the administrative burden on agencies and better informing the public about the FOIA process. To this end, E-FOIA requires agencies to post on their Web sites guidance for making a FOIA request as well as comprehensive indexes to agency records.

Ten years later, a number of agencies still have failed to implement key provisions of E-FOIA. The National Security Archive recently issued a Knight Open Government Survey report titled *File Not Found: 10 Years after E-FOIA, Most Federal Agencies are Delinquent*. The Archive examined federal agency compliance with E-FOIA's mandate that agencies use technology to make the ideal of an open government a reality. We conducted a review of 149 agency and component Web pages, evaluating each site to determine compliance with the law and assessing agencies' progress in using the Internet to further the goals of the Act. Our data indicated a striking level of noncompliance with both the letter and the spirit of the law.

We found that agencies have clearly failed to keep pace with the revolution in access to information. Only 21 percent of agencies post all four categories of records required by E-FOIA. Only 6 percent include on their Web sites sufficient guidance for



Catherine Nielsen

FOIA requesters. Many agencies do not employ helpful online tools to ease their FOIA processing burden, and many agency FOIA Web sites are poorly organized and difficult to navigate. Even on sites that provide some or all of the required materials, users may be unable to find the information they seek because agencies have not made an effort to design user-friendly FOIA sites.

In spite of this grim picture, we did find some outstanding agencies whose efforts in complying with E-FOIA demonstrate that the burden of the law is not too high. For example, the National Aeronautics &

Space Administration has proactively posted records of great interest to the public, like those related to the Space Shuttle Columbia disaster.

Unfortunately, however, the audit identified a much larger number of agencies that are delinquent in complying with E-FOIA. Perhaps the worst case of non-compliance with E-FOIA is the Air Force. Its FOIA information is split between two distinct Web sites, one of which is not accessible from the agency's home page, and neither site contains the records required under E-FOIA. The Air Force attempts to pass off its responsibility for maintaining an electronic reading room by providing links—at least 139 of which are broken—to other Web sites.

For 10 years, the E-FOIA amendments have languished largely unfulfilled and unenforced, while backlogs of pending FOIA requests at federal agencies grow dramatically. FOIA has been marginalized, under-funded, and at times ignored in many federal agencies. As a result, the promise of a revolution in access to government information through the use of the Internet has never materialized. Moreover, no authority has compelled federal agencies to comply with the E-FOIA Amendments. This dearth of Executive Branch leadership and Congressional oversight on E-FOIA has allowed many agencies to remain far from compliance for far too long. Increased oversight and direction will bring FOIA into the 21st century and fulfill E-FOIA's transformative vision.

Catherine Nielsen is the FOIA Coordinator at the National Security Archive. She monitors the U.S. government's compliance with the FOIA and researches freedom of information policy.