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# THE BRECHNER REPORT

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Volume 31, 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 2007

## FEMA records made public after three-year battle

FORT MYERS – The Federal Emergency Management Agency was ordered to make public the addresses of more than 600,000 households that received \$1.2 billion in aid following the 2004 hurricane season.

*The News-Press, Pensacola News Journal* and *Florida Today* newspapers, all owned by Gannett Co. Inc., and the *South Florida Sun-Sentinel*, owned by Tribune Co., sued FEMA for the names and

addresses after their public information requests were denied.

“We wanted to know if FEMA was fair and equitable in the way they distributed aid in the state by storm. The only way to do that - and the

judges concurred - is for FEMA to be held to a standard that they are accountable and fair,” said Betty Wells, Special Projects editor at *The News-Press* during the three-year battle.

“We requested the information so we could perform our watchdog duties, and with this reversal we will be able to do just that,” said Kevin Doyle, *News Journal* president and publisher.

The three-judge panel of the U.S. 11<sup>th</sup> Circuit Court of Appeals ruled that the newspapers have a right to access

the addresses of disaster aid recipients. However, the court did not provide access to the names of those recipients.

The judges ruled that “disclosure of the addresses will help...by shedding light on whether FEMA has been a good steward of billions of taxpayer dollars in the wake of several natural disasters across the country, and we cannot find any privacy interests here that even begin to outweigh this public interest.”

“After the review is complete, we will determine the best manner in which to proceed,” said FEMA Press Secretary Aaron Walker.

“I think the judges’ decision is so compelling, leaving so little room for criticism, I’d be hard-pressed to believe that they will continue to fight this,” Gannett attorney Charles Tobin said.

### ACCESS RECORDS

## Florida FOI Summit Registration Begins

GAINESVILLE - Reporters, editors, access advocates, public officials, media lawyers, citizens and students interested in freedom of information in Florida, nationally, and globally will be gathering in Gainesville, Fla., for the 2007 Florida FOI Summit, Sept. 20-21. Participants will explore Florida’s open government laws, ask the experts questions, discuss challenges to access and recommend strategies for protecting and increasing the public’s right to know and freedom of information.

During the Summit, new members will be inducted into the Florida FOI Hall of Fame, the top 30 FOI stories in the state of Florida over the past 30 years will be unveiled and the Brechner Center’s 30th anniversary will be celebrated.

The cost of the conference is being underwritten by a grant from Mrs. Marion Brechner. More information about the Summit is available at [www.Brechner.org](http://www.Brechner.org).

## Attorney General launches Government Accountability Program

TALLAHASSEE - Attorney General Bill McCollum launched the Government Accountability Project (GAP) to encourage state and local government entities to provide Florida’s citizens more information and records necessary to hold their government accountable.

The project was launched in partnership with The Brechner Center for Freedom of Information, whose mission is to further advance the understanding, appreciation and support for freedom of information and education.

“Florida is a national leader in providing open government for the public,” said Attorney General McCollum. “It is my hope that this project will serve as an example for other government entities to follow.”

### ACCESS RECORDS

The first phase of the project will determine what discrepancies exist between records already available and the information citizens need but have difficulty obtaining. The second phase will involve collaboration with state and local government entities to eliminate

discrepancies. “The Brechner Center is excited to be partnering with Attorney General McCollum on this project,” said Sandra Chance, executive director of the Center. “Improved electronic access will make it much easier for us to hold our government officials accountable for their decisions that affect our lives, our families and our communities.”

Information about the Government Accountability Project is available at <http://myfloridalegal.com/sunshine>.

## Summary: Attorney General Opinions on open government

TALLAHASSEE – Attorney General Bill McCollum issued several opinions regarding open government issues during his first months in office. The following are summaries. To read the full text of the opinions, visit [www.myfloridalegal.com](http://www.myfloridalegal.com).

*Law enforcement officer photos: Who is considered "law enforcement personnel" for the purposes of the public records exemption in section 119.071 (4)(d)1, Florida Statutes? What limits the chief of police when releasing photos of police department officers and employees?*

AGO 2007-21: This exemption seeks to protect law enforcement personnel and their families. Although "law enforcement personnel" is not clearly defined, it includes law enforcement officers who, for the purposes of the public records exemption, appear to include sworn personnel but not support staff. Photographs of law enforcement officers are exempt, but not confidential. The chief of police should consider whether there is a statutory or policy need for releasing the photos.

*Juvenile misdemeanor records: Is the sheriff's office required to release the name and addresses of parents of juvenile misdemeanor offenders when asked for such information in a public records request?*

AGO 2007-19: Assuming section 985.04(2) (governing juvenile records where the juvenile has committed what would be equivalent to, if he was an adult, three or more misdemeanors or a felony) does not apply, the sheriff's office is not authorized to release the names and addresses of the parents of a juvenile

misdemeanor pursuant to a public records request.

*Business expansion/relocation plans: Does section 288.075, Florida Statutes, requiring an economic development agency to keep business plans confidential upon written request from the business, preclude the agency from disclosing the existence of the written request and other confidential documents?*

AGO 2007-15: A written request for confidentiality under 288.075(2) may contain information required to be confidential. The records custodian must determine on a case-by-case basis whether the request or part of the request falls under the statutory exemption. The custodian may cite 288.075(2) as the reason for withholding the document (implicating its existence) without violating the confidentiality required by the statute.

*E-mails and e-mail addresses: Are e-mails sent by city commissioners that contain undisclosed or blind recipients and their e-mail addresses public records? If so, how should these records be maintained?*

AGO 2007-14: An e-mail sent by the commissioner in connection with official business is a public record, regardless of whether the e-mail contained undisclosed or blind recipients. Records custodians should comply with Florida statutes and internal procedures regarding the maintenance of electronic records.

*Regional planning council: Is it a violation of the Sunshine Law for two county commissioners who are also board members of a regional planning council to attend and participate in*

*planning council meetings when those planning council issues may later arise at county commission meetings?*

AGO 2007-13: Two county commissioners who are also planning council members may take part in council meetings and express their opinions without violating the Sunshine Law. However, they should not discuss these issues outside the Sunshine as either commissioners or council members.

## Jacksonville records come up short

JACKSONVILLE – A *Florida Times-Union* report revealed a flawed system of public notification, dozens of meetings about public business held without public notice or written minutes and several that took place in private locations, a violation of the city's ethics code.

Records from June 2005 to December 2005 revealed that meeting notices involving two or more council members are given to other city officials and to the media but rarely the public.

**ACCESS MEETINGS** Forty-seven scheduled meetings between two or more council members

dealt with specific items of city business, according to calendar entries. Yet no public notice was filed.

Several discussions of public business involving two or more council members were held in private places.

Ten of 19 council members failed to keep written minutes for any of their meetings.

According to the *Times-Union*, State Attorney Harry Shorstein told the council at a meeting in June that he would push for an inquiry because of the council's "culture of blatant disregard" for open meetings laws.

After hearing three hours of evidence, the Duval County grand jury decided to investigate whether members of the Jacksonville City Council violated Florida's Sunshine Law. Violations could result in up to 60 days in jail or fines of up to \$500.

"There were allegations of continual violations of government Sunshine Law," State Attorney Harry Shorstein said in announcing the grand jury's decision, according to WJXT-TV.

## Veteran loses honorable status after protest

KANSAS CITY, Missouri – A U.S. military panel recommended a Marine reservist receive a general discharge after he was pictured at an anti-war protest dressed in desert fatigues.

Marine Corporal Adam Kokesh, 25, insisted he did not violate military policy because he removed his name tag and badges, but the military considered the protest a political event, at which

personnel are not allowed to wear their uniforms without authorization.

The three-judge military panel's final recommendation was to involuntarily dismiss Kokesh with a general discharge just weeks before the official end of his contract.

The decision strips Kokesh of the honorable discharge he received after a combat tour in Iraq.

**FIRST AMENDMENT**

## 'Bong Hits 4 Jesus' case limits student rights

WASHINGTON, D.C. – The Supreme Court ruled that a high school principal did not violate a student's constitutional rights when she told him to take down a 14-foot banner that read "Bong Hits 4 Jesus" and subsequently suspended him for 10 days when he refused.

The Court ruled 5-4 that Deborah Morse did not violate Joseph Frederick's First Amendment rights because school officials may "take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."

In a written opinion, Chief Justice John Roberts said, "It was reasonable for [the principal] to conclude that the banner promoted illegal drug use... and that failing to act would send a powerful

message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use."

The decision gives schools wider discretion to limit messages that appear to advocate illegal drug use.

Frederick unveiled the banner as the 2002 Olympic torch relay passed by his high school.

Morse argued this was a school speech case because the event occurred during school hours and was sanctioned as an "approved social event at which the district's student-conduct rules expressly applied."

Students were allowed to leave the school premises to view the parade.

She said that she was "empowered to

enforce the school board's written policies at the time aimed at keeping illegal substances out of the school environment."

The Court said in its opinion, "The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."

In his dissent, Justice John Paul Stevens wrote, "The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible."

Frederick, now 24 and teaching English in China, told CNN, "I find it absurdly funny... I was not promoting drugs... I assumed most people would take it as a joke."

## SPJ requests investigation into arrest of journalist

MIAMI – The South Florida Chapter of the Society of Professional Journalists has asked the Miami-Dade Police Department to open an inquiry into the February arrest of television journalist Michael Kirsch, who was investigating allegations against the department and its director.

Kirsch, who was employed at the time as an investigative reporter at WFOR CBS 4, said he was assaulted and treated harshly with no provocation during a traffic stop near his home when he was

off-duty with his family.

SPJ sent a letter to Director Robert Parker requesting a department inquiry into how the officer responded

### NEWSGATHERING

when Kirsch stepped out of his automobile at the roadside.

The letter said, "Nobody should be subjected to detention that is not made necessary and appropriate by the circumstances of the actions of the

individual. Nor should police behavior in any case degrade or punish a member of the public. Any punishment should follow charges and judicial action. Mr. Kirsch believes he was subjected to unnecessarily harsh treatment."

Kirsch was originally charged with multiple felony offenses, including assault on a police officer. The state attorney reduced the charges to a misdemeanor charge of resisting arrest without violence.

## Governor Crist appoints Commission on Open Government

TALLAHASSEE – Gov. Charlie Crist appointed the nine-member Commission on Open Government to review and evaluate the public's right of access to government meetings and records.

The commission will hold at least three public hearings throughout the state to receive input from the public, media and government representatives.

The commission's findings and recommendations will be presented to the governor, Senate president and speaker of the House of Representatives by the end of 2008.

### ACCESS RECORDS

"Florida's Sunshine Laws are among the strongest in the nation and give every citizen access to information necessary for participating in the democratic process," said Gov. Crist. "The Commission on

Open Government will help ensure that all levels of government are accessible to the people."

The committee is comprised of media representatives, attorneys and government officials from throughout the state. Information about the Commission on Open Government is available online at [http://www.flgov.com/og\\_home](http://www.flgov.com/og_home).

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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.



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# Court clears FEMA's cloud of secrecy

Long before Floridians could clean-up the devastation left in the wake of Florida's historic 2004 hurricane season, reporting by the *South Florida Sun-Sentinel* revealed serious flaws in FEMA's aid disbursement process.

Questions emerged about whether the Federal Emergency Management Agency had allowed millions of dollars of federal taxpayer money to be released to people in areas that were not impacted by the storms.

A government investigation ensued, which revealed FEMA failed to provide needed oversight and neglected to implement quality controls that could protect the integrity of the process.

The *Sun-Sentinel* made a Freedom of Information Act request for FEMA's aid disbursement records, including the database that tracks aid requests and disbursements.

FEMA insisted that the addresses of disaster claimants were exempt from public disclosure under FOIA Exemption 6, which allows government agencies to withhold materials when disclosure would constitute a "clearly unwarranted invasion of personal privacy."

An Exemption 6 analysis requires a court to balance the public's interest in disclosure against the privacy interest in confidentiality. The 11<sup>th</sup> Circuit Court of Appeals decided that the public interest in access to addresses of individuals who requested disaster relief from FEMA outweighs any privacy interest in the information.

In considering the public interest, the court "easily" concluded that the interest in learning whether FEMA properly handled billions of taxpayer dollars after the 2004 hurricane season goes to the core purpose of FOIA, which is to shed light on the operations and activities of government.

The court rejected FEMA's argument that the public interest had already been served by two government investigations and by the release of disbursements broken down by zip code. FEMA itself disputed the government's findings and had outwardly



*Deanna K. Shullman*



*Rachel E. Fugate*

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*By Rachel E. Fugate and Deanna K. Shullman*

cautioned against system-wide extrapolation from the limited investigations. The court also found that ZIP codes were too large a geographic area to meaningfully analyze.

The court found that the public interest in determining how FEMA disbursed aid dollars in response to the four hurricanes and other disasters was "undeniable and powerful," and that release of the addresses would "go a long way" in answering the questions about FEMA's disbursement process that arose following the 2004 hurricanes.

The court also rejected the contention that applicants' privacy may be violated if they were contacted by the newspapers.

"[I]ndividuals are under no obligation to speak to reporters, and on balance, the modest annoyance of a 'no comment' is simply the price we pay for living in a society marked by freedom of information laws, freedom of the press, and publicly-funded disaster assistance."

The 11<sup>th</sup> Circuit considered the balancing of the respective interests to be a fairly easy task, finding a "powerful" public interest that outweighed a privacy interest that could not "be said even to rival this public interest, let alone exceed it."

The court held that FEMA did not even "come close to meeting its heavy burden" to justify application of Exemption 6 and ordered the agency to release the damaged location addresses.

The 11<sup>th</sup> Circuit's opinion sends a clear message to government agencies that the expenditure of public funds is entitled to public scrutiny. Once the information is released, the public will have the opportunity to determine for itself whether FEMA properly handled billions of taxpayer dollars after the 2004 hurricanes and other disasters.

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*Rachel E. Fugate and Deanna K. Shullman, with the law firm Thomas & LoCicero PL, and David Bralow, Tribune Company, represented the South Florida Sun-Sentinel in this matter.*