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# THE BRECHNER REPORT

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Volume 31, Number 11 ■ 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  
November 2007

## Fla. Supreme Court issues revised records policy

TALLAHASSEE – The Florida Supreme Court has issued a revised interim policy on the electronic release of court records, expanding access to information about criminal defendants and providing general remote access to some files for attorneys.

The revised interim policy was issued more than a year after the first policy was enacted, based on recommendations from the Committee on Access to Court Records. The 15-

member Committee is the successor to the Committee on Privacy and Court Records.

The new policy expands access by allowing the electronic release of the full birthdates of criminal defendants, a move that will assist in confirming the identities of individuals. The policy restricts access to images of traffic infraction citations, however, apparently to avoid the release of driver's license numbers.

The new policy also clarifies that it

is not applicable to court administrative records or digital recordings of judicial proceedings. Finally, attorneys may now be provided with "general remote electronic access" to certain cases so long as the cases and particular files are not confidential. The policy continues to allow access to progress dockets, limited information on parties, official records, and all appellate court filings. Certain high-profile cases or cases in which a state agency is a party will remain available electronically.

### ACCESS COURTS

## Board agrees to operate in open

PALM BEACH COUNTY – A land trust formed last year to create and preserve affordable housing finally agreed to operate under Florida's open government laws, although some board members were reluctant to do so.

The county and the Community Land Trust of Palm Beach County spent months wrangling over a contract that would require the county to provide the trust with \$200,000 per year for two years, but would also require the trust to operate in the Sunshine.

"Yes, it is unfair, but we have to take a stand and the stand is for the public and for affordable housing," said board member Hazel Lucas. "If it be (in the) sunshine, so be it."

The trust is a nonprofit that will buy property and build and sell homes, retaining the titles to the land so that it can remain affordable. Tensions between the county and the trust came to a head this summer, when the Palm Beach County Commission voted to give a 5.6-acre parcel of land slated for the trust to Habitat for Humanity.

### ACCESS MEETINGS

## Lawmakers want report sealed

WEST PALM BEACH – South Florida lawmakers have continued their challenges to the release of a grand jury report, now hoping the Fourth District Court of Appeal will reverse a lower court's ruling that the report should be open to the public. The grand jury was convened to examine the role of campaign contributions in city contracts and project approvals.

City of West Palm Beach Mayor Lois Frankel and state Rep. Mary Brandenburg took legal action to keep parts of the original report sealed. The grand jury

released its report Jan. 31.

Frankel attempted to keep her effort to seal the report a secret, but *The Palm Beach Post* later revealed that she had hired attorney Bruce Rogow to challenge the grand jury's conclusions as improper.

Rep. Brandenburg told *The Post* she is challenging allegations in the report that she pressured a nonprofit group to contribute to the mayor's reelection campaign.

The portions of the report at issue remain sealed pending a decision by the Fourth District.

### COURTS

## Suit prompts records release

MANATEE COUNTY – A public records lawsuit filed by a local government watchdog prompted the Manatee County School Board to release appraisals it had completed on a \$15.75 million building it purchased. Longtime school board critic David Miner filed the suit after the school district said it would not release the records until 30 days after the contract to buy the building was agreed upon.

"What we have is a public body, our school board, agreeing to obtain property for \$15.75 million, without the public having a right to see the appraisal – even if there are confidential parts that could be redacted," Miner argued before Circuit Judge Paul Logan.

School board lawyer John Bowen agreed to release the appraisals, though the building's floor plan was redacted. Bowen announced during closing arguments before Judge Logan that the board would release the records. Logan said he would consider the possibility of awarding attorney's fees to Miner.

The school district plans to use the building and 18 acres to consolidate employees throughout Manatee County, according to *The Bradenton Herald*.

## Judge dismisses slander suit against *News-Journal*

PENSACOLA – A slander lawsuit stemming from a poll conducted in preparation for another lawsuit, both brought by Joe Anderson Jr. against the *Pensacola News-Journal*, has been dismissed by a circuit court judge.

Anderson's first suit against the *News-Journal* is currently pending review by the Florida Supreme Court and involves his allegation that the newspaper placed him in a false light.

In preparation for that trial, the *News-Journal* and parent company Gannett Co. hired a research company to do a

community telephone poll in order to develop information for jury selection and trial strategy. Anderson learned about the poll during the December 2003 trial for the false light lawsuit.

Anderson's lawyers then requested access to the names of the 400 people surveyed to determine if any potential jurors were on the list.

Trial judge Michael Jones ordered the research company to turn over the names to Anderson's lawyers, but required the names be kept private and used only to determine if anyone surveyed was a

member of the jury pool.

Anderson himself apparently copied the list and hired private investigators to interview people surveyed. He then filed another lawsuit against the *News-Journal*, this time claiming the pollsters asked defamatory questions.

Judge Terry Terrell dismissed the second lawsuit, noting that Anderson violated the trial judge's "simple, concise, unambiguous ruling," and that attorneys have flexibility regarding conduct and statements made in the course of litigation.

## FIRST AMENDMENT

### Commission declines ad dispute

TALLAHASSEE – The Florida Elections Commission has rejected a complaint by state Rep. Paige Kreegel alleging that attack ads distributed in the 2004 election were false and malicious.

Kreegel filed the complaint 18 months prior to the Commission's decision not to pursue formal charges against political consultant Randy Nielsen and the Florida Home Builders Association, according to the *St. Petersburg Times*.

Kreegel's complaint stemmed from

last-minute campaign ads mailed to voters that highlighted lawsuits filed against Kreegel as well as a criminal mischief charge that was dismissed.

Elections general counsel Charles A. Finkel determined that the accusations against Kreegel were protected by the First Amendment.

In addition to the complaint to the Elections Commission, Kreegel also filed a libel lawsuit that is still pending in the courts.

### Presidential search committee under fire for anonymous ballots

FORT MYERS – The Florida Gulf Coast University presidential search committee changed its anonymous voting procedures after media reports criticized the committee's use of anonymous ballots. A spokeswoman for the State Attorney's Office said no formal complaints had been filed against FGCU.

"We are monitoring the situation with FGCU and the alleged Sunshine Law violations," said spokeswoman Samantha Syoen, according to the *Naples Daily News*. "Generally, we don't launch an investigation on a news report."

The committee previously used anonymous ballots to narrow the applicant list to 10 candidates, then to six

semifinalists. However, when the FGCU committee voted to narrow the pool to three, members put their names on the ballots.

The university's attorney and human resources department supported the use of anonymous ballots, despite a statement in the Government-in-the-Sunshine Manual to the contrary.

FGCU general counsel Vee Leonard cited a previous case that supported the use of anonymous ballots. Florida's special counsel for open government, Pat Gleason, suggested the committee err on the side of openness. The committee opted not to re-vote or sign the existing anonymous ballots.

ACCESS  
RECORDS

### Poll statute's impact unclear

TALLAHASSEE – The Florida Elections Commission rescinded an advisory legal opinion in late August, choosing instead to interpret a Florida statute in favor of political committees.

The original opinion was issued in response to a letter from the political committee Red and Blue Florida. Red and Blue wanted to know if it could collaborate with other committees to poll voters regarding ballot issues.

An elections attorney for the Commission wrote that based on the applicable Florida law, only candidates were expressly allowed to poll voters.

After political activists criticized the interpretation, the Commission revisited the issue and released another advisory opinion.

"[G]iven the history of the statutory provision and because polling activities implicate the First Amendment right to free speech, it is reasonable to conclude that the legislature did not intend to infringe upon this right any more than necessary to accomplish its expressed goal of regulating candidate polls," wrote elections attorney Amy Tuck.

"Therefore, although the language of the statute is not entirely clear, we believe the better interpretation is to construe its purpose as being to impose restrictions upon candidate polling without imposing any similar restrictions upon issue polling," Tuck wrote.

## Official initiates closed meeting; council objects

TAMPA – A Hillsborough County commissioner's decision to hold an advisory council's meeting behind closed doors was quickly rejected by the council, who stopped the closed meeting in order to avoid violating the Open Meetings Law.

Commissioner Brian Blair attended the meeting of the agriculture advisory

council, of which he is not a member, to discuss wetlands issues. After about an hour, Blair asked members of the public and other guests, including the executive director of the county's Environmental Protection Commission, to leave.

The county's agriculture industry development manager, Stephen Gran,

stopped the closed meeting minutes later. "The (agricultural advisory) council does not meet in that manner; we do not have closed meetings," Gran said. "That's why we stopped the meeting as soon as we realized."

Blair had no comment on the meeting, according to *The Tampa Tribune*.

## Attorney General's Office weighs in on issues

TALLAHASSEE – The Attorney General's Office weighed in on several open government issues this summer, ranging from accident scene photo accessibility to e-mails among public officials. The opinions, both informal and official, are summarized below.

*How does the Public Records Law apply to e-mails sent among public officials?*

Informal Opinion, June 8, 2007: E-mails made or received by agency employees in connection with official business are public records. The Open Meetings Law also applies to e-mails among public officials. As long as there is no interaction among officials related to an e-mail sent by one public official (i.e., a county commissioner), then there appears to be no violation of the Open Meetings Law.

*Are local health councils which are provided for in Fla. Stat. s. 408.033 subject to the Open Meetings Law?*

AGO 2007-27, June 26, 2007: Yes. In determining whether a private

organization is subject to the Open Meetings Law, the Attorney General's Office usually looks at factors related to the relationship between the private entity (the local health council) and the public entity (such as the Department of Health and the Agency for Healthcare Administration). The local health councils are established pursuant to statute, play an integral role in the decision-making process of the AHCA, their costs are paid by assessments collected by the state, and they are included within the definition of a regional government entity for purposes of the Florida Governmental Conflict Resolution Act. Therefore, local health councils are subject to the Open Meetings Law.

*May the request by the attorney for an entity to meet in private pursuant to an exemption to the Open Meetings Law be made during a special meeting?*

AGO 2007-31, July 10, 2007: Yes. The request for a closed attorney-client meeting may be made during a special meeting as long as the special meeting is

open to the public, notice has been given, and minutes are taken.

*Are photographs taken by the medical examiner's investigator at the site of an automobile accident exempt from disclosure under Florida's Public Records Law?*

Informal Opinion, July 25, 2007: Yes. In AGO 2001-47, the opinion concluded that crime scene photographs were not included within the scope of the Fla. Stat. s. 119.07(1) exemption for autopsy photos. However, the exemption would still apply to photographs taken by the medical examiner as part of the autopsy process.

*May city commissioners, outside a public meeting, exchange documents that they wish other members of the commission to consider on matters coming before the commission for official action, and if so, what limitations exist?*

AGO 2007-35: Yes. However, commissioners are not permitted to respond to the exchange of documents or interact with each other related to the documents prior to the public meeting.

## ACCESS COURTS CONTINUED

### Court denies bid to re-hear case

MIAMI – The Third District Court of Appeal has decided not to re-hear *The Palm Beach Post's* request for access to Rush Limbaugh's divorce settlement. The panel of judges ruled 2-1 to deny the motion for re-hearing, refusing to issue a written opinion.

Limbaugh and his former wife, Marta Miranda, divorced in 2004. They signed a 22-page marital settlement agreement which the trial court allowed not to be filed with the court record.

*The Post* filed a motion requesting the settlement be filed with the court, which the trial court denied. The Third District

chose not to disturb the trial court's ruling.

Judge Gerald Cope, however, did write a dissenting opinion which stated that the settlement agreement was a public document under the plain language of the Florida Constitution. Cope cited Article I, Section 24 of the Constitution, which declares records "made or received in connection with . . . official business" are public.

"The conclusion is inescapable that the marital settlement agreement is a judicial record," Cope wrote. He recommended the case be remanded to determine whether there was an applicable exemption.

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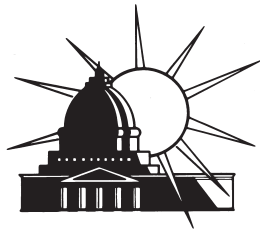
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*The Brechner Report* is published 12 times a year under the auspices of the University of Florida Foundation. *The Brechner Report* is a joint effort of The Brechner Center for Freedom of Information, the University of Florida College of Journalism 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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November 2007



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## Reporter vigilance necessary to prevent sealing abuses

Who knew a divorce case could unleash so many secrets? There wasn't anything particularly salacious about the divorce of two South Florida television personalities when it first appeared on the court docket in summer 2005. It wasn't until I went back a couple of months later to review the court docket that secrets began to emerge. A search on the Broward Circuit Court's Web site using the parties' names and case number yielded no information. So on my next trip to the courthouse, I entered the case information into one of the computers available for use by the public. Still nothing.

I then asked a court clerk to enter the case number into the electronic docket used by the clerk's office. On the screen in red-flashing letters appeared "CONFIDENTIAL." I'd never

### The Back Page

By Patrick Danner

earlier uncovered how cases in South Florida's federal court were concealed from public view. No law, though, allows for cases to be placed on a secret docket.

Now, something similar appeared to be happening in state court. So Dan and I set out to learn how pervasive the problem was in Broward. With no idea how many cases had been super-sealed, we asked the clerk's office for a list of cases that had been made confidential between 2001 and 2006. The clerk's office ultimately produced a list of 107 cases that had been kept on a secret docket. They included divorce, negligence, malpractice and fraud cases.

But that's all we had. We still didn't have case numbers or parties names. Only through interviews with officials in the clerk's office and judges, as well as reviewing related cases, were we able to flesh out some details about a few of the super-sealed cases. The judges we interviewed said they never intended for whole cases to disappear. The chief judge said the clerk's staff members might have misinterpreted court orders to mean they should be taken underground. The clerk countered that his office only followed the judges' instructions.

Regardless of the reason, we learned the practice wasn't limited to Broward. Clerks in Palm Beach and Pinellas counties



Patrick Danner

also revealed they occasionally super-sealed cases. After our story appeared, a few judges reversed their orders hiding cases. Still, *The Miami Herald* sued to learn the party names and case numbers for the vast majority of super-sealed cases in Broward.

Two months later, the clerk's office provided that list. On it were divorces and disputes involving judges, politicians, business people and other big shots. Ultimately, we learned nearly 700 cases had been hidden through the years. The cases have since been restored to the electronic docket that the public can access. *The*

*Herald* has successfully fought to have a few of the cases unsealed because they involved newsworthy individuals. But most of the cases remain sealed.

Meanwhile, our investigation led us to another courthouse secret – this time in Miami-Dade. Court dockets had been changed to cover up the felony convictions of two defendants, both of whom were informants for the Miami-Dade State Attorney's Office. The State Attorney's Office said it has been an "established practice" for two decades for prosecutors to ask judges to alter public records. Florida law, however, makes it a crime for anyone, including judges and clerks, to alter or falsify court records.

In April, the Florida Supreme Court ruled unanimously that judges and clerks can no longer hide civil lawsuits from the public. The practice threatens to "undermine public trust in the courts," the ruling said.

Not all judges in Broward and Miami-Dade have a firm grasp of the new rules on sealing. Recently, we found 12 of 16 sealing orders issued since the new rules took effect didn't comply with the requirements. Within days of our report, a Miami-Dade judge voided his own order intended to seal a court file "until the end of the earth."

While one can hope the new Supreme Court rules put an end to the harmful practice of super-sealing court records, reporters should remain vigilant. Reporters should routinely check sealing orders to determine whether the matter is newsworthy, but also to make sure judges are adhering to the new sealing requirements.

The Miami Herald's Patrick Danner and Dan Christensen are the 2007 Brechner FOI Award winners. Visit [brechner.org/top30](http://brechner.org/top30) for an interview with the authors and copies of the original stories.