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# THE BRECHNER REPORT

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April 2008

## Fines suspended pending appeal of contempt order

WASHINGTON, D.C. – Three judges for the U.S. Court of Appeals for the D.C. Circuit granted a stay for former *USA TODAY* reporter Toni Locy, who was ordered to pay steep fines by a U.S. District Court judge after she refused to reveal confidential sources for a series of stories she wrote on the September 2001 anthrax attacks.

The court granted the stay pending Locy's appeal of U.S. District Court Judge Reggie Walton's contempt order.

The fines, which began at \$500 a

day for a week, would eventually have increased to \$5,000 a day.

Walton also prohibited Locy from accepting assistance to pay the fines.

### REPORTER'S PRIVILEGE

According to the Reporters Committee for Freedom of the Press, no judge has ever officially ordered that a reporter

may not accept financial assistance from an employer or others to pay for fines levied as a result of a contempt citation.

When Locy said she could not remember who her specific sources were, Walton ordered her to reveal the names of up to a dozen confidential sources within

the Justice Department upon whom she routinely relied.

A coalition of about two dozen media companies and non-profit journalism organizations filed an amicus brief supporting Locy.

Locy, who is currently a professor of journalism at West Virginia University, said, "I'm relieved and thankful that the Court of Appeals has found that my legal arguments are worthy of its consideration," according to *USA TODAY*.

Locy faces a possible prison sentence if she fails to name the confidential sources, according to the Reporters Committee.

Source: *USA TODAY*

## Council made 'technical or noncriminal' violations

JACKSONVILLE – An unsealed grand jury report found evidence that Jacksonville City Council members committed "technical or noncriminal" violations of Florida's Open Meetings Law.

However, State Attorney Howard Shorstein said he will not prosecute members of the council unless there is evidence of a kickback to a Jacksonville City Council member or other criminal act.

"I do not think I would ever charge anybody without a clear criminal intent," said Shorstein, according to the *Florida Times-Union*.

Shorstein said he has the option to

pursue noncriminal charges against council members, which are punishable with fines up to \$500.

However, Shorstein said he is unlikely to do so because he is occupied with the prosecution of violent crimes and cannot devote time to civil infractions.

The grand jury investigation was prompted by a 2007 *Times-Union* investigation, which documented dozens of meetings held by the Jacksonville City Council that concerned public business but had little to no public notice or written

### ACCESS MEETINGS

minutes.

The grand jury's investigation widened to look at problems with no-bid city contracts awarded to companies owned by friends of Mayor John Peyton.

The investigation did not find any illegal activities, and all former and current council members who testified denied violating the law, according to the *Times-Union*.

The *Times-Union* reported skepticism on the part of the grand jury foreman as to the truthfulness of some of the testimony.

Source: *Florida Times-Union*

## FDLE denied unlimited access to Foley computers

TALLAHASSEE – The U.S. House of Representative's legal office denied the Florida Department of Law Enforcement access to former U.S. Rep. Mark Foley's computers as the agency continues to investigate his illicit sexual messages to male congressional pages.

Instead of providing unfettered access to Foley's computers, the House legal office offered FDLE the option to submit search terms, which the House legal office

### ACCESS RECORDS

would use to review Foley's e-mail.

However, findings from the search would first be screened by Foley's attorneys, who could deny the release of information they considered constitutionally protected legislative information.

"I'm sure anyone being investigated by FDLE would like the opportunity to review and filter evidence before providing it to us. The only appropriate course to ensure an independent and

objective criminal investigation is direct access to these computers," said FDLE Commissioner Gerald Bailey in a statement, according to the *Sarasota Herald Tribune*.

FDLE first sought access to Foley's computers when then-House Speaker Dennis Hastert asked FDLE to investigate whether Foley had violated any state laws with his lurid e-mails to congressional pages. Foley resigned in 2006 following news accounts of the e-mails.

Source: *Sarasota Herald Tribune*

## Audit of state agencies finds flaws, improvement

TALLAHASSEE – In a survey of 34 state agencies, 50 percent passed a four-part public records test conducted by the Florida First Amendment Foundation.

Volunteers from the foundation, who presented themselves as average citizens, requested the same routine record – a copy of the most recent travel reimbursement form filed by the agency’s chief administrative officer.

The volunteers documented whether they were asked to give their name, present identification, provide a reason or purpose for the request or provide the

request in writing – all things prohibited by Florida’s Public Records Law.

Thirty-two percent of the state agencies audited had one violation, and 12 percent had two. Only the Department of Transportation had three violations.

The most common violation – requesting the record requestor’s name – occurred in one-third of the state agencies. Just more than one quarter of the agencies required the request in writing. Only two agencies required that the requestor provide a reason for the request.

The only agency to completely fail

the audit was Visit Florida. The agency denied the requestor access to the agency’s office because of “renovations,” according to the First Amendment Foundation. The requestor was unable to find anyone to talk to about her public records request.

The audit also found that the attitude of government employees toward those making public record requests has “dramatically improved,” according to the foundation, which cited the efforts of Gov. Charlie Crist and his Office of Open Government to facilitate transparency.

Source: *The Ledger (Lakeland)*

## ACCESS MEETINGS CONTINUED

### Legislator kicks photographer

DENVER – The Colorado House of Representatives censured a legislator for kicking a newspaper photographer who took his picture during the session’s opening prayer.

Rep. Douglas Bruce, R-Colorado Springs, kicked *Rocky Mountain News* photographer Javier Manzano. Bruce was later sworn in as a midterm replacement.

According to *The Associated Press*, Bruce has described his action as a “nudge,” but Manzano said the legislator brought his shoe down hard on the photographer’s bent knee and said, “Don’t do that again.”

The censure was the first ever in the Colorado Legislature’s history.

Source: *The Associated Press*

### Fish fry raises Sunshine issues

LEON COUNTY – The *Tallahassee Democrat* questioned Leon County Commissioner Bryan Desloge about possible Open Meetings Law violations as a result of his second-annual fish fry at his beach house for fellow commissioners and senior county staff.

According to the *Democrat*, Desloge pledged that guests would not discuss public business. The event was not open to the public, but Desloge did invite members

of the media, as he had the year before.

Desloge told the *Democrat* that he understands the purpose of the Open Meetings Law, but he said, “[I]t’s almost forcing you not to socialize.”

Commissioner Bob Rackleff, who attended the fish fry last year, told the *Democrat*, “There’s a lot more to life than county government. Believe it or not, that’s not all we talk about.”

Source: *Tallahassee Democrat*

### City settles with ex-police chief

SNEADS – The City of Sneads agreed to pay its former chief of police \$10,000 and his attorneys \$25,000 seven years after he filed a civil suit alleging the city violated Florida’s Open Meetings Law.

Former Police Chief William Nelson said he was fired by the town council during a special meeting to which, he alleged, the public was not given proper notice.

“It was wrong the way they did this, and I just hope that this will encourage them to always conduct business in the sunshine. If this action accomplished that, I consider it a great success,” Nelson told the *Jackson County Floridian*.

Nelson said the suit was never about seeking money damages.

“I wasn’t out to hurt anybody, and I didn’t want this to keep costing the city money... I did this to prove a point that you have to have government in the sunshine,” Nelson said, according to the *Floridian*.

Sneads City Manager Ed Kilpatrick said the settlement should not be read as an admission of any wrongdoing by the city.

In the face of additional court costs, he told the *Floridian* that settling with Nelson was “the fiscally sound thing to do.”

Source: *Jackson County Floridian*

### City settles with former police officer

HALLANDALE BEACH – City Commissioners have agreed to pay a former Hallandale Beach Police officer more than \$100,000 to settle a lawsuit alleging, in part, that the city board held an illegal meeting.

In 2005, former Hallandale Beach Police Officer Talous Cirilo was charged with three misdemeanor counts of battery on a prisoner.

Although Cirilo was acquitted, the city refused to reinstate him on the police force.

Cirilo filed two lawsuits against the city, one of which alleges the city civil service board held an illegal meeting outside City Hall one week before a scheduled hearing on his reinstatement.

Others allegations include falsification of evidence and persuasion of a felon to lie under oath about Cirilo.

“This case was an abomination from the very beginning and good officers were hurt. It could ultimately have a chilling effect on officers who want to protect themselves and their colleagues but are afraid because they could get in the same type of situation,” said Alberto Milian, Cirilo’s attorney, according to the *South Florida Sun-Sentinel*.

The settlement includes Cirilo’s attorney fees.

Source: *South Florida Sun-Sentinel*

## Records reveal sexual messages

SEBRING – Highlands County fired three budget department employees for sending sexually explicit instant messages to each other on the county computers during work.

The voluminous messages, which are public record, were discovered during a routine financial audit of expenditures for the 9-1-1 emergency call system.

Jared Lee, the budget department's budget analyst, Christine Edwards, a budget technician, and Treasa Handley, coordinator of non ad-valorem assessments, each said they were "flabbergasted," "shocked" and "couldn't believe" their dismissals, according to *Highlands Today*.

"The three of us are very good friends and we often have conversations," Handley told *Today* about their use of instant messaging at work.

Lee told *Today* that the messages were of a "personal nature and, I guess, to them (county officials), they were excessive"

Edwards said that she, Handley and Lee all knew that their instant messages could, and probably would, be monitored, according to *Today*.

Bob Jamison, the senior director of business services in the clerk of court's office, said the discovery was accidental.

"We did not target them or any other employees," he told *Today*.

Source: *Highlands Today*

## City can charge for salary, benefits

HIGHLANDS COUNTY – The 2<sup>nd</sup> District Court of Appeal ruled that public records providers can include both salary and benefits when calculating their special service charge for responses to extensive public records requests.

The case stemmed from a 2005 public records request by Preston Colby, who asked for public documents related to the county's hurricane preparedness.

The city charged Colby approximately \$65 in advance to cover the estimated costs of locating the records. Preston paid the required amount but protested the legitimacy of the charge.

He filed suit, alleging the county failed to make the records available to him and that he should not have been required to prepay for the records search.

The same day the suit was filed, the city delivered part of the requested documents to Colby and offered him a \$30 refund because the search took less time than estimated. Colby refused the refund.

According to the court's opinion, the city later made the remainder of the requested records available to him, but Colby never "availed himself of this opportunity."

Source: *News Sun*; also see The Brechner Report Dec. 2005 issue.

## Reporter subpoenaed for source

WASHINGTON, D.C. – A federal grand jury subpoenaed a *New York Times* reporter in what his lawyer said was an apparent attempt to have him reveal his sources for a 2006 book about the Central Intelligence Agency.

Attorney David N.

Kelley said the

subpoena seeks the source of information used in a chapter of James Risen's book, "State of War."

Kelley said Risen plans to fight the subpoena.

"He has an agreement of confidentiality with his sources and he intends to stand by that in the highest degree of journalistic traditions," Kelley said, according to the *South Florida Sun-Sentinel*.

According to the *Sentinel*, *Times* spokeswoman

Catherine Mathis said her newspaper "strongly supports

Mr. Risen and deplors what seems to be a growing trend of government leak investigations focusing on journalists, particularly in the national security area."

Source: *South Florida Sun-Sentinel*

### REPORTER'S PRIVILEGE

## Sentinel wins access to confession

BROWARD COUNTY – The *South Florida Sun-Sentinel* successfully argued against a court order banning the public from a hearing in which the confession of one of three men who allegedly beat a homeless man to death two years ago would be played from a prerecorded tape.

Circuit Court Judge Cynthia Imperato initially closed the hearing in response to a request by a defense attorney but later modified her order in response to a challenge by the *Sentinel*.

She allowed the media to attend the hearing if they did not copy or duplicate the accused's statement.

According to the *Sentinel*, the accused, William "Billy" Ammons, 20, could be heard on the tape saying, "I thought it was funny," referring to the beating.

However, the statement was not included in the transcript of the confession.

Imperato also issued a gag order at the onset of the proceedings, prohibiting attorneys, law enforcement officers and witnesses from discussing the case publicly.

"This court believes that some extra-judicial comments may very well have already been prejudicial to the respective parties' rights," Imperato said, according to the *Sentinel*.

However, Imperato later clarified and limited the gag order in response to a challenge by the *Sentinel*.

The clarified order prohibits attorneys, law enforcement officers and witnesses from discussing the case publicly until a jury has been sworn in.

Source: *South Florida Sun-Sentinel*

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### COURTS

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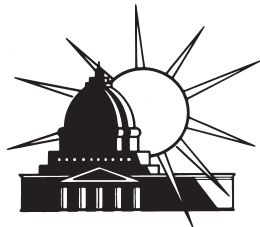
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Source: *South Florida Sun-Sentinel*

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## Taxpayers pay dearly for FEMA's obstinance, arrogance

It shouldn't have been this hard to get information from the government when we're entitled to it. But bureaucrats made everything way too hard. In the end, it cost taxpayers dearly. The Federal Emergency Management Agency (FEMA) recently paid four Florida newspapers more than \$250,000 in legal fees after three years of contentious litigation. The newspapers - Gannett's *The News-Press* (Fort Myers), *FLORIDA TODAY*, and *Pensacola News Journal*, and Tribune Co.'s *South Florida Sun-Sentinel* - filed two lawsuits against FEMA under the federal Freedom of Information Act (FOIA).



Kate  
Marymont



Chuck  
Tobin

The newspapers sought information about the \$5.6 billion in FEMA aid to Floridians following the devastating 2004 hurricane season. More than \$30 million went to the Miami-Dade area, even though none of the hurricanes passed through there. Prosecutors indicted a dozen people for fraudulently taking federal relief money. A congressional investigation concluded that FEMA's system for distributing aid was fraught with inefficiency. No one knew the precise extent of the waste of taxpayer funds. The newspapers had to build this story from the ground up. So they asked FEMA for the names and addresses of all aid recipients in Florida.

FEMA took refuge in FOIA's privacy provision. FOIA permits the government to withhold these types of records only when disclosure "would constitute a clearly unwarranted invasion of personal privacy" that substantially outweighs the public's interest. FEMA argued that having journalists probe individual homeowners invades people's privacy.

One federal judge in Florida sided with the agency. The other sided with the newspapers. And in a groundbreaking June 2007 decision, a three-judge appeals court sided with the notion of transparency in government.

Announcing that it "cannot find any privacy interests here that even begin to outweigh this public interest," the appeals court ordered FEMA to disclose the addresses. The appeals

judges found nothing invasive about reporters knocking on doors to ask questions: "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 ringing appellate endorsement of the press as watchdog on government should have ended FEMA's resistance. Instead, it kicked off eight more months of foot-dragging and FEMA propaganda. Throughout the summer and fall, instead of releasing the information as ordered, FEMA:

- Sent letters to more than a million Floridians telling them the newspapers had asked for their Social Security numbers. The newspapers had not done so.
- Told aid recipients in California and North Carolina that the Gannett newspapers had asked for information about them. The Gannett newspapers had not asked for any information outside of Florida.
- Announced that despite the appeals court ruling that the law requires FEMA to release this type of information, FEMA "will continue to protect the names and addresses of disaster victims in the future..."

Ultimately, a direct order from the federal judge in Fort Myers wrenched the information from the government. And even though FEMA later agreed to reimburse the newspapers more than a quarter-million dollars in legal expenses, the agency did not release any money to Gannett until two months later, after the newspapers threatened to again report the agency to the court.

The FEMA records led not only to closer investigative scrutiny by the newspapers, but also to an outpouring of personal stories submitted to the newspapers' Web sites. You can view these examples of citizen journalism at its finest by visiting: [newspress.com/fema](http://newspress.com/fema). Telling important stories like these shouldn't be this hard. Hopefully, the next time it won't be.

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*Kate Marymont is executive editor of The News-Press (Fort Myers), a Gannett newspaper. Attorney Chuck Tobin chairs the Holland & Knight national media practice team, which represented the Gannett newspapers in the litigation.*