THE
BRECHNER REPORT

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Ormond Beach officials sued in Sunshine case

DAYTONA BEACH – A circuit judge has refused to throw out a lawsuit against three Ormond Beach commissioners accusing them of violating the Sunshine Law.

Attorneys for the commissioners asked Circuit Judge J. David Walsh to throw out the suit brought by the News-Journal Corp. claiming commissioners Jeff Boyle, Joyce High and Jim Privett illegally coordinated the firing and subsequent rehiring of City Manager Isaac Turner.

ACCESS MEETINGS

The commissioners' attorneys argued that the News-Journal Corp. had failed to prove that anything illegal had occurred. Jake Kaney, a News-Journal attorney, told the judge that circumstantial evidence is enough to allow the newspaper to proceed with asking the court to prevent commissioners from future Sunshine Law violations.

The lawsuit was filed in response to comments made by the three commissioners to rehire Turner less than eight hours after voting to fire him in January 2002.

Kaney believes the matter will likely be tried in front of a jury before the end of the year. (5/28/03)

House attorney challenges AGO

TALLAHASSEE – An attorney for House Speaker Johnnie Byrd said that Byrd does not have to follow a legal interpretation from Florida Attorney General Charlie Crist in regards to the two-thirds vote requirement for exemptions to Florida's Open Government Laws.

LEGISLATURE

Rep. John Carassas, R-Miami, asked Crist if the two-thirds vote requirement for closing records applied to renewing exemptions as well. Crist, in an official Attorney General's Opinion (AGO 2003-18), wrote that all exemptions require a two-thirds vote by both chambers, even for renewals.

House General Counsel Tom Tedcastle said the Attorney General's Opinion does not apply to the Speaker of the House.

"He [the attorney general] can state his opinion all he likes," Tedcastle said. "That's his opinion. The only persons who have constitutional authority to determine if a two-thirds requirement is required by the House and Senate are the Speaker and the Senate President."

In addition, Tedcastle said Crist's opinion didn't matter because Carassas, and not Byrd, requested it.

The two-thirds majority requirement was adopted as a Constitutional Amendment in 2002 as a way to protect open government by making it more difficult to pass new exemptions. (5/7/03-5/9/03)

Judge rejects attempt to seal court records on disabled woman

ORLANDO – A judge rejected an attempt by the state to seal court records in the case of a mentally disabled girl who was raped while in a state-licensed group home.

Circuit Court Judge Lawrence Kirkwood ruled that the case did not involve an ongoing investigation and most of the information had already been made public.

ACCESS RECORDS

The case involved the issue of legal guardianship of the woman's fetus. Gov. Jeb Bush and the Department of Children and Families argued that the fetus is deserving of legal guardianship.

Both the *Orlando Sentinel* and *The Miami Herald* filed a motion objecting to the state's request. Tim Franklin, the *Sentinel's* editor, argued that the public has a right to know about the case.

"…[T]his case involves profound legal issues for state government and the courts, and we believe the public has a right to be present to witness the courtroom debate on this matter," Franklin said.

The DCF argues that the case should be closed because of health privacy laws and because the woman was sexually assaulted.

"Since the public has already gained access to this information, sealing the file at this stage would offer no protection," Kirkwood wrote in the court order.

The Christian Coalition of Florida, who filed a brief asking the judge for protection of the fetus, said a dozen adoption agencies and 15 families are interested in adopting the baby after it is born. (5/14/03-5/27/03)

Pinellas County sheriff's office investigates box of public records

PINELLAS COUNTY- A box of public records that was turned over to Pinellas County officials by the ex-husband of a fired county official has initiated a sheriff's investigation.

County budget analyst Clark Scott, who inspected the records, said they appear to be original public records. In the sample he inspected, he found applications dating from 1997 to 1999 from people applying for welfare, job training or other benefits. It is not known if the people who requested help by filling out the records actually got it.

ACCESS RECORDS

John Simms, Clearwater attorney for the former county official, Kelly Mooney, said he knew nothing, and that her ex-husband may have turned over the records because he is angry with Mooney over their divorce.

Investigators are also looking into a report from the ex-husband alleging that other records may have been destroyed.

County Attorney Susan Churuti said whoever took the records could be faced with obstruction of justice if the records relate to any of the three lawsuits involving WorkNet Pinellas, the county's welfare and job training agency.
(5/3/03)

DECISIONS ON FILE

Copies of case opinions, Florida 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, P.O. Box 118400, University of Florida, Gainesville, FL 32611-8400, (352) 392-2273.

County decorum rules suspended

PINELLAS COUNTY – Pinellas County commissioners have suspended their new decorum rules, saying they went too far in limiting free speech.

The rules were in effect for approximately one month as a result of a group of citizens making broad accusations about corruption in the county government. The most vocal citizen, John Schestag, was arrested under the new rules for calling the county attorney a liar and refusing to leave the assembly room foyer.

Commissioner Bob Stewart, who pushed to overturn the rules, said one person's "irrational and irreverent behavior" was difficult for commissioners.

"But I don't think that justifies (limiting) the freedom for an individual to get up and say what they think," he said. "I think we need to just allow the individuals to have their say."

The rules barred "irrelevant, impertinent or slanderous" comments and limited each speaker to addressing a topic once every 30 days.

Commissioners suspended the rules unanimously, and said they plan to review other government's decorum rules and possibly write new rules.
(5/21/03)

Oak Hill official pleads no contest

DELAND – An Oak Hill city commissioner has pleaded no contest to charges that he violated the Open Meetings Law.

Commissioner Bob Jackson was accused in November of illegally meeting with former Commissioner Ron Mercer in person or by telephone between Oct. 1, 2001, and May 7, 2002, to discuss several issues scheduled to come before the commission.

County Judge Mary Jane Henderson ordered Jackson to pay $250 in fines, take a Sunshine Law class, and withheld adjudication of guilt.

Henderson also rejected arguments from the attorney representing Jackson and Mercer claiming they did not break the law because there were not enough people at their meetings to vote on any of the issues discussed.

"That does not make sense," Henderson said, adding it is clear the state Legislature did not contemplate the need for more than two members or a quorum of a governing body be present at a meeting for a Sunshine Law violation to occur.

Mercer maintains he did nothing wrong, and his case will come to trial later this summer.
(5/21/03)

Former Welaka town official guilty of violating Sunshine Law

WELAKA – A Putnam County judge found former Welaka town official Steve Richardson guilty of violating Florida's Open Records Law and ordered him to pay a $150 fine.

Judge Peter Miller withheld adjudication of guilt, so Richardson will not have a criminal record in the case.

ACCESS RECORDS

The suit came when Bob and Pat Ford accused Richardson of refusing to let them inspect a sign-out sheet of recreational equipment, which according to the complaint, was accessible immediately.

Ford said he wanted to inspect the document to show that residents were not using a town park and that the town should seek grant money for purposes other than the park.

"That's a slap on the wrist and an inappropriate slap on the wrist," Ford said. "This was only one prosecution of many violations. The town of Welaka continues to practice a totalitarian form of government."

A 2001 state audit cited the town for 21 improper personnel, accounting and record-keeping practices, and in February of this year, Welaka Mayor Gordon Sands pled no contest to violating the Open Meeting Law and was ordered to pay a $500 fine.
(5/17/03)

BROADCASTING

FCC approves new broadcast ownership rules and regulations

WASHINGTON, D.C. – In a 3-2 vote, the Federal Communications Commission approved new broadcast ownership rules that will alter media concentration limits on both the national and local levels. The vote marks the most comprehensive review of media ownership regulation in the agency's history.

The proposed changes include increasing the national television ownership cap to 45 percent, permitting crossownership of broadcast stations and daily newspapers in the same market, and permitting ownership of three television stations in markets with 18 stations. The proposed change of prohibiting duopolies between any of the market's four top-rated stations was also passed.

The FCC states that the new limits are carefully balanced to protect diversity, localism, and competition in the American media system.

Chairman of the FCC Michael Powell stated that the rule change was necessary.

"Keeping the rules exactly as they are, as some so stridently suggest, was not a viable option. Without today's surgery, the rules would assuredly meet a swift death," Powell said in a press statement.

Commissioners Michael Copps and Jonathan Adelstein dissented.

"I dissent because today the FCC empowers America's new media elite with unacceptable levels of influence over the media on which our society and our democracy so heavily depend…I see centralization, not localism; uniformity, not diversity; monopoly and oligopoly, not competition," Copps said.

The FCC received comments from nearly 750,000 people before the changes were passed. More than 99 percent opposed allowing more media consolidation. The commission passed the proposed changes despite the objections. (6/2/03)

ACCESS RECORDS CONTINUED

Supreme Court weighs question of city e-mails as public records

TALLAHASSEE – The Florida Supreme Court agreed to hear arguments over whether e-mail messages sent or received by government employees are subject to Florida's Open Records Law by virtue of being housed or sent through a government-owned computer.

The *St. Petersburg Times* argued that the e-mail messages are public records and should be open to public inspections. Attorney General Charlie Crist's office supported this argument.

The computer system "is the people's property," argued Solicitor General Chris Kise, the state's top lawyer in cases before the Supreme Court. "The people's interest is making sure the people have access to a record of the use of the equipment."

Attorneys for the city of Clearwater argued that personal e-mails of city employees should not be considered public records. The city clarified that e-mails sent or received by city employees are not public unless they meet certain requirements as official business. The city also said that public records, as defined by the law, are documents and other materials related to laws or otherwise made "in connection with transaction of official business."

The city attorneys further said that the law goes by content and not who is in possession of the material, stating that individual employees should be responsible for deciding whether the content is related to official business.

The suit originated when the *Times* requested all e-mails of two city employees during a 16-month period in 1999 and 2000. The city gave the paper some, but said others were personal in nature and could not be released.

The Supreme Court didn't say when it expected to rule on the case. (6/5/03)

Judge says group cannot fly banners

ORLANDO – A federal judge rejected a conservative Christian group's attempt to remove a no-fly zone over Walt Disney World in order to fly planes trailing anti-homosexual banners during Gay Days.

The Virginia-based Family Policy Network filed a suit challenging the no-fly zone claiming it restricted their First Amendment free speech rights. The group wanted to trail banners that read: "JESUS CHRIST: HOPE FOR HOMOSEXUALS.COM" over the park.

FIRST AMENDMENT

U.S. District Judge Anne C. Conway said the group did not meet the burden of proof necessary to provide a temporary restraining order against the Federal Aviation Administration's restrictions. The no-fly zone was adopted to prevent possible terrorist attacks and states that planes must remain at least 3,000 feet above the park or stay at least three nautical miles away.

Disney said the "safety and enjoyment" of its guests were the reasons the company wanted the no-fly zone over the park, and want it maintained.

The 13th annual Gay Days celebration is a four-day event and draws more than 100,000 gay and lesbian tourists. (6/4/03 – 6/5/03)

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New medical privacy laws block access to records

The Back Page

By Michael J. Glazer

Michael J. Glazer

If you've been to any doctor lately, you were handed a sheet telling you about the new privacy laws. Maybe you read the first couple of lines, scribbled your name on the form and didn't give it another thought.

If you're a reporter, you may also have had the recent experience of trying to either get public records regarding some health care facility or provider or you were seeking what previously was a simple report on an accident victim only to find your request delayed or denied. There have been reports of parents unable to get information on the medical condition of adult children; offices that no longer allow memos announcing baby showers or 'get well' cards because of privacy concerns; doctor's offices afraid to have sign-in sheets or call out patient names in the waiting room and on and on.

The reason for all of these experiences is the same. Comprehensive new federal privacy regulations implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA) went into effect April 14, 2003.

Health care plans and providers have watched these new regs evolve over the last several years with trepidation because of their length, complexity and the extensive cost of implementation. Penalties for violating HIPAA can be severe. Sanctions can range from $100 to, in extreme cases, fines of up to $250,000 and 10 years in prison. A new industry of consultants and lawyers has evolved to deal with the issues surrounding HIPAA.

The regulations are far too extensive to describe, but there are a few things to know that may be helpful.

First, HIPAA covers *protected health information* (PHI). PHI includes (1) information created or received by a health care provider, health plan, employer or school; (2) that relates to past, present or future physical or mental health of an individual or the provision or payment for health care to an individual; and (3) identifies or can lead to the identity of the individual.

We recently called an agency asking about the license of a facility. What was previously a routine question went unanswered based on "the new privacy laws." The question didn't come close to touching any PHI, but this is the kind of confusion that exists. If you run into that problem, find an official that understands that you don't want PHI.

One part of HIPAA that will affect medical information provided to the media is a rule relating to a *facility directory*. Facilities such as hospitals can disclose certain information so long as the individual is informed in advance and has the opportunity to agree or limit the disclosure. If there is no objection, the facility can generally provide name, location within a facility (i.e. intensive care unit) and a general description of condition, but only to people that ask for the individual by name. The American Hospital Association has developed some common medical condition descriptors that are beginning to appear in some media guides. If a patient is unable to be given the opportunity to agree or restrict directory information, and depending on the circumstances, some facilities may now be unwilling to release even this limited information.

What all this really means is that under HIPAA, the best way to obtain medical information will be through the patient and her family, either directly or through a detailed authorization to the provider. However, even authorizations must now be far more specific than in the past. For stories that are worth the effort, obtaining this authorization may well be the only way to get accurate information.

HIPAA is so much more than what is discussed here. The federal government has an excellent website at: http://www.hhs.gov/ocr/hipaa/privacy.html.

HIPAA has already caused and will continue to be a source of both intended and frustrating unintended consequences. The goal of HIPAA- protecting the privacy of our medical information- is laudable. It's breadth will not make the job of the media any easier.

Michael J. Glazer is a shareholder with Ausley & McMullen. He is a long-standing member of the Media & Communications Law Committee and also past Chair of the Health Law Section of The Florida Bar. He currently serves on the Bar's Board of Governors.