

THE BRECHNER REPORT

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Americans find government secretive, survey says

WASHINGTON, D.C. – Almost 90 percent of Americans want to know their presidential and congressional candidates' position on open government, according to the Sunshine Week Survey 2008, which polled more than 1,000 adults. The survey was conducted by Scripps Howard News Service and Ohio University and released in March as part of Sunshine Week.

Almost 75 percent of those surveyed also think the federal government is

“very or somewhat secretive.” This is an increase of 13 percent from two years ago, according to *The Associated Press*.

Seventy-five percent of those surveyed also believe that the federal government has opened the mail or monitored the telephone conversations of Americans, although only 25 percent said they thought it happened to them personally, according to the survey. Two-thirds of the respondents think members of the media have been monitored in this manner, according to *The Press*.

The Press reported that 50 percent of respondents said their state government is secretive, while 44 percent found it open. Forty percent of those surveyed said their local government is secretive – up six percent from last year.

The Press said that survey respondents expressed an interest in increased access to information on concealed handguns, police reports on local crimes, and information about local lawmakers' meetings.

The complete survey is available at <http://www.sunshineweek.org/sunshineweek/secretypoll08>.

Source: *The Associated Press*

FREEDOM OF INFORMATION

Councilman guilty of violation

MARCO ISLAND – A Collier County judge found a Marco Island city council member guilty of a non-criminal public records violation for deleting e-mails that contained information about city business from his personal computer.

Collier County Judge Mike Carr ordered council member Chuck Kiester to pay the maximum \$500 fine.

Carr said Kiester had “made a mockery of the law” by failing to maintain proper records of e-mails to and from constituents, according to the *Naples Daily News*.

The complaint against Kiester was filed in March 2007, before which, Kiester said, he regularly deleted e-mails from his personal inbox.

“I was told I could safeguard the

e-mails by putting them in a recycling bin. It would archive them and they could come back at any time,” Kiester said, according to the *Naples Daily News*.

However, Kiester's computer contained software that periodically emptied the recycling bin, making it impossible for a regular user to recover the files.

Kiester argued that he didn't technically destroy the e-mails because forensic computer technicians were eventually able to recover the roughly 1,000 deleted e-mails.

The court rejected his argument and said there was no difference between destroying the e-mails and emptying the recycling bin in which they were contained, according to the *News*.

Source: *Naples Daily News*

ACCESS RECORDS

Records policy contradicts state law

WILDWOOD – Sumter County law enforcement agencies were providing victims of certain violent crimes the opportunity to remove their names from the public record, contrary to Florida law.

Ric Ridgway, chief assistant state attorney for the Fifth Judicial Circuit, told the *Orlando Sentinel* that his office's Victim Witness Unit provided the Sumter agencies with forms that permitted victims of domestic violence, aggravated stalking,

harassment and aggravated battery to petition for their names and contact information to be removed from the public record for five years.

This was the state of the law before 2004 when it was replaced with language that allows victims to request the removal of their contact information but not their names. Ridgway said his office plans to change the language on the forms.

Source: *Orlando Sentinel*

Judge closes, reopens Web site

SAN FRANCISCO – A federal district court judge in San Francisco shut down a “whistleblower” Web site, then, citing First Amendment and jurisdiction concerns, reopened it one month later, according to *The Associated Press*.

U.S. District Court Judge Jeffrey White ordered a San Mateo, Calif.-based domain name registrar, Dynadot, to take down the Wikileaks.org domain name, effectively shutting down Wikileaks.org, which allows people to post leaked documents that expose “unethical” corporate and governmental behavior, according to *The New York Times*.

The initial order to shut down the Web site was a response to a complaint by a Cayman Islands bank that claimed an ex-employee had stolen documents and given them to Wikileaks.org.

Wikileaks.org posted the documents online and alleged that they exposed “asset hiding, money laundering and tax evasion,” according to *The Times*.

The Web site is available at <http://www.wikileaks.org/wiki/Wikileaks>.

Sources: *The New York Times* & *The Associated Press*

University posts GPAs online

COLLIER COUNTY – Ave Maria University disclosed student grade point averages, test scores, exit interviews and research paper evaluations online in an apparent contradiction to federal education privacy laws, according to the *Naples Daily News*.

The files were among hundreds of internal assessment documents made publicly available on the school's Web site for its Institutional Effectiveness Committee, which assesses its readiness for review by national and regional accreditation agencies.

Most documents were published without attribution, but in the literature department's end-of-year report, student's names were linked to grade point averages along with extensive assessments of their

oral and written reports.

The federal Family Education Rights and Privacy Act classifies such information as private and prohibits the public disclosure without a prior written waiver by a student or her legal guardian if the student is a minor, according to the U.S. Department of Education.

The university removed the information from its Web site within hours of being notified that it was publicly available.

Jim Bradshaw, a Department of Education spokesperson, told the *News* that when a violation occurs, the department typically works with the school to resolve the matter, although the law does include enforcement options.

Source: *Naples Daily News*

City meetings streamed online

PANAMA CITY – The Panama City Commission became the first local government in Bay County to offer live online coverage of its meetings.

In February, the city launched online Web casts with an equipment and software purchase of approximately \$12,000.

City Clerk Mike Bush said the city's management wanted to stay technologically modern.

"Many cities provide that service already. Audio feed has been available,

but we want to go to the next step," said Bush, according to the *News Herald*.

The City's information technology director, Jimmy Yates, said he has received positive feedback from the public since launching the Web casts.

"(The media) especially were excited about (the Web casts) because they can get back to it whenever they need to," Yates said.

The Web casts are available at <http://www.panamacity-fl.gov/index.htm>.

Source: *News Herald*

ISP releases e-mails to FBI

WASHINGTON, D.C. – The FBI gained access to e-mail messages from an entire computer network instead of the one e-mail address sanctioned for release by a secret intelligence court during a national security investigation, according to an internal report of the 2006 incident.

An unnamed Internet provider turned over all of the e-mail from hundreds of accounts on a small e-mail domain for which it served as host.

FBI officials blamed an "apparent miscommunication" with the Internet provider for the mistake.

The individuals whose e-mail was released were never informed because the national security investigation is ongoing, but FBI officials said the records were eventually destroyed.

"This was a technical glitch in an area of evolving tools and technology and fast-paced investigations. We moved quickly to resolve it and stop it. The system worked exactly the way it's designed," said FBI spokesperson Michael Kortan, according to *The New York Times*.

Source: *The New York Times*

Police ask media to wear ID tags

BRADENTON BEACH – Police Chief Sam Speciale ordered members of the media to wear credentials at public meetings in order to identify themselves.

He eventually rescinded the order he had sent out by press release to five local newspapers.

Speciale said it is not "an actual requirement. It's more like a request," according to the *Sarasota Herald Tribune*.

The "request" stemmed from increasing chatter at City Commission meetings, where members of the public were speaking loudly and out of turn, Speciale told the *Tribune*.

Speciale said it was acceptable for media to speak to one another during the meetings.

However, discussion among non-media members of the audience had become disruptive.

City commissioners wanted to be able to distinguish the media from the public, Speciale said.

Source: *Sarasota Herald Tribune*

Court rules blogger is journalist under Lanham Act exemption

SOUTH CAROLINA – A federal court held that a blogger qualifies as a journalist under the Lanham Act's exemption for "forms of news reporting and news commentary."

Online auction listing company, BidZirk.com, sued blogger Philip J.

Smith for violation of the Lanham Act, defamation and invasion of privacy because of postings

Smith made on his blog that criticized BidZirk.com and its president.

The Lanham Act is a federal law that governs false statements made in competition for sales. Although the act exempts from liability anyone who

publishes "news reporting or news commentary," it does not define those terms or specify who is protected.

The court ruled there was "no evidence that the sole purpose of the article was to denigrate BidZirk... [t]he article posted by Smith concerning [BidZirk was] for the purpose of conveying information to the public...."

According to *Media and Communications*, this appears to be the first published court opinion defining a blogger as a journalist under the protection provided in the statute.

Source: *Media and Communications published by Holland & Knight*

**FIRST
AMENDMENT**

Judge denies record-release delay

SARASOTA COUNTY – A circuit judge reaffirmed his denial of a defense motion to delay for 60 days the public release of documents about the murder of Denise Lee, according to the *Charlotte Sun*.

Circuit Judge Deno Economou rejected for a second time the argument made by attorneys for Michael King, who was charged with abducting and murdering Lee in January.

King's attorney, assistant public defender John Scotese, argued that the documents should be kept sealed for a "reasonable time" to avoid prejudicial publicity.

Scotese argued that similar measures were taken in previous trials that garnered national media attention, including the Carlie Brucia murder trial in Sarasota and the Danny Rolling trial in Gainesville.

Scotese said a delay in the public release of records related to Lee's murder would allow King's attorneys to petition the judge to keep certain records secret.

However, *Herald-Tribune* attorney Rachel Fugate argued that the publicity King's trial has received has not risen to a level that requires a delay in the public release of the records.

Source: *Charlotte Herald-Tribune*

Judge closes hearing about closing hearing in attorney's case

BUNNELL – A circuit judge closed a hearing on whether a subsequent hearing should be open to the public, according to the *St. Augustine Record*.

Circuit Judge Kim C. Hammond cleared the courtroom after the hearing began to hear arguments from State Attorney Harry Shorstein of Jacksonville and attorneys representing State Attorney John Tanner of Daytona Beach.

The subsequent hearing was set to consider whether a Duval County grand jury's findings about an investigation by Shorstein should remain sealed.

Shorstein investigated Tanner's handling of a case involving abuse allegations at the Flagler County Jail. Tanner began investigating the jail after

one of his daughters, Lisa, was arrested and allegedly mistreated there in 2005.

Shorstein has argued for all proceedings to remain open to the public while Tanner's lawyer, assistant state attorney Jonathan D. Kaney Jr., has argued for the proceedings to be closed.

Tanner has spent over \$400,000 in 14 months to keep the grand jury's findings sealed, arguing they were influenced by Shorstein's bias against him.

Tanner is currently running for reelection in the 7th Circuit. The grand jury's report concerning him remains sealed.

No subsequent hearings about the grand jury's findings have been held.

Source: *St. Augustine Record*

Judge silences acquitted man

MIAMI – A federal judge who declared a mistrial for six South Florida men charged with conspiring to support al-Qaida imposed a broad-sweeping gag order to protect efforts to seat an impartial jury for their retrial.

U.S. District Judge Joan Lenard prohibited the defendants, their lawyers, prosecutors, and others, including agents, investigators and witnesses, from speaking to the media, according to the *South Florida Sun-Sentinel*.

The order extended the same restrictions to Haitian national and U.S. resident Lyglenson Lemorin, who was the only defendant acquitted in the first trial.

The order also applies to Lemorin's criminal defense lawyer and the attorney representing him in immigration proceedings. Federal prosecutors contend the order even applies to Lemorin's wife, who was once listed as a potential defense witness.

"This is supposed to be America. Once you're acquitted, it seems to me you should be able to stand on top of the tallest building and scream it," said David O. Markus, a Miami criminal defense attorney, according to the *Sentinel*.

Source: *South Florida Sun-Sentinel*

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Judicial conduct complaints open

WASHINGTON, D.C. – The Judicial Conference of the United States unanimously approved a binding set of procedures to make final orders of judicial complaints public.

In some cases, final orders of cases involving judicial conduct and disability proceedings may be placed on a court's public Web site, and, in most cases, final sanctions will name the judge involved.

This is the first time that a uniform set of rules dealing with judicial complaints has been instituted nationwide, according to Dick Carelli, a spokesperson for the federal courts. Previously, differing rules among the states allowed inconsistencies.

"We hope this will bring more uniformity, more efficiency and ultimately more transparency to the process," Carelli said, according to The Reporters Committee for Freedom of the Press.

The rule changes will allow some portions of the judicial conduct and disability proceeding process to remain confidential and sealed.

An order dismissing a complaint will reveal neither the complainant nor the subject of the complaint. Also, a chief judge of an appeals court will maintain the authority to investigate judicial conduct whether or not a formal complaint has been filed.

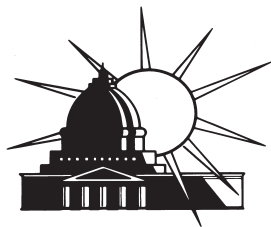
Source: *The Reporters Committee for Freedom of the Press*

ACCESS
RECORDS

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Executive order meant to improve FOIA fails to deliver

In December 2005, President Bush issued Executive Order 13,392 on “Improving Agency Disclosure of Information.” The order purported to address several problems that have plagued the Freedom of Information Act (FOIA) system, including excessive backlogs and delays. It instructed agencies to take a “citizen-centered” and “results-oriented” approach to FOIA. Agencies were directed to review their FOIA programs, identify areas for improvement, and draft improvement plans setting goals for reform in several areas, including customer service, backlog reduction, and use of technology and the Internet to make information available to the public.



Catherine Nielsen



Kristin Adair

In its latest Knight Open Government Survey, *Mixed Signals, Mixed Results: How President Bush's Executive Order on FOIA Failed to Deliver*, the National Security Archive examined how agencies have fared in implementing the order. The Archive focused on new customer service mechanisms established by the order, as well as backlog reduction and agency Web sites.

The Archive's audit found that the executive order raised the profile of FOIA at many agencies, helping them to acknowledge problems and develop strategies for improvement. The order, however, did not provide agencies with any additional resources for achieving their goals and included no enforcement mechanisms to ensure agencies set adequate goals and succeeded in meeting them.

Significant gains can be seen across the board in customer service. The order mandates a new three-tiered customer service system, featuring FOIA Service Centers, Public Liaisons, and Chief FOIA Officers at each agency. This system has helped standardize FOIA customer service, giving requesters a clear point of contact at each agency. The Archive's experience with this system was generally positive: most agency representatives were courteous and helpful, and almost all proved responsive to the Archive's inquiries about its requests.

But the order falls short in several respects. Some agencies were able to achieve significant backlog reductions by setting and meeting ambitious goals. But other agencies fell far short.

Of the agencies and components with backlogs in 2005, 30 percent reported an increase in pending requests over the last two years. Notably, 15 percent of the agencies with backlogs — nine in total — actually claimed to have met all of their backlog reduction goals but still reported an increase in pending requests during the implementation period. The number of pending requests government-wide was only 2 percent lower at the end of FY2007 than it was before the order was issued.

In its 2007 audit, *File Not Found: 10 Years After E-FOIA, Most Federal Agencies Are Delinquent*, the National Security Archive found that many agencies failed to post essential guidance information and required documents and had poorly-designed Web sites that were difficult to navigate. A follow-up review of the 12 worst agencies identified in *File Not Found* revealed that only 42 percent (five agencies) significantly improved their Web sites, while the same portion, 42 percent, made no apparent improvement to their Web sites, despite serious deficiencies.

The audit results overall suggest that lack of resources and insufficient enforcement largely crippled the order's effectiveness, allowing some agencies to remain deficient without consequences. Agencies that have historically taken FOIA seriously tended to show greater diligence in approaching the order, setting goals calculated to achieve measurable improvement.

Through recent legislation enacted in December 2007 that amended the FOIA, Congress has provided a mandate with more teeth and the prospect of genuine oversight. By codifying some elements of the order and requiring better reporting and tracking as well as penalties for noncompliance, the amendments establish the enforcement mechanism that is notably absent from the president's order. The recent FOIA amendments, however, are just one of the necessary steps to fixing the many challenges the FOIA faces. Without more resources and better congressional and public oversight, some agencies may continue to be unable or unwilling to bring their FOIA programs into full compliance with the law.

Catherine Nielsen is the FOIA Coordinator at the National Security Archive. Kristin Adair serves as Staff Counsel at the National Security Archive.