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# THE BRECHNER REPORT

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## Supreme Court weighs cell phone tracking

WASHINGTON, D.C. – The U.S. Supreme Court heard arguments in November involving a case in which the U.S. government used a global positioning system, or GPS, to electronically track the movements of a D.C. nightclub owner for more than a month.

Antoine Jones was originally found guilty on drug charges, but the 11th Circuit Court of Appeals overturned the

conviction, finding that such intrusive monitoring should require a warrant.

The decision is likely to affect the far more common police practice of tracking users of the nation's 327 million cell phones, *The Wall Street Journal* reported.

For instance, Miami-Dade police

tracked locations of 130 phones in 2010, up from 102 in 2009, according to documents obtained by the *Journal* through open records requests. Federal prosecutors in the Southern District of Florida sought cell phone location data 189 times in 2010, up 8 percent from the previous year.

Source: *The Wall Street Journal*

### PRIVACY

## Media disturbed over Occupy protest treatment

NEW YORK – New York City police are facing tough criticism for their treatment of reporters covering the Zuccotti Park base of the Occupy Wall Street movement, in what some are calling a “media blackout.”

Journalists at the overnight raid of Occupy Wall Street's New York encampment in and around Zuccotti Park and at other

protest sites in downtown Manhattan were kept at a distance from covering the events of an NYPD raid in November.

At least half a dozen journalists were among those arrested, handcuffed and hauled onto police buses along with hundreds of protesters, according to *Associated Press* reports.

Media organizations sent letters to city

officials complaining about the police handling of journalists covering the Occupy protests, calling for meetings to address their concerns.

“It's extremely disturbing that credentialed reporters would be singled out in a roundup aimed at preventing them from witnessing police activity at the disbanding of the Occupy Wall Street camp,” said Lucy Dalglish,

Executive Director for the Reporters Committee for Freedom of the Press, a Washington, D.C.-based nonprofit organization.

Dalglish said she was also concerned about the possible treatment of journalists at other “Occupy” demonstrations that have sprung up around the nation. Similar protests have

occurred at locations such as Milwaukee, Wis., Nashville, Tenn., Oakland, Calif., and Chapel Hill, N.C.

New York police officials said it is often difficult to separate journalists covering the events from those participating in the protests, especially when making mass apprehensions. City officials, including Mayor Michael Bloomberg, have insisted that police action was intended only to keep journalists out of harm's way.

Democratic Rep. Jerry Nadler, who represents the district that includes Zuccotti Park, has called for the Department of Justice to investigate allegations of excessive force by NYPD officers against Occupy Wall Street protesters, including the media members.

Source: *The Associated Press*, *The Washington Post*, *RFCP.org*

### NEWSGATHERING

## Scott job czar defends incentives programs

TALLAHASSEE – Gov. Rick Scott's job czar defended the state's economic incentive programs recently, saying Florida would go after companies that failed to perform, but also said he supports quicker release of information about the secret tax incentive deals the state gives some of the largest companies in the world.

“Once a deal is made, I have no problem and do believe we have a fiduciary duty to provide the details to the public,” Enterprise Florida CEO Gray

Swoope told the *St. Petersburg Times*.

Florida has paid \$739 million in incentives since 1995 to companies like Wal-Mart, Burger King and Coca-Cola to create 86,284 jobs. But details about projects with 62 companies are protected from public scrutiny

because of a public records exemption that can last for two years.

The exemption is scheduled to sunset Oct. 1, 2012. A bill, S.B. 7014, that would

re-enact the law was scheduled for a vote in November in the Senate Commerce and Tourism Committee. That hearing has now been postponed after reports that the state has received about one in three jobs it anticipated with its incentive deals, according to the *St. Petersburg Times*.

The state is in the process of trying to renegotiate contracts with six companies that did not meet their job goals.

Source: *St. Petersburg Times*

### ACCESS RECORDS

## Panel OK with pension fund investment

TALLAHASSEE – A state panel concluded that Florida’s massive pension fund did nothing wrong when it hired a company with ties to the fund’s executive director.

Florida Chief Financial Officer Jeff Atwater asked an advisory panel last month to look into a decision by the state to invest \$125 million with a firm that specializes in shaking up or breaking up companies in order to make money for investors.

Atwater made the request after Sen. Mike Fasano (R -New Port Richey)

asked for records related to the transaction approved by the state agency that manages Florida’s \$100 billion plus pension fund for public employees.

The State Board of Administration initially told Fasano it would cost nearly \$11,000 to turn over the records.

Ash Williams, the executive director of the board, defended his response to the request, despite it being called “indefensible” by Attorney General Pam Bondi. That response prompted an internal review.

A panel of financial experts picked by

Gov. Rick Scott, Bondi and Atwater said that they did not see anything that showed the state or Williams had done anything wrong.

Williams once worked at a hedge fund whose clients included the head of the company that set up the firm, which is known as Starboard Value and Opportunity. That alone did not constitute a conflict of interest, panel members said. Williams insisted that he had no role in the state’s decision to hire the investment firm.

Source: *The Associated Press, St. Petersburg Times, The Miami Herald*

## Judge wants anthrax records unsealed

WEST PALM BEACH — A federal judge is asking why records should remain sealed in the case involving the death of a Florida man in the 2001 anthrax attacks.

U.S. District Judge Daniel T.K. Hurley, for the Southern District of Florida, says in court papers the public generally has access rights to such documents.

Those sealed include personnel records of Army scientist Bruce Ivins, who is blamed by the FBI for the attacks that killed five people, including Robert Stevens, and sickened 17 others. Other

sealed documents involve security procedures at the Maryland Army lab where Ivins worked.

Stevens, 62, a Florida tabloid photo editor, died days after inhaling anthrax powder at work. The federal government recently agreed to settle with Stevens’ widow and children for \$2.5 million in a lawsuit claiming that the Army did not adequately secure its supply of the deadly pathogen. The settlement, the second multimillion-dollar payment by the government in the anthrax case, follows

an eight-year legal battle that exposed slack rules and sloppy recordkeeping at the Army’s biodefense laboratory at Fort Detrick, in Frederick, Md.

As part of the agreement, Justice Department lawyers are seeking to have many documents that were uncovered in the litigation kept under court seal or destroyed. The attorney for Stevens’ widow says there’s no reason to keep those documents sealed.

Source: *The New York Times, The Associated Press*

## 11th Circuit ruling loosens advertising regulations

JACKSONVILLE – A U.S. District Court judge for the Middle District in Jacksonville, has ruled in favor of a challenge to the Florida Bar’s regulations on advertising, making it easier for Florida lawyers to advertise freely.

A suit, filed by the law firm Harrell and Harrell in January 2008, claimed that some of the Florida’s Bar regulations were “vague” and “arbitrary” and in violation of the First Amendment.

In his suit, Harrell challenged nine of the Florida Bar’s regulations on advertising as unconstitutional encroachments on his free speech. The Florida Bar, which

requires all Florida attorneys to submit their advertisements to the Bar for prior approval, rejected the slogan “Don’t settle for less than you deserve,” a slogan he had used for years.

The Florida Bar is now in the process of updating their regulations, which have long been viewed as some of the most restrictive in the nation, to be more in line with those recommended by the American Bar Association.

Source: *Jacksonville Business Journal, Harrell v. The Florida Bar*

### ADVERTISING

## Flagpole prayer challenged in Clay County

CLAY COUNTY – The flagpole prayers occurring at Clay County schools violate the U.S. Constitution and are a clear case of endorsement of religion and Christianity, according to the Clay County School Board’s attorney.

In his legal opinion, school board attorney J. Bruce Bickner also found that it was a violation for “a teacher, school administrator or other school district

employee to join in a prayer session during their work time,” *The Florida Times-Union* reported.

District employees had participated in the prayers, which occurred on campus just before school began at 8:15 a.m., before a secular rights group sent the district a letter asking for the prayers to stop.

Bickner said the prayers could continue on school grounds if the

sessions were moved up before 7:10 a.m., when teachers report to schools.

Although the pastor who leads the prayer sessions originally stated he planned to continue the prayers as usual, the parties have since come to an agreement that the sessions could be conducted “off of School Board property but in proximity to each of the schools” now used as sites for the prayers.

Source: *The Florida Times-Union, Clay Today*

### FIRST AMENDMENT

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# THE BRECHNER CENTER

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## 2011 FREEDOM OF INFORMATION REPORT

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Published by The Brechner Center for Freedom of Information ■ College of Journalism and Communications ■ University of Florida

### Legislation: A tale of two bills on access

TALLAHASSEE – The 2011 Legislative Session ended in divergent outcomes for two open government bills—one exempting public access to death scene records, the other seeking to protect the right of citizens to speak at public meetings.

S.B. 310, which would grant members of the public a “reasonable opportunity to be heard” at public meetings before official action is taken, was originally filed by Sen. Joe Negron (R-Stuart) in 2010.

The legislation was reintroduced in 2011 in the wake of a 2010 Florida

Supreme Court ruling that individuals have a right to be seen but not necessarily to be heard at public meetings. That legislation died in committee.

Alternatively, H.B. 411, banning public access to death scene materials, was passed almost unanimously by the Florida Legislature and signed into law by Gov. Rick Scott on June 2. The law, which took effect July 1, prohibits the release of photographs or audio and video recordings relating to the death of a person, except to immediate family members; and targets records custodians by making it a third-degree felony to

“willfully and knowingly” violate the law.

The law has since prevented the release of a video depicting the death of 18-year-old Eric Perez, who died while in the custody of the Palm Beach Juvenile Detention Center in West Palm Beach on July 10. Perez reportedly died after hours of screaming and vomiting.

Perez’s mother initially requested a copy of the video, intending to make it public, but later changed her mind, according to *The Miami Herald*.

Source: *Tallahassee Democrat*, *Orlando Sentinel*, *The Miami Herald*

### Media vie for access to Anthony court records

ORLANDO – The battle over access to court records in the high-profile murder trial of 25-year-old Casey Anthony resulted in several victories in 2011 for the media organizations requesting that records related to the case remain open.

Access to Anthony’s jail records, a witness list, a jailhouse video and juror information were among those sparking the greatest debate.

Superior Court Judge Belvin Perry, who presided over most of the hearings in the Anthony case, ordered the release of Anthony’s jail records—including a jail visitation log, commissary records

and telephone records—in October 2010, despite the defense’s attempts to keep those records private.

In January 2011, the *Orlando Sentinel* prevailed in its efforts to obtain the names of witnesses who would testify in the penalty phase of Anthony’s murder trial. In his four-page order, Perry wrote that, “Release of any known individual’s name could not possibly deprive the defendant of her fair trial rights.”

The September unveiling of the grainy jailhouse video depicting Anthony reacting to news her daughter’s remains had been found came on the heels of Anthony’s July

acquittal of first-degree murder charges for the death of her 2-year-old daughter Caylee Anthony. Following an Orlando television station’s motion that the video be released, Perry ruled that the order keeping the video private, which had been in effect since June 2010, be reversed on grounds that protecting Anthony’s right to a fair trial was no longer an issue.

In October, Perry released the names of the 12 jurors and three alternates who had served during the trial, signifying the end of a three-month “cooling off” period, during which the names remained sealed.

Source: *Orlando Sentinel*, *The Associated Press*, *The Palm Beach Post*

### Fla. high court limits info in court files

TALLAHASSEE – The Florida Supreme Court has adopted new rules regarding information that can be kept in online court documents. The rules, which take effect Oct. 1, represent an effort by the court to balance privacy of an individual’s information in court records with the public’s right to know.

Among the requirements, the rules specify that minors can only be identified by their initials; only the year of the person’s birth can be included; no portion

of any Social Security number, bank account, debit card or credit card can be entered unless allowed by another statute or exception; and only the last four digits of a phone number, driver’s license number or passport may be included.

“The inclusion of unnecessary personal information in court filings is of special concern because providing electronic access, which would include internet

access, to court records will make nonconfidential personal information contained in those records more readily accessible to the public,” the court’s June 30 opinion states.

In 2009, the Florida Legislature mandated that the judiciary and clerk of the circuit courts provide the public with electronic access to court records by Jan. 1, 2012.

Source: *Scripps Treasure Coast*

ACCESS  
RECORDS

COURTS

## Gov. Scott vetoes public records exemption

TALLAHASSEE – The following is a summary of the nine Public Records and Open Meetings Law exemptions passed in 2011. However one exemption for public airport business information was vetoed by Gov. Rick Scott. Chief sponsors of the bills are indicated at the end of the summaries. Copies of the legislation in full are available at the Florida Legislature's website ([www.leg.state.fl.us](http://www.leg.state.fl.us)). *SB* = Senate Bill; *HB* = House Bill; *CS* = Committee Substitute.

### **CS/HB 409 Video Voyeurism:**

Expands the current public record exemption for criminal intelligence and investigative information, creating an exemption for photos, videos or images of victims of certain sexual offenses, including video voyeurism. (Perry, R-Ocala).

### **CS/HB 411 Photographs Depicting Killing of a Person:**

Creates a new exemption to the Public Records Law for photos, videos, or audio recordings that depict the "killing of a person." This is defined as "all acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death." Immediate family members of the deceased, as well as official agencies, are permitted access. Others can access the records only by a court order and a showing of good cause. (Burgin, R-Tampa).

### **CS/HB 579 Regional Autism Centers:**

Creates a public record exemption for clients of regional autism centers who receive services at the center or participate. Also exempt are all records related to the clients family. The bill also exempts from the Public Records Law personal identifying information of current or prospective donors to a regional autism center who request anonymity. (Coley, R-Marianna).

### **HB 597 Emergency Notification System:**

Creates a new public record exemption for information provided to an agency for emergency notification purposes. Exempt information includes names, addresses, telephone numbers, e-mail addresses, and other electronic communication addresses. (Taylor, D-Daytona Beach).

### **CS/HB 667 Inspector General**

**Reports:** Changes the current exemption for non-final reports of internal auditors for local governments. Creates a new public records exemption for investigative and audit reports of local government inspectors general, providing for disclosure only after the audit or investigation is final. Information received, produced, or gained as the result of a local government inspector general's investigation is also exempt. (Clemens, R-Lake Worth).

### **CS/HB 677 Office of Financial**

**Regulation:** Creates public records exemptions for information received by the Office of Financial Regulation from other agencies that is exempt under state or federal law, as well as information received as part of a multi-agency investigation. (Pilon, R-Sarasota).

### **CS/HB 913 Public Airports –**

**Proprietary Business Information:** Creates an exemption to the Public Records Law for "proprietary confidential business information" that is held by or submitted to a public airport. This information includes: business plans; internal auditing controls and reports; reports of external auditors for privately held companies; trade secrets; client and customer lists; material that could be patented; business transactions; financial information of the proprietor; and financial projections of the proprietor or airport facilities projects. (Horner, R-Kissimmee). Vetoed by Gov. Scott June 24.

### **CS/HB 1473 Florida Health**

**Choices Program:** Creates public record exemptions for information related to the Florida Health Choices Program, including personal identifying information of enrollees or participants; client and customer lists; and proprietary confidential business information held by Florida Health Choices, Inc. (Corcoran, R-New Port Richey).

**CS/SB 1970 OPPAGA:** Creates a public record exemption for papers held by the Office of Program Policy Analysis and Government Accountability that relate to a project or research product. (Thrasher, R-Jacksonville).

*The following 10 exemptions were reenacted in 2011 under the Open Government Sunset Review Act (OGSR),*

### **HB 7075 Home Addresses – DJJ**

**Employees:** Reenacts with minor changes the public record exemption for the home address and other contact information of certain employees of the Department of Juvenile Justice and their family members.

### **HB 7077 Biometric Identification**

**Information:** Reenacts without change the exemption for biometric information held by an agency. Biometric identification information includes friction ridge detail, fingerprints, palm prints and footprints.

### **HB 7079 Florida Center for Brain**

**Tumor Research:** Expands the current exemption for medical records held by the Florida Center for Brain Tumor Research to include an exemption for personal identifying information of donors to the central repository for brain tumor biopsies or the brain tumor registry.

### **HB 7081 Statewide Public**

**Guardianship Office:** Reenacts with minor changes the public records exemption for information identifying donors or potential donors to the direct support organization of the Statewide Public Guardianship Office.

### **HB 7083 Interference with Custody:**

Reenacts the public record exemption for the current address and telephone number of a person who takes a minor child and reports such to the sheriff or state attorney under the exception to the offense of interference with custody.

### **HB 7085 Court Monitors:**

Reenacts with minor changes the public records exemption for court orders appointing court monitors. Also exempts reports of monitors related to medical conditions, finances or mental health of wards.

### **HB 7159 Ethics Commission:**

Reenacts the public records and open meetings exemptions for records and meetings related to Ethics Commission investigations of alleged violations of certain lobbyist registration and reporting requirements.

### **HB 7161 Concealed Weapon Permits:**

Reenacts with minor changes the public record exemption for personal identifying information of individuals applying for concealed weapon permits.

### **HB 7223 Competitive Solicitations:**

Amends the public record exemption for sealed bids or proposals received by an agency in response to requests for proposal or invitations to bid earlier.

– Continued on p. 3

## LEGISLATIVE SESSION REPORT

## Attorney General weighs in on Sunshine Law

TALLAHASSEE – Attorney General Pam Bondi’s office weighed in on several open government issues in 2011, from employee personal notes to improperly filed school board personnel assessments. Below are summaries of these Florida Attorney General Advisory Legal Opinions. The full-text opinions are available at <http://myfloridalegal.com>.

**Employee’s personal notes:** Are personal notes, taken by a city employee in the course of conducting official duties and made for the purpose of assisting in the remembrance of matters discussed, subject to the Public Records Law?

**AG 2010-55:** No. Personal notes, taken in the course of conducting official business

by a public employee, are not public records subject

to the provisions of Public Records Law, if the notes have not been transcribed or shown to others and were not intended to perpetuate, communicate or formalize knowledge.

**Sunshine Law and nonprofit corporations:** Are the meetings of the Biscayne Park Foundation, Inc., a not-for-profit foundation created by the Village of Biscayne Park, subject to the Open Meetings and Public Records Law?

**AG 2011-01:** Yes. The Biscayne Park Foundation, Inc., is an “agency” for purposes of the Open Meetings Law

because it was created by the village to act on behalf of the village in financing and administering certain charitable, educational and scientific programs; the village is the sole member of the foundation and retains considerable control over the foundation; and the goals of the foundation are directed toward enhancing the quality of life in the community, which appears to constitute a municipal government purpose.

**Sunshine Law and county criminal justice commission:** Does Sunshine Law apply to communications between the state attorney and the sheriff, when, as authorized by ordinance, each elects to appoint an individual to serve in each

officer’s place as a member of the Palm Beach Criminal Justice Commission?

**AG 2011-04:** No. When the attorney general and the sheriff elect to appoint individuals to serve on the Palm Beach County Criminal Justice Commission in the place of each officer, as authorized by county ordinance, neither would appear to be a member of the commission such that communications between the two officials would be subject to Sunshine Law.

**Public Records Law and the Florida Offender Alert System:** Are the email addresses and physical addresses of individuals provided for participation in the FDLE Offender Alert Program, which

allows individuals who have submitted their information to receive emergency notification when a sexual offender moves near an “address of concern,” exempt from Public Records Law? Does the exemption apply to requests for such information made before the statute’s effective date of July 1, 2011?

**AG 2011-16:** Yes and yes. The email addresses and physical addresses provided for participation in the FDLE Offender Alert System come within the scope of an exemption provided by Public Records Law, which “applies to information held by an agency, before, on, or after the effective date of the exemption.” Thus, it would apply to pending public records requests received prior to the statute’s effective date.

**School board personnel assessment and Public Records Law:** May the School Board of Lake County remove from a personnel file or destroy an assessment of professional performance standards for an assistant superintendent that was not filed by the school superintendent in accordance with Public Records Law?

**AG 2011-19:** No. An Assessment of Professional Performance Standards, District Administrative Appraisal I for an Assistant Superintendent that was not filed in accordance with statutory requirements, is a public record and part of the assistant superintendent’s personnel file, which may not be removed from public view or destroyed.

## ATTORNEY GENERAL OPINIONS

## Fla. leads nation in transparency

ALEXANDRIA, Va. – Non-profit watchdog group Sunshine Review announced the results of a national audit of government websites, showing Florida as the national leader in website transparency.

Using a 10-point checklist, the Sunshine Review ranked more than 6,000 websites. The checklist considered the ease of use of websites and the availability of information on budgets, contracts, open meetings and other public information.

State and local governments who received perfect scores were given “Sunny Awards” for their transparency. Twenty-one winners were from Florida, followed by Texas with 12.

Top-rated Florida government entities were: Brevard County, Charlotte County Public Schools, Duval County, Escambia County School District, Hillsborough County Public Schools, Indian River School District, Lake County, Marion County Public Schools, Miami, Orange County Public Schools, Osceola County School District, Palm Beach County, Palm Beach County School District, Pinellas County, Polk County School District, Putnam County, Seminole County Public Schools, St. Johns County School District, St. Lucie County School Board, Sumter County and Volusia County.

*Source: Daily Commercial (Sumter County), Sunshine Review.org*

## LEGISLATIVE REPORT CONTINUED

**HB 7223 Competitive Solicitations** (continued): Also provides an exemption for portions of meetings at which negotiations with vendors conducted pursuant to a competitive solicitation and those portions of team meetings at which negotiation strategies are discussed.

**HB 7225 State Board of Administration Alternative Investments:** Reenacts the exemption for records related to alternative investments made by the State Board of Administration. Provides that information relating to third party placement agents is subject to disclosure.

*Source: Florida First Amendment Foundation: [www.floridafaf.org](http://www.floridafaf.org), [www.flsenate.gov](http://www.flsenate.gov) and [www.myfloridahouse.gov](http://www.myfloridahouse.gov).*

## A year inside access to the Scott administration

TALLAHASSEE – *The first year of Scott's four-year stint as Florida governor was marked by controversy as he struggled with providing access to public records held by his office and clarifying the administration's open government and media policies. The following timeline tracks some of the most noteworthy events related to access in 2011, as reported in the Brechner Report.*

**February** – Gov. Rick Scott made open government the focus of one of his first official acts as governor with the enactment of Executive Order 11-03, re-establishing the Office of Open Government, first created by former Gov. Charlie Crist.

**March** – Members of the capital press corps complained to the Florida Society of News Editors that Scott had excluded members of the media from attending events traditionally open to the press, including hand-picking reporters to cover certain events, and that his administration had been slow in responding to public records requests.

**April** – Scott removed Wauchula City Commissioner Daniel Graham from office for attending secret meetings. The other four commission members resigned shortly after.

**May** – The Scott administration amended its policies to charge the minimum of 15 cents per page for all public records requests, a departure from previous administrations that only charged for large requests. The administration said the fee was implemented as a way to curb costs after it received more than 300 records requests within Scott's first two months in office. Scott previously directed all department heads in state government to refer public records requests to the governor's office.

**July** – Scott's administration drew criticism from transparency advocates after Democrats were ordered out of a budget-signing meeting and top Scott staffers admitted to rarely using email to avoid the Public Records Law.

**September** – Scott eases his fee policies for public records after months of complaints from the media and open government advocates.

**October** – Scott orders the Florida Department of Law Enforcement to investigate why the email accounts of Scott and at least 50 transition team officials were erased by a private company in charge of providing email service.

The *St. Petersburg Times* began making requests for transition team emails, spanning a two-month period of time from his election to inauguration, in January. It was not until August that Scott acknowledged that the emails had been erased even though documents showed Scott officials may have been notified as early as January of the missing emails.

**November** – Scott's office confirmed that emails on Scott's iPad and BlackBerry had been deleted.

**December** – Records showing the salaries of 52,000 state employees were posted on Scott's website, [floridahasarighttoknow.com](http://floridahasarighttoknow.com), as part of a larger effort to increase transparency in government information.

*Source: The Miami Herald, St. Petersburg Times*

## Corporations don't have privacy claim under FOIA

WASHINGTON, D.C. – The U.S. Supreme Court unanimously ruled that corporations can't claim the personal privacy exemption of the Freedom of Information Act (FOIA). The decision in *FCC v. AT&T* overturned the 3rd Circuit Court of Appeals' ruling in favor of AT&T.

The documents at issue were collected during a Federal Communications Commission

investigation of AT&T's involvement in a federal program that assists schools in getting Internet access. AT&T eventually paid \$500,000 to resolve allegations that it overcharged the government but did not admit any wrongdoing.

AT&T's rivals requested the documents from the FCC, but AT&T argued against release, citing the personal privacy exemption to FOIA.

"The protection in FOIA against

disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations," Chief Justice John Roberts wrote. "We trust that AT&T will not take it personally."

The Brechner Center for Freedom of Information participated in a friend-of-the-court brief in favor of disclosure.

*Source: The Associated Press*

## Chief Judge orders access to foreclosure hearings

TALLAHASSEE – Florida Supreme Court Chief Justice Charles Canady has ordered trial judges in the state to keep foreclosure hearings open. The directive comes after media groups and the American Civil Liberties Union wrote a letter to Canady describing closed hearings across the state.

Florida courts hope to clear a backlog of foreclosure hearings, which has resulted in fast-track hearings being held

in less formal settings such as judges' chambers. The Florida Press Association and other groups noted instances across the state where people were denied access to foreclosure hearings.

In Jacksonville, a legal aid attorney who brought a reporter for *Rolling Stone* to a foreclosure proceeding was later reprimanded by the presiding judge and

threatened with contempt charges.

"The courts of Florida belong to the people of Florida," Canady wrote. "The people of Florida are entitled to know what takes place in the courts of this state. No crisis justifies the administrative suspension of the strong legal presumption that state court proceedings are open to the public."

*Source: Florida Press Association*

**ACCESS  
RECORDS**

## Judge blocks cigarette pack images

WASHINGTON, D.C. – A U.S. District Court judge for the District of Columbia in November blocked a U.S. government requirement that would have forced tobacco companies to put graphic images on their cigarette packages.

U.S. District Judge Richard Leon granted the tobacco companies' request for a preliminary injunction, finding that there was a "substantial likelihood" the tobacco companies could ultimately succeed on the merits of their arguments.

The Justice Department argued that the images, coupled with written warnings, were designed to communicate the dangers of smoking to youngsters and adults. Leon found that the nine graphic images approved by the Food and Drug Administration (FDA) in June, however, go beyond conveying the facts about the health risks of smoking into advocacy, a critical distinction in a free speech case.

The FDA rule, authorized by Congress in 2009 and slated to go into effect in September, now is likely to be embroiled in a legal dispute for months or years.

Source: *The Associated Press*

### THE BRECHNER REPORT

Brechner Center for Freedom of Information  
3208 Weimer Hall, P.O. Box 118400  
College of Journalism and Communications  
University of Florida, Gainesville, FL 32611-8400  
<http://www.brechner.org>  
e-mail: [brechnerreport@jou.ufl.edu](mailto:brechnerreport@jou.ufl.edu)

Sandra F. Chance, J.D., Exec. Director/Exec. Editor  
Kara Carnley Murrhee, Editor  
Alana Kolifrath, Production Coordinator  
Emily Miller, Production Assistant

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## Suit targets mortgage registry

PALM BEACH COUNTY – A Florida court official has filed a class-action lawsuit against a national mortgage registry firm.

Mortgage Electronic Registration Systems, or MERS, a 50-person operation in Virginia, was created by the banking industry as a way to streamline and track the transfer and sale of mortgages. Each time a mortgage changes hands, MERS is responsible for keeping track. In Florida, that job once belonged to court clerks.

Duval County Clerk of Court Jim Fuller claims that, by sidestepping public recording land rules and bypassing fees to the detriment of the public and the state's 67 clerks, MERS operates an "unlawful scheme."

The company has been the target of ire

nationwide as problems with identifying the true owners of mortgages became clearer in the wake of last fall's "robo-signing" scandal, in which lenders and their attorneys faked documents to win foreclosure judgments, according to *The Palm Beach Post*.

The company also faces challenges related to its business practices, including a lawsuit filed by the Delaware Attorney General's Office claiming that MERS makes it difficult for borrowers to identify their mortgage holder, which hurts their ability to fight foreclosures.

Janis Smith, the spokeswoman for MERS, denied the allegations, stating that MERS is not a legal system of records or a replacement for public land records.

Source: *The Palm Beach Post*

## Muslim group denied access

WASHINGTON, D.C. – The U.S. Department of Justice does not have to release FBI investigative guidelines, according to a U.S. District Court opinion.

U.S. District Judge Emmet G. Sullivan, for the District of Columbia, ruled that the limited access granted to Muslim Advocates, a California-based group seeking equality for Muslims, to view investigative guidelines did not make them "permanent public record," necessary to waive exemption under the federal Freedom of Information Act (FOIA).

Muslim Advocates and other civil rights organizations were allotted two hours on two separate occasions to view the FBI's Domestic Investigations and Operations Guide at its headquarters in 2008, as

a way of ensuring that certain groups were not targeted by the guidelines. The investigative guidelines were enacted in 2008 as a way to "standardize policy so that criminal, national security and foreign intelligence investigative activities are accomplished in a consistent manner."

In the suit, Muslim Advocates argued that, by granting it and other organizations limited access to the documents, the Department of Justice had waived its right to the exemption under FOIA.

Relying on the D.C. Circuit's 2001 opinion in *Students Against Genocide v. Department of State*, the court found that no waiver had occurred.

Source: *RCFP.com, Muslim Advocates v. U.S. Department of Justice*

## Hospital board's private meeting not a Sunshine Law violation

MIAMI-DADE COUNTY – Jackson Health System's executive team crafted a strategic plan to turn around the financially distressed public hospitals, which have lost more than \$400 million over the past three years.

But neither taxpayers, county commissioners, nor the 10,500 workers whose livelihoods depend on Jackson were allowed to attend the meeting, at which the seven board members met privately at a hotel in November to discuss the executive team's plan.

"We don't want our competitors to

know what we're planning," Jackson Chief Executive Carlos Migoya told *The Miami Herald*.

Although approval of the final plan must be done at a public meeting, public hospitals are allowed to close a meeting, under an exemption to Florida's Public Records Law, to discuss details of "a strategic plan, the disclosure of which would be reasonably likely to be used by a competitor to frustrate, circumvent, or exploit the purpose of the plan before it is implemented."

Source: *The Miami Herald*

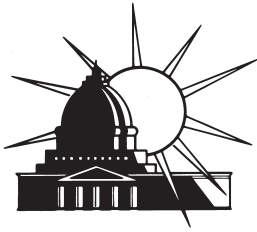
ACCESS MEETINGS

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## Not many exceptions to free-speech guarantee

“You can’t yell fire in a crowded theater.”

That paraphrase of a paragraph in a 1919 U.S. Supreme Court opinion written by Justice Oliver Wendell Holmes Jr. is often cited as justification for limiting free speech. Critics of the Occupy movement often point to it as justification for government shutting down protests in public parks.

Here’s what Holmes actually wrote:

“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic...The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger.”

The decision says the First Amendment doesn’t protect false speech that is likely to cause immediate harm to others. It doesn’t say, “The government has plenty of ways to shut you up.”

### The Back Page

By Ken Paulson

In America, we have extraordinary latitude in saying what we believe without fear of repression, making the U.S. a model for other nations. That’s

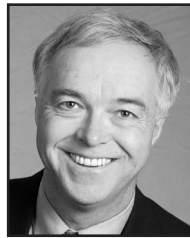
why I’m always surprised when members of the news media suggest otherwise.

One recent example is a column by Chuck Goudie, a reporter at ABC-7 News in Chicago who writes in the *Daily Herald* of suburban Chicago. Here, in a column about the Occupy protests, is his take on freedom of speech:

*“Perhaps more than any other part of the Constitution, the First Amendment right of ‘free speech’ gets cited by Americans. Wrongly so. From an eighth-grader suspended for recording a song about why his teacher should be dead to the gay community members whose parade has been rerouted, the chorus sounds the same: ‘My right to free speech is being violated.’*

*“The problem with that is: The Constitution doesn’t guarantee you ‘free speech.’ Despite what many seem to believe, the ‘freedom of speech’ guarantee in the Constitution doesn’t give you the right to say anything you want, anywhere you want.*

*“The First Amendment makes it unconstitutional for government to suppress speech (and ‘expression’ as it has come to include). That’s it. There are numerous exceptions to that, well beyond just the popular citation of the ‘yelling fire in a*



Ken Paulson

*crowded theater’ kind of speech that is prohibited. Child pornography, defamation and inciting crimes are just a few examples of speech that has been determined to be illegal under the U.S. Constitution.”*

I’m sure Goudie is trying to illuminate the issues, but articles like this leave readers with the sense that the free-speech guarantee is porous and full of exceptions. Yes, the First Amendment applies only to government action, but that’s where censorship threats typically come from.

Today in America, more than 312 million people will say exactly what they want to say about politics, policies and the world around them. Not a single person will be jailed for the words he or she utters.

Today that same 312 million will pray to the God of their choice (or to none at all), and suffer no consequences. Today several thousand newspapers and millions of websites and bloggers based in the U.S. will write about what is going on in their communities and in some cases, how they feel about it. Nobody will end the day in jail because of what he’s written.

The power and scope of the First Amendment is extraordinary and we do it a disservice when we suggest that the extraordinarily rare exceptions are the norm. There’s no massive laundry list of exceptions to the First Amendment. Of course, you can’t yell “Fire” in a crowded theater. You also can’t step to the front of the theater in the middle of a showing of the latest installment of “Twilight” and yell “Long Live the First Amendment” over and over again. In either case, you’d be taken into custody because of your disruptive or threatening action. And although you can sue someone for defamation, America’s news media enjoy substantial protection under the First Amendment. Essentially you can prevail in a libel suit only if the statement is false and intended to harm (see “Theater, Yelling Fire In”).

Protesters in the Occupy movement are being arrested for trespassing and related acts, but not for their message. It’s an important distinction. If we accept as conventional wisdom that free-speech rights are often limited, then free expression doesn’t seem so sacrosanct. Though conduct related to speech can be punished, ideas are largely inviolate. That foundation of freedom has served this nation well.

Ken Paulson is president and chief executive officer of the First Amendment Center.