
THE BRECHNER REPORT

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1st DCA rules college must release student's name

TALLAHASSEE – An email from a student to a department chair complaining about a professor's conduct is not a confidential education record for purposes of the Family Education Rights and Privacy Act (FERPA), the 1st District Court of Appeals in Tallahassee ruled.

The professor, Darnell Rhea, a former adjunct professor of mathematics at Santa Fe College in Gainesville, filed a public records lawsuit for the student's

name after the college redacted it from the professor's request for the email, according to the Student Press Law Center. Rhea said he wanted to know the name of the student so he could defend against the email's allegations. In reversing the trial court's decision, the appeals court ruled that the email did not come within FERPA's definition of education record because it was not "directly related to the student," the Student Press Law Center reported.

"The fundamental character of the e-mail relates directly to the instructor; the fact that it was authored by a student does not convert it into an 'education record,'" Judge Stephanie Ray wrote for a unanimous three-judge panel.

The court ordered the college to release the student's name. The college denied that Rhea's contract was not renewed because of the complaint, the *Orlando Sentinel* reported.

Source: Student Press Law Center, Orlando Sentinel

**ACCESS
RECORDS**

Judge strikes down law restricting doctors' speech

MIAMI – The state of Florida is appealing a Miami federal judge's decision to strike down a state law prohibiting doctors from discussing gun ownership with their patients.

U.S. District Court for the Southern District of Florida Judge Marcia Cooke ruled that the law, making it a crime for a doctor to ask patients whether they own a gun, violated the doctors' First Amendment speech rights. The case has been dubbed "Docs vs. Glocks" for its dispute between free speech and the right to bear arms, according to *The Miami Herald*.

"The State, through this law, inserts itself in the doctor-patient relationship, prohibiting and burdening speech

necessary to the proper practice of preventive medicine, thereby preventing patients from receiving truthful, non-misleading information.... This it cannot do," according to the decision.

Cooke also held that the privacy provisions failed to provide standards for practitioners to follow.

The ruling made permanent a preliminary injunction Cooke granted against the law in September, *The Herald* reported.

Gov. Rick Scott has since announced that the state is appealing the decision to the 11th U.S. Circuit Court of Appeals in Atlanta, *The South Florida*

Sun-Sentinel reported.

"This law was carefully crafted to respect the First Amendment while ensuring a patient's constitutional right to own or possess a firearm without discrimination," Scott said in a statement.

The law, backed by the National Rifle Association and sponsored by Rep. Jason Brodeur (R-Sanford), initially included a \$5 million fine for physicians who violated

it, according to *The Sun-Sentinel*, but a compromise later eliminated the fine and allowed doctors to inquire about guns if they thought the inquiry was "relevant" to

patient care.

Source: The Miami Herald, The South Florida Sun-Sentinel

**FIRST
AMENDMENT**

Atwater pushes for transparency in state contracts

TALLAHASSEE – The office of Florida's Chief Financial Officer (CFO) Jeff Atwater launched a website, the Florida Accountability

Contract Tracking System, or FACTS, to provide greater transparency in

government spending. The website, which hosts more than 23,400 contracts that make up more than 50 percent of the state's budget, is intended to become a

centralized, statewide contract reporting website, the *Sunshine State News* reported.

The contracts were only previously available through a public records request.

Along with the website, Atwater is also pushing legislators to define what the contract process is and what they believe could remain shielded from public view, according to the *Sunshine State News*. He is also recommending the state require

contracts to be put out for bid rather than simply awarded.

Florida law requires state agencies to enter contracts into the contract management system within 30 days of execution. As soon as a state contract is entered into the management system, it will be available to the public and government agencies through the website, the *Sunshine State News* reported.

Source: Sunshine State News, Fla. Stat. § 2011-49 (2011)

**OPEN
GOVERNMENT**

Judge rules Valparaiso violated Sunshine Law

VALPARAISO – A judge ruled that the city of Valparaiso violated Florida’s Sunshine Law on two separate occasions when it conducted a private meeting and failed to provide public notice.

City resident Anthony Bradley filed suit in 2009 alleging a Sunshine Law violation following a dispute between the city and the nearby Eglin Air Force Base to bring F-35s to the base and train pilots in the sky over Valparaiso.

In his ruling, Judge Thomas T. Remington for the 1st Judicial Circuit held that city commissioners violated the Sunshine Law by conducting a private meeting at which the commissioners

discussed retaining the law firm Rose, Sundstrom & Bentley (RSB) for the purpose of filing a Freedom of Information Act request with the Air Force.

The ruling also criticized city attorney Doug Wyckoff and fellow attorney Chris Bentley of RSB for filing the FOIA lawsuit against the Air Force without public input and after receiving “private consent” from the city’s mayor and two other city commissioners, the *Northwest Florida Daily News* reported.

The decision noted that city commissioners expected to have an opportunity to consider the issue and

vote on the action before any lawsuit was filed.

The ruling also found Valparaiso city commissioners guilty of a second Sunshine Law violation in February 2009 when officials failed to provide sufficient public notice of a meeting, as required by city ordinance, at which several commissioners voted to challenge the Air Force base’s “record of decision,” according to the *Daily News*.

Remington also found that attempts in 2010 to “cure” earlier Sunshine Law violations did not meet legal standards, the *Daily News* reported.

Source: *Northwest Florida Daily News*

ACCESS RECORDS CONTINUED

City to pay newspaper \$15K

JACKSONVILLE – Jacksonville Mayor Alvin Brown’s office will pay *The Florida Times-Union* \$15,000 to settle a lawsuit over access to public records.

The newspaper filed suit against the city in June after the mayor’s office failed to timely respond to two requests for documents related to a budget proposal presented to the Jacksonville

City Council on May 1.

Hours before the presentation, the office said no drafts of the budget proposal were available, according to *The Florida Times-Union*.

The Times-Union attorney George Gabel said the newspaper incurred \$16,300 in fees and expenses to gain access to the records.

Source: *The Florida Times-Union*

Union seeks access to pension records

JACKSONVILLE – The union representing utilities workers in Jacksonville has filed suit against a local organization to gain access to public records.

The lawsuit, filed by the International Brotherhood of Electrical Workers Local 1618 against Jacksonville Electric Authority (JEA), seeks to force JEA to provide access to pension records, according to *The Florida Times-Union*.

“We were curious as to what they had been doing with the pension since 1986, so we started requesting documents,” said Robert Jenkins, local union president. “As we pushed harder, we got little to no documents. Over two years, they still have failed to even halfway turn over the documents that we’ve requested.”

The union, which represents about 200 workers at the St. Johns River Power Park, says it has made 78 requests for records that have been unfiled, reported *The Times-Union*.

But JEA officials say the organization has acted appropriately and has made available any documents responsive to the union’s requests.

Source: *The Florida Times-Union*

Retention of employee texts on hold

JACKSONVILLE – Jacksonville city employees were told that the city would start preserving text messages sent to them on their city BlackBerrys to comply with Florida’s Public Records Law. But that requirement has been placed on hold after the practice was questioned by the city’s top attorney.

Text messages have long fallen into a grey area, the treatment of which has often been analogized to phonecalls, which are not required by law to be saved, according to *The Florida Times-Union*.

According to members of the city’s Office of Ethics, Compliance and Oversight, the development of new technology requires a change in thinking. Although there is no formal legal opinion from the state’s Attorney General’s Office on the matter, former Attorney General Bill McCollum issued an informal opinion in 2010, describing the similarity in

procedures that should be kept regarding the retention of emails and text messages.

“The same rules that apply to email should be considered for electronic communication including BlackBerry PINs, SMS communications (text messaging), MMS communications (multimedia content) and instant messaging conducted by government agencies,” McCollum wrote.

That opinion also addressed the creation of the Sunshine Technology Team, which likewise determined text messages regarding official business is public record.

Officials from the Jacksonville general counsel’s office and the ethics office are now meeting to discuss issues raised by the commission regarding text message retention, according to *The Times-Union*.

Source: *The Florida Times-Union News, WJHG News Channel 7*

Brevard rivals go to court over records dispute

TITUSVILLE – A circuit judge ruled that Clerk of Courts Mitch Needelman’s office fulfilled most of the public records requests filed by political opponent Scott Ellis, but that does not prevent Ellis from filing more requests.

Ellis filed a lawsuit against Needelman in June, claiming that he was withholding public documents, according to *Florida Today*.

He had filed numerous records requests related to Needelman’s operation, including an \$8.52 million, five-year contract with BlueGEM LLC, to digitize paper documents.

Brevard County Circuit Judge John Harris ruled that at least the attorney invoice related to the contract was exempt from public records law, reported *Florida Today*.

Ellis served as Brevard County’s former clerk of courts from 2001 until resigning in 2010 with two years left in his term. He defeated Needelman in the battle for Brevard County Clerk of the Court in the Aug. 14 Republican primary, according to *Central Florida News Channel 13*.

Source: *Florida Today*, *Central Florida News Channel 13*

FBI subpoenas Walton County officials’ email records

JACKSONVILLE – The FBI is investigating whether Walton County Commissioners violated Florida’s Open Records Law by sending emails from their personal email accounts, according to *WJHG News Channel 7*.

The investigation was launched following a ruling by a judge that commissioners had not violated the law by sending emails from their personal accounts.

The FBI subpoenaed records related to a business venture by developer Jay Odom, built on his Hammock Bay development in Freeport, the *Northwest Florida Daily News* reported. Odom

donated the 60-acre sports complex to the city in 2007.

It also requested “email communications sent to or from Walton County Board of County Commissioner Scott Brannon,” according to the *Daily News*. Brannon’s email conversations have been the subject of an ongoing public records lawsuit filed by resident Suzanne Harris.

County attorney Toni Craig produced the requested records, rather than appear in court, following the filing of a subpoena in mid-June.

Source: *Northwest Florida Daily News*, *WJHG News Channel 7*

Group files suit for wildlife info

WASHINGTON, D.C. – The American Bird Conservancy (ABC) filed suit against the federal government, claiming that it violated the Freedom of Information Act (FOIA) by failing to provide information related to wind energy projects.

The suit alleges that two government agencies, including the U.S. Fish and Wildlife Service (FWS), failed to comply with the statutory deadlines for disclosure of information under the Freedom of Information Act, according to the

American Bird Conservancy.

ABC filed six FOIA requests with the agencies for information related to correspondence between FWS and wind developers, as well as the potential impact of wind energy projects on birds and bats, such as bird and bat deaths at controversial wind developments in 10 states.

Those requests were made by ABC more than eight months ago, according to ABC.

Source: *American Bird Conservancy*

State to release voter purge list

TALLAHASSEE – The state of Florida will release a list of 180,000 names of potential noncitizens currently included on Florida’s voter registration rolls.

The release follows a decision by a federal judge in Tallahassee that the state’s practice of removing ineligible voters from its rolls does not violate federal law, *The Associated Press* reported.

Gov. Rick Scott’s administration initially refused numerous public records requests from news organizations and voter advocacy groups for the list, stating that it was unclear whether it was public record, according to the *Tampa Bay Times*.

The U.S. Department of Justice filed the lawsuit against the state on June 13, asserting that the practice violated the National Voter Registration Act, that the list was outdated and that review of the rolls could not take place within 90 days

of an election.

U.S. District Judge Robert L. Hinkle of the Northern District of Florida said ineligible voters should not be allowed to vote because it can cause “irreparable harm” to legitimate voters, *The Associated Press* reported.

The Justice Department filed the lawsuit after many of the 2,700 names on a list released earlier were found to be erroneously included.

The State halted the practice of sending names of potential noncitizens to election supervisors for review, following the filing of the lawsuit, at least until it could gain access to an immigration database so that it could verify voters’ citizenship.

It filed suit against the Department of Homeland Security for access to that list, according to *The Associated Press*.

Source: *The Associated Press*, *Tampa Bay Times*, *News Service of Florida*

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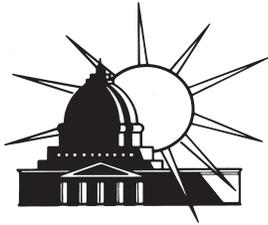
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Courtroom cameras inform the public dialogue

A little more than 72 hours after 12 people died and dozens more were injured inside a Colorado movie theater this summer, America got its first glimpse of the alleged mass shooter — a video image “as mesmerizing as it was creepy,” as one *Washington Post* columnist put it.

But that’s the last sight we’ve had of James Holmes, save for a color sketch created during a motion hearing on Aug. 9. A standing decorum order issued in the case prohibits filming and photographing inside the courtroom, and the presiding judge denied the news media’s request for expanded media coverage of the July 30 hearing where the 24-year-old was officially charged.

A 1986 Colorado appellate court opinion held that a trial judge did not err when he applied a presumption under court rules in

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By *Kristen Rasmussen*

favor of televised courtroom coverage, a presumption that can be rebutted only if a defendant, after presenting evidence in a hearing, shows that such coverage interfered

with his right to a fair trial. Yet the judge in the Holmes case, presumably without holding a hearing on the matter, denied the request in a one-page order.

“The Court has weighed the factors it must consider ... [and] has also considered the grounds in Defendant’s [written] Objection. The Court also notes that the July 30, 2012 proceeding is open to the media and to the general public, so the media and public will have ready access to the proceeding,” was the only rationale Arapahoe County District Court Judge William Sylvester provided for his decision.

Significant progress in providing visual and audio coverage of courtroom proceedings has been made since 1981, when the U.S. Supreme Court held that states may adopt rules permitting cameras and recording equipment in their courts. But the Holmes case is a strong reminder that much is still yet to be done.

Indeed, all 50 states allow audio and visual recording of court proceedings to some extent, and efforts to increase such coverage are ongoing. The Utah Judicial Council, for example, is currently considering a rule that would allow electronic media



Kristen Rasmussen

coverage of criminal and civil trial court proceedings.

The current rule prohibits photography and audio recording in trial courts. And the Michigan Supreme Court is considering an amendment to an administrative order that would extend film and electronic media coverage beyond trial courts to the state’s Court of Appeals and Supreme Court.

Camera coverage of federal courts is more limited and nowhere more so than at the nation’s highest court, where several justices seem impervious to arguments that audio and video coverage of their proceedings

would provide greater transparency and serve the public good.

The Supreme Court in March rejected a request by a coalition of 47 news media organizations and other groups, including The Reporters Committee for Freedom of the Press, for camera coverage of the arguments in the health care reform law cases.

The decision forced many news media groups to develop unprecedented methods to provide real-time coverage of the historic arguments, including the use of several journalists to cover the event — a newsgathering procedure that not every news organization can afford.

And many legal observers couldn’t help but wonder whether the millions of Americans who relied on CNN or Fox for news of the Court’s decision three months later would have been spared a few minutes of false information had the Court allowed live coverage of its announcement, as the media coalition requested.

The Supreme Court has unequivocally and consistently stated that the First Amendment protects the right of public access to the country’s courts.

The time has come for that valuable access to be expanded to include visual recordings so that its citizens may observe and monitor, in real-time as it is made before the highest court in the land, the debate over some of the most significant issues to inform the nation’s public dialogue.

Kristen Rasmussen is the 2011–2012 McCormick Legal Fellow at The Reporters Committee for Freedom of the Press. She is a 2010 graduate of the J.D./M.A.M.C. joint-degree program at the University of Florida.