
THE BRECHNER REPORT

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County officials consider bill banning cell phones

ORANGE COUNTY – Officials in Orange County will consider banning cell phones at public meetings.

The proposed changes to officials' use of cell phones during meetings in Orange County arose in the wake of a battle over a sick-leave initiative at a September Orange County Commission meeting, the *Orlando Sentinel* reported.

Citizens for a Greater Orange County filed a lawsuit to force commission

members to turn over text messages exchanged with lobbyists opposed to the measure during the meeting at which the initiative was discussed.

Commission members acknowledged deleting messages sent and received during that meeting from their cell phones, in an apparent violation of Florida Public Records Law, the *Orlando Sentinel* reported. Some of those texts have yet to be recovered.

Commissioners proposed installing jamming devices to prevent communications coming from public meetings or banning cell phones on days meetings are held, according to the *Sentinel*.

A 2010 Florida Attorney General's Opinion says text messages in the conduct of public business are public records that must be archived, according to the paper.

Source: *Orlando Sentinel*, *FloridaWatchdog.org*

**ACCESS
MEETINGS**

Judge rules student's flyers are free speech

TAMPA – A federal judge ruled that the Hillsborough County School Board violated the First Amendment speech rights of a fourth-grader by prohibiting the student from passing out flyers inviting fellow classmates to an Easter egg hunt at his church.

The student, identified in court documents as J.G., asked a substitute teacher for permission to hand out the invitations to his classmates, according to the *Tampa Bay Times*. The teacher confiscated the flyers and took them to the principal, who later returned the invites to the student with a note saying

he was barred from distributing them, according to the *Tampa Tribune*.

The boy's mother then filed a lawsuit claiming a violation of her son's constitutional rights.

In October, U.S. Magistrate Elizabeth A. Jenkins ruled that the two rules the School Board used to justify prohibiting the child from passing out the flyers did not meet the standards permitting schools to restrict personal speech, according to the *Times*.

U.S. District Judge James D.

Whittemore agreed, issuing an injunction which barred the district from enforcing its policy prohibiting students from

distributing religious materials at school during non-instructional hours, the *Tribune* reported.

In his order, Whittemore quoted from a seminal Supreme Court case, saying, "It can hardly be argued that...students shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Source: *Tampa Bay Times*, *Tampa Tribune*

**FIRST
AMENDMENT**

Sunshine lawsuit costs Sarasota \$10K in legal fees

SARASOTA – The city of Sarasota paid \$10,000 to settle a lawsuit filed against them by activists alleging violation of the Sunshine Law.

The settlement stems from the creation of a Public Art Steering Committee in July 2011 to lead a \$55,000 art project involving the installation of bronze sculptures on Main Street in Sarasota, according to the *Sarasota Herald Tribune*.

Activists alleged the city failed to provide adequate public notice of

meetings to discuss the project, the *Herald Tribune* reported.

The city halted the art project after agreeing to the settlement, including \$7,000 in legal fees and \$3,000 to hire an outside attorney to represent one of the committee members individually named in the suit.

The lawsuit is the second the city has settled this year, the first involving allegations of Sunshine Law violations during a police officer's disciplinary hearing in 2010, which cost the city and its insurers \$90,000, according to the *Herald Tribune*.

Yet another Sunshine lawsuit is pending, filed last month by paralegal Michael Barfield against Sarasota's Downtown Improvement District Advisory Board, according to the *Herald Tribune*. The lawsuit alleges volunteer board members deleted emails related to city business.

The city plans to hold refresher sessions on the state's Government-in-the-Sunshine Law and email usage for commissioners and advisory board members in response to the lawsuits, according to the paper.

Source: *Sarasota Herald Tribune*

**OPEN
GOVERNMENT**

Sheriff's Office investigates School Board texting

MANATEE COUNTY – The Manatee County Sheriff's Office is investigating a complaint that School Board member Julie Aranibar violated the state's Public Records Law.

Activist Christine Sket filed a complaint with the Sheriff's Office after it became apparent to her that board members were texting during a Sept. 10 meeting at which Superintendent Tim McGonegal's resignation was announced. Sket claimed Aranibar failed to comply with her request for copies of the text messages sent during that meeting, according to the *Sarasota Herald Tribune*.

Aranibar said she complied with the request but did not need to provide Sket with copies of the messages sent during

the meeting that were from her children.

In her complaint, Sket included a copy of a text conversation beginning on Sept. 10 between Aranibar and Lakewood Ranch High School teacher Robert Moates, who lost his bid for a seat on the board during the meeting, the *Herald Tribune* reported.

In the message, Moates, who confirmed that he texted Aranibar, wrote that he wanted an item removed from the consent agenda. Aranibar said there were no messages on her phone from Moates from that date, according to the *Herald Tribune*.

Sket—who leads the Manatee chapter of Fund Education Now, a group of parents lobbying for more funding of public schools and is a frequent speaker

at School Board meetings—made the same public records request of all five board members, according to the *Herald Tribune*.

She said she would like investigators to look at Aranibar's phone company records for proof that there were other text messages sent during the meeting.

Cell phone text messages sent by board members are considered public records if they relate to school board business, said Barbara Peterson, president of the First Amendment Foundation, the *Herald Tribune* reported.

"I think there is a lot of behind-the-scenes going on that we are not aware of," Sket said, according to the paper. "We need to stop these practices."

Source: *Sarasota Herald Tribune*

Suit delays president's departure

BRADENTON – A Sarasota man filed a lawsuit against the State College of Florida (SCF) Board of Trustees members for potential violation of the Sunshine Law.

Robert Chandler filed a motion for an injunction, alleging negotiations between SCF President Lars Hafner's attorney and a Sarasota law firm hired by the board should be open to the public, according to the *Sarasota Herald Tribune*.

During the session, the board awarded Hafner a settlement package of nearly \$1.4 million over five years, the *Herald Tribune* reported.

In the lawsuit, Chandler claims the board's decision to hire a law firm to

"obtain a mutually acceptable agreement regarding Hafner's employment status" amounts to a delegation of authority.

A similar case occurred in 1982, when a Lee County hospital board delegated the preparation of a \$35-million budget to a staff committee, the lawsuit states, according to the *Herald Tribune*.

In that case, the 2nd District Court of Appeals ruled that meetings of that committee should have been noticed and open to the public.

Board members have been trying to fire Hafner since June. The decision to negotiate was an effort to avoid costly litigation, according to the paper.

Source: *Sarasota Herald Tribune*

Suit seeking assistant state attorney emails dismissed

SARASOTA – A judge dismissed a lawsuit filed by a citizen in September, seeking to force Assistant State Attorney for the 12th Judicial Circuit Ed Brodsky to release his personal emails.

Senior Circuit Judge Thomas Gallen reviewed the emails personally before ruling that the lawsuit failed to show Brodsky violated the Public Records Law, according to the *Sarasota Herald Tribune*.

The court also rejected Joe Chandler's

request for an itemized index of the withheld documents and ruled the special service fee of \$1,500 was "reasonable," the *Herald Tribune* reported.

Chandler originally requested the emails in May, after eventually paying the \$1,500 fee. When Chandler found hundreds of emails missing, he made an additional request. The office handed over several hundred additional pages of emails in July, but held back 300 more, according to the *Herald Tribune*.

He filed the lawsuit to force the release of these documents

Source: *Sarasota Herald Tribune*

Legislators to weigh right-to-speak bill for third consecutive session

TALLAHASSEE – For the third consecutive legislative session, Florida legislators will consider a bill seeking to protect citizens' right to speak at public meetings.

Sen. Joe Negron (R-Stuart) filed his public comment bill for the 2013 legislative session, according to the *Stuart News*. Neither Florida statutes nor the state constitution requires officials to let the public testify during meetings, according to two district courts of appeals, after government boards completely shut down public comment, the *News* reported.

Although Negron's bill made it through

the Senate in 2012, its companion bill stalled in the House.

Under the bill, boards could limit testimony to keep meetings timely and officials could make decisions without public weigh-in during emergencies such as hurricanes. Boards could also withhold public comment during quasi-judicial or procedural actions.

Violating the rule would not automatically void actions taken by the board at a meeting, but the losing party would end up paying the opposing party's attorney's fees in a lawsuit.

Source: *Stuart News*

ACCESS RECORDS

Donors, victims of violence among exemptions

TALLAHASSEE – *The following is a summary of the eight Public Records and Open Meetings Law exemptions passed in 2012. Copies of the legislation in full are available at the Florida Legislature's website (www.leg.state.fl.us). SB = Senate Bill; HB = House Bill; CS = Committee Substitute.*

SB 374 Exemption/Donors – Historic Capitol Museum: Creates a public records exemption for information identifying a donor or prospective donor to the Legislative Research Center and Museum at the Historic Capitol if the donor or prospective donor wants to remain anonymous. (Detert, R-Venice).

SB 570 Exemption/Donors – Performing Arts Centers: Creates a Public Records Law exemption for information identifying a donor or prospective donor to publicly owned performing arts centers if the donor or prospective donor wants to remain anonymous. (Ring, R-Margate).

CS/HB 629 Exemption/Telephone Numbers and Dates of Birth: Expands the current public records exemption to exempt telephone numbers and dates of birth of government employees and their families. Clarifies the exemption for law enforcement officers to include active or former “sworn or civilian” law enforcement personnel, and expands the exemption for judges and justices to include current or former justices and judges. (Hooper, R-Clearwater).

CS/HB 645 Exemption/Title Insurance Information: Creates a public records exemption for proprietary business information provided to the Department of Financial Services. This information can include: business plans; internal auditing controls and reports of internal auditors; reports of external auditors; trade secrets; and financial information, including revenue data, loss expense data, gross receipts, taxes paid, capital investment, customer identification, and employee wages. (Moraitis, R-Fort Lauderdale).

CS/HB 1089 Exemption/Home Addresses – DBPR & Tax Collectors: Creates a public records exemption for the home addresses, telephone numbers, and photographs of current and former investigators and inspectors of the

Department of Business and Professional Regulation and the children and spouses of such investigators and inspectors. Also creates a public records exemption for the home addresses and telephone numbers of county tax collectors and the children and spouses of such collectors. (Adkins, R-Fernandina Beach).

CS/HB 1193 Exemption/Victims of Violence: Creates an exemption from the Public Records Law for personally identifying and location information of victims of domestic, dating, sexual or repeat violence provided to the clerks of court and law enforcement in order for the victims to receive automatic notification when a restraining order requested by the victim has been served. Requires the victims to request protection of their personal information in writing. (Jones,

D-Jacksonville).

HB 1239 Exemption/Department of Citrus Research Reports: Creates a public records exemption for non-published research related to citrus disease and crop efficiency conducted by the Department of Citrus. (Albritton, R-Bartow; Crusafelli, R-Merritt Island).

CS/SB 1856 Exemption/Biomedical Research: Creates a public records exemption for portions of peer review panels of the James and Esther King Biomedical Research Program and the William G. “Bill” Bankhead, Jr., and David Coley Cancer Research Program. Also creates an exemption for records related to biomedical research grant applications and for research grant applications reviewed by the peer review panel. (Flores, R-Miami).

The following exemptions were reenacted in 2012 under the Open Government Sunset Review Act (OGSR), which requires review of exemptions every five years.

SB 446 Insurance Claim Exchange Data: Reenacts with minor changes the public records exemption for personal information obtained by the Department of Revenue used for identifying parents who owe past due child support.

HB 7013 Census Bureau Address Information: Repeals the public records exemption for United States Census Bureau address information, including

maps showing structure location points, agency records verifying addresses, and agency records identifying address errors or omissions, held by an agency pursuant to the Local Update of Census Addresses Program under Federal law.

HB 7015 Donors – House Museums: Reenacts the public records exemption for information that would identify a donor or prospective donor to a publicly owned house museum designated by the United State Department of Interior as a National Historic Landmark if the donor or prospective donor desires to remain anonymous.

HB 7017 Donors – Historic St. Augustine: Reenacts the public records exemption for information that would identify a donor or prospective donor to the direct support organization for Historic St. Augustine, housed at the University of Florida, if the donor or prospective donor desires to remain anonymous.

HB 7033 DHSMV – Personal Identifying Information: Reenacts with minor changes the public records exemption protecting personal identifying information, and the policy numbers, of anyone insured or formerly insured under personal injury protection and property damage liability insurance policies held by the Florida Department of Highway Safety and Motor Vehicles.

HB 7035 Physician Workforce Surveys: Reenacts with minor changes the public records exemption for personal identifying information contained in physician workforce surveys submitted to the Department of Health by physicians and osteopathic physicians renewing their professional licenses.

HB 7037 Sunshine State One-Call: Reenacts the public records exemption for propriety confidential business information held by Sunshine State On-Call Florida, Inc.

HB 7103 Florida Opportunity Fund: Reorganizes the public records exemption protecting proprietary confidential business information concerning investments and the identity of investors or potential investors in projects reviewed by the fund who wish to remain anonymous as well as materials that relate to methods of manufacture or production, potential trade secrets, or patentable material that is received or discovered

- *Continued on next page*

LEGISLATIVE SESSION REPORT

Few AGO opinions contemplate Sunshine Law

TALLAHASSEE – Attorney General Pam Bondi's office weighed in on several open government issues in 2011-2012, ranging from discussion of whether information about an individual who makes a 911 call contained in an offense report should be kept confidential to whether a board of directors designated as an appropriate local official to receive complaints and investigate documents must take

action upon such complaint at a public meeting.

Below are summaries of these Florida Attorney General Advisory Legal Opinions. The full-text opinions are available at <http://www.myfloridalegal.com>.

E911 calls and identifying information in offense report: Is information regarding an individual who makes a 911 call contained in an offense report confidential and exempt pursuant to section 365.171(12), Florida Statutes, regardless of whether the offense report reflects that a 911 call was made or identifies the individual as having made the 911 call?

AGO 2011-27: Yes. Information obtained from a 911 call by an agency

for the purpose of providing service in an emergency which reveals the name, address, telephone number, or personal information about, or information which may identify any person requesting emergency services or reporting an emergency is confidential while in the custody of the agency. However, identifying information obtained or created independently of the 911 call, for example from a criminal investigation or offense report created as a result of such investigation, is not exempt under section 365.171(12), Florida Statutes.

Sunshine Law and confidential information considered: May the Hillsborough Transit Authority board of directors be designated as an appropriate local official permitted to receive complaints and investigative documents under section 112.3188, Florida Statutes? 2. If so, is the board required to consider and take action upon such a complaint at a public meeting pursuant to section 286.011, Florida Statutes?

AGO 2012-20: Yes. 1. The HART board of directors may be designated as the appropriate local official to receive complaints and investigative documents under section 112.3188, Florida Statutes. In light of the discussion in Question

Two, however, such designation may not be advisable. 2. The HART board of directors is a collegial public body which must comply with the public meeting requirements in section 286.011, Florida Statutes, when carrying out official business of the authority. Absent a statutory exemption, the handling of confidential information or records during the course of public meetings does not otherwise allow meetings of the board to be closed.

Sunshine law and ratifying invalid action: Does an audit committee's ratification of a request for proposals which was created and issued by the county's financial officer and found to be defective validate the previously issued request for proposals?

AGO 2012-31: NO. An audit committee's statutorily prescribed function to exercise its discretion to create a request for proposals may not be delegated to a subordinate or other entity, absent statutory authorization. The committee may not, therefore, ratify a defective request for proposals which was created and issued by the county's financial officer contrary to the requirements of the law. A mere perfunctory or ceremonial acceptance of the previous action will not validate the defective request for proposals.

LEGISLATIVE REPORT CONTINUED

during research by universities held by the Florida Opportunity Fund or the Institute for the Commercialization of Public Research. Reenacts with changes the exemption for portions of meetings of the boards of the Fund or Institute during which exempt information is presented or discussed.

HB 7105 Workers' Compensation Joint Underwriting Association: Reenacts the public records exemption for various records held by the Florida Workers' Compensation Joint Underwriting Association, including (1) underwriting files; (2) claims files under termination of all litigation and settlement of all claims arising out of the same incident; (3) audit reports until the audit is completed; (4) proprietary information; (5) medical information relating to the medical condition of an individual; (6) information relating to negotiations for financing, etc.; (7) reports of fraud until investigation of such fraud is complete or no longer active; (8) payroll information

received from the Department of Revenue; and (9) attorney-client work product. Reenacts the exemption for portions of meetings at which exempt records or information is discussed as well as transcripts and minutes of the closed meetings.

HB 7107 Consumer Complaints – Florida Insurance Code: Reenacts with minor changes the public records exemption protecting personal and financial and health information held by the Department of Financial Services relating to a consumer complaint or inquiry filed under the Florida Insurance Code or Workers' Compensation Employee Assistance and Ombudsman Office.

HB 7109 Lifeline Assistance Plan: Reenacts the public records exemption for personal identifying information of participants in a telecommunications carrier's Lifeline Assistance Plan held by the Public Service Commission.

HB 7111 Unclaimed Property Reports: Reenacts the exemption for

social security numbers and property identifiers contained in unclaimed property reports held by the Department of Financial Services, and expands to include social security numbers for locator services.

CS/HB 7115 Economic Development Records: Reenacts with changes the public records exemption for information held by economic development agencies. Creates a 12-month exemption for private companies and corporations that provide a written request for confidentiality before an economic incentives agreement is signed. Creates an exemption for certain information related to a signed economic development agreement after a final product order is issued. Removes the exemption for anticipated wages for the project jobs that the business plans to create and the average wage actually paid by the business for the jobs created by the project.

Source: Florida First Amendment Foundation (floridafaf.org), www.flsenate.gov and myfloridahouse.gov.

Advocacy group requests White House visitor logs

WASHINGTON, D.C. – A federal court heard oral arguments on whether releasing White House visitor logs to an advocacy group could release sensitive information held by the president.

A three-judge panel for the U.S. Court of Appeals for the Federal Circuit in Washington, D.C., heard oral arguments in *Judicial Watch v. Secret Service* in which the advocacy group Judicial Watch is seeking the logs and records of visitors to the White House under the Freedom of Information Act (FOIA), the Reporters Committee for Freedom of the Press reported.

The U.S. Department of Justice has argued the records are exempt because they are not “agency records,” but belong to the office of the president, which is not subject to FOIA, according to the Reporters Committee.

Judicial Watch requested records related to visitors to all agencies within the walls of the White House who submit their visitor information to the White House, such as the Council of Economic Advisors, not just information related to the president’s visitors. These records, the group has argued, are subject to FOIA, according to the

Reporters Committee.

The challenge was brought following the Secret Services’ denial of the group’s request for records, which contain personal information about potential visitors to the White House, including their names, Social Security numbers and birth dates. The Secret Service collects and uses this information to conduct background checks on the individuals before they visit the White House, according to the Reporters Committee.

Source: *Reporters Committee for Freedom of the Press*

Judge orders some Watergate records unsealed

WASHINGTON, D.C. – Documents sealed in the 1970s as part of the court case against men involved in the Watergate burglary must now be released, a federal judge ruled.

Chief Judge of the U.S. District Court in Washington, Royce Lamberth, ruled that the National Archives and Records

Administration will have a month to review and release materials being requested by a Texas history professor, according to *The Associated Press*.

In 2009, Luke Nichter, a history professor at Texas A&M University-

Central Texas who also runs a website cataloging secret recordings made by President Richard Nixon in the White House, requested that potentially hundreds of pages of documents be unsealed, according to *The AP*.

He alleged the court records could help explain the motivation behind the 1972 break-in at the

Democratic National Committee’s headquarters that ultimately led to Nixon’s resignation from office three years later.

Government attorneys argued that documents containing personal information, grand jury information

and those regarding the content of illegally obtained wiretaps should not be disclosed, according to *The AP*.

In his order, Lamberth wrote that to keep such documents sealed, the U.S. Department of Justice (DOJ) should copy the records and explain why each should not be made public.

The DOJ has a month to submit that information to the judge, *The AP* reported.

In 2011, Lamberth unsealed a secret transcript of Nixon’s testimony to a grand jury about the Watergate break-in.

Source: *The Associated Press*

ACCESS
RECORDS

Protestor disputes release of tweets

NEW YORK CITY – An Occupy Wall Street (OWS) protester is challenging a court order that Twitter release his tweets and subscriber information.

In September, New York Judge Matthew Sciarrino Jr. ordered Twitter to turn over the subpoenaed information or face criminal and civil contempt charges, according to the Reporters Committee for Freedom of

the Press. Twitter complied with the court order, but protester Malcolm Harris is challenging the ruling, arguing that information should be protected by his First and Fourth Amendment rights, as they would apply to information stored on a personal computer or cell phone.

Prosecutors subpoenaed the information from the social media platform following the October 2011 arrest of 700 activists, including Harris, for disorderly conduct.

The protesters had marched on the Brooklyn Bridge, including entering onto the roadway.

The New York County District Attorney’s Office said it was interested in Harris’ Twitter activity

because it showed Harris was aware he was not permitted to walk on the bridge’s roadway, disproving his anticipated defense, according to the Reporters Committee.

Source: *Reporters Committee for Freedom of the Press*

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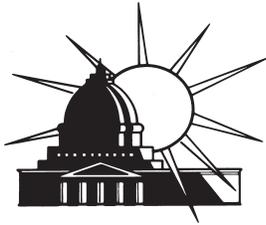
FIRST
AMENDMENT

THE BRECHNER REPORT

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UF UNIVERSITY of
FLORIDA

Why *The Alligator* newsrack war was fought

Newsracks are the lowest tech means of getting the daily news out as can be found. They sit on the ground. They don't flash or beep. Their contents are updated just once per day. They have no Facebook friends.

At the same time, every living soul on the University of Florida campus is packing one or more of the latest devices for instantly accessing not only all the news that's fit to print but all of it that isn't fit to print too.

So who needs newsracks?

To many, they are just hulking reminders of a bygone era junking up the view while waiting to thrust a jagged edge into soft flesh focused on the tweet of the moment instead of the sidewalk glide path.

The Back Page

By Thomas R. Julin

A fleet of 470 racks littered the campus and they carried not only noble newspapers but also apartments guides, beer joint flyers, and other lesser rags.

Getting rid of the beasts seemed the right way to go. The means to do so would be a simple rule banning them without UF approval. To placate the few troglodytes who might still want news on pressed wood pulp, UF would put up its own racks which, eventually, might be removed.

Had this plan been completely logical, one might have expected it to have been rolled out without fear. But fear there was and with good reason.

Advertisers remain convinced that the most effective form of local advertising is advertising on the printed page.

When they buy a display ad in a daily newspaper, they see their business jump. When they buy an online spot on the website of a local news site, they do not typically see much reaction.

The reason for this is obvious. Websites compete with thousands of other websites.



Thomas R. Julin

A daily newspaper has few competitors and is unique in its ability to serve its advertisers. It requires no batteries. It has no off switch. It is always available. It gets passed around all day.

As an advertising medium for local business, it works just great.

This is why 90 percent or more of *The Alligator's* revenue comes from its print edition and also why the UF newsrack ban posed a direct threat to *The Alligator*. No newsracks. No money. No newspaper.

Knowing exposure of their plan might be seen as the threat it was, UF kept it from *The Alligator* as long as possible. Eventually, the Board of Trustees approved it in December 2009 as though it were nothing more than a campus maintenance rule tweak.

When finally *The Alligator* learned of the rule, UF argued the ban should not be feared because its own racks would be available for just a small fee.

But the rules also allowed the fee to adjust to administrators' reaction to contents and to punish publishers' unpopular views in myriad ways, including removal of the UF racks. In essence, the rule promised publishers a fate worse than death.

That is why *The Alligator* went to war on August 8, 2012, filing suit and asking for an immediate injunction against the UF newsrack rule.

In response, UF did not and could not defend its rule. It asked the court to stay its hand and pledged to fix the rule, as recommended by *The Alligator*, so that it could not be used to control content.

On December 7, 2012, the Board of Trustees did just that and this allowed *The Alligator* to agree to use UF racks instead of its own. UF also agreed many *Alligator* racks may remain.

This was a First Amendment war that could have been avoided had UF been more open in the first instance and had *The Alligator* been more vigilant in watching UF planners. Lesson, I hope, has been learned by all.

Thomas R. Julin was editor of The Independent Florida Alligator in 1977. He now chairs the First Amendment litigation group at Hunton & Williams LLP.